SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

**Case No.:** **X-KRŽ-07/386**

**Date:** **Delivered on 21 October 2010**

**Before the Appellate Panel: Judge Redžib Begić, Presiding**
**Judge Dragomir Vukoje**
**Judge Phillip Weiner**

**PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

**v.**

**MILORAD TRBIĆ**

# SECOND INSTANCE VERDICT

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

**Mr. Erik Larson**

**Counsel for the Accused:**

**Mr. Milan D. Trbojević**

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**Case No.: X-KRŽ-07/386**
**Sarajevo, 21 October 2010**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes composed of Judge Redžib Begić, as the Presiding Judge, and Judges Dragomir Vukoje and Phillip Weiner as the Members of the Panel, with the participation of Legal Advisor-Assistant Medina Džerahović as the Record-taker, in the criminal case against the Accused Milorad Trbić, for the criminal offense of Genocide in violation of Article 171(a), (b), (c) and (d) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), in conjunction with Article 180(1) and Article 29 of the CC of BiH, deciding upon the appeals by the Prosecutor's Office of BiH number: KT-RZ-139/07 of 28 May 2010, Defense Counsel for the Accused, Lawyer Milan D. Trbojević of 29 May 2010, and the aggrieved parties Šuhra Omerović, Nurija Hurić, Mejra Hurić, Naza Hadžić, Mustafa Hadžić, Enver Hadžić and Habiba Sinanović, filed from the Verdict of the Court of Bosnia and Herzegovina number: X-KR-07/386 of 16 October 2009, following an appellate session in the presence of the Accused, his Defense Counsel and the Prosecutor of the Prosecutor's Office of BiH, Erik Larson, on 21 October 2010 pronounced the following

**V E R D I C T**

The respective appeals filed by the Prosecutor's Office of BiH, the Defense Counsel for the Accused, Lawyer Milan D. Trbojević, and the aggrieved parties Šuhra Omerović, Nurija Hurić, Mejra Hurić, Naza Hadžić, Mustafa Hadžić, Enver Hadžić and Habiba Sinanović, are **dismissed as ungrounded,** and the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/386 of 16 October 2009 is hereby **upheld**.

## REASONING

## PROCEDURAL HISTORY

1. By the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/386 of 16 October 2009, the Accused Milorad Trbić was found guilty of the following: by the actions described in detail under sections 1 (a)-(h) of the operative part of the Verdict, he committed the criminal offense of Genocide in violation of Article 171 of the CC of BiH, subparagraph (a) killing members of the group, and subparagraph (b) causing serious bodily or mental harm to members of the group, as read with Article 180(1) of the CC of BiH. He was sentenced to long-term imprisonment of (30) thirty years; time spent in custody was credited towards the sentence.

2. With regard to the sentencing part of the Verdict, pursuant to Article 188(4) of the Criminal Procedure Code of BiH (CPC of BiH), the Accused is relieved from the duty to reimburse the costs of the criminal proceedings; the costs will be borne by the budget of the Court. Pursuant to Article 198(2) of the CPC of BiH, all aggrieved parties are referred to take civil action regarding their claims as filed or to be filed under property law.

3. By the same Verdict the Accused was acquitted of the charges that, having acted as described under sections 1, 2 and 3 of the Verdict, he committed the criminal offense of Genocide in violation of Article 171 of the CC of BiH, under subparagraph (a) killing members of the group, subparagraph (b) causing serious bodily or mental harm to members of the group, subparagraph (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and subparagraph (d) imposing measures intended to prevent births within the group, as read with Article 180(1) and Article 29 of the CC of BiH.

4. Pursuant to Article 189(1) of the CPC of BiH, the costs of the criminal proceedings and scheduled amounts related to the acquitting part of the Verdict shall be borne by the Court. Pursuant to Article 198(3) of the CPC of BiH, all aggrieved parties are referred to pursue their property law claims by taking civil action.

*Appellate arguments*

5. The appeals from the Verdict were timely filed by the Prosecutor's Office of BiH (Prosecutor), Defense Counsel for the Accused Milan D. Trbojević (Defense Counsel), and the

aggrieved parties Šuhra Omerović, Nurija Hurić, Mejra Hurić, Naza Hadžić, Mustafa Hadžić, Enver Hadžić and Habiba Sinanović.

6. The Prosecutor appealed the erroneously and incompletely established state of facts pursuant to Articles 296(c) and 299(1) of the CPC of BiH, and the Decision on the sanction pursuant to Articles 296(1)(d) and 300(1) of the CPC of BiH, moving the Appellate Panel of the Court of BiH (the Appellate Panel) to grant the appeal, revoke the Verdict in its acquitting part, and, pursuant to Article 315(2) of the CPC of BiH, order a trial before the Appellate Panel and uphold the sentencing part of the Verdict. With regard to sentencing, the Prosecutor moved to revise the First Instance Verdict and sentence the Accused to long-term imprisonment of 45 years.

7. Defense Counsel's appeal raised the following grounds: essential violations of the CPC, violations of the Criminal Code, erroneously established state of facts, and the decision as to the sanctions. Defense counsel moved the Court to revoke the Verdict in the sentencing part, hold a trial upon which the Appellate Panel would evaluate the facts and evidence properly and in compliance with the law, remove the referenced and other essential violations of criminal procedure and acquit the Accused.

8. Appeals were also filed by the above-named aggrieved parties from the part of the Verdict referring to the decision on the costs and property law claims. Due to his poor financial status, the Accused is not required to pay the costs of the criminal proceedings, and the aggrieved parties are instructed to pursue their property law claims by taking civil action.

9. The Prosecutor responded to the Defense Counsel's appeal on 8 June 2010, moving the Court to dismiss it as ungrounded.

10. Neither the Accused nor his Defense Counsel responded to the appeal by the Prosecutor.

11. At the session of the Appellate Panel held on 21 October 2010, pursuant to Article 304 of the CPC of BiH, the Prosecutor and the Defense Counsel briefly presented their arguments on appeal consistent with the arguments in their briefs, and orally responded to the opposing party's appeal arguing that it was ungrounded and moving the Court to dismiss it.

12. The Accused supported the arguments of his Defense Counsel.

*New evidence*

13. In the course of the appeal, the Prosecutor's Office sought to admit into evidence a report of the OSCE (Organization for Security and Cooperation in Europe) and requested that the Appellate Panel review it. The Appellate Panel concluded that the report could not be tendered into evidence because it was not relevant to evaluate the Verdict's legal and factual findings contested by the appeal. We note that OSCE comments are not binding on this Panel at all, nor can they affect the rendering of an impartial and reasonable decision which is solely grounded on the law.

14. Also in the course of the appellate proceedings, the defense sought to admit into evidence fourteen Decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) concerning 24-hour surveillance of the Accused while in custody. The Appellate Panel's consideration of these documents is discussed at paragraph 59 of this Verdict.

**DEFENSE CLAIMS ON APPEAL**

# I. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS (ARTICLE 297 CPC OF BIH)

## A. THE STATEMENTS OF THE ACCUSED WERE PROPERLY ADMITTED INTO EVIDENCE

### 1. Statements Made to Investigators in the United States and The Hague

15. Six statements of the Accused, the first of which was taken in the United States by a prosecutor from the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the remaining five at The Hague by an ICTY prosecutor and investigator were introduced into evidence at trial.

16. The Accused argues that the First Instance Panel/Trial Panel erred in admitting these statements into evidence.[1] He contends that he made the statements under duress, that they were coerced and extorted, and that he was "blackmailed."[2] He further argues that (1) prior to making the statements, he was not warned that he was a suspect in the investigation or told the facts behind the charges, and that if he was warned, those warnings did not comply with Article 6(3)(a) of the European Convention on Human Rights (ECHR); and (2) he was promised that in exchange for cooperating with investigators he and his family would be sent to Australia.[3]

17. The Accused also contends that he was held in an unknown place in The Hague without any status for almost two years — from October 24, 2003 until April 7, 2005 — when he was taken into custody for this case, and that he suffered mistreatment during this time. The Accused also argues that he was subjected to repeated questioning over the course of several years, each time for many hours, and each time was told to tell the truth and to alter his statements so that they would be consistent with the statements of other individuals. He claims that he was not given the opportunity to remain silent.[4] The Accused also complains that whether he received warnings prior to making the statements cannot be verified because no records exist of interviews prior to August 19, 2002, on which date the prosecutor told the Accused that he had been advised of his rights in the earlier

[1] Defense Brief at p. 1 (Unless otherwise noted, the English version of the briefs, transcripts, and recordings of witness testimony is cited throughout).
[2] Defense Brief at pp. 1-3, 5-6.
[3] Defense Brief at p. 2.
[4] Defense Brief at pp. 3, 6.

interviews.[5] Finally, the Accused argues that, contrary to the Verdict at paragraph 87, he objected to the admission of his statements.[6]

18. The Prosecutor contends that the Appellate Panel should dismiss the issues raised by the Accused because he (1) failed to object to the admission of the statements into evidence; (2) does not deny that proper warnings were given prior to each interview; and (3) properly waived his rights prior to giving each statement. The Prosecutor further argues that there is no evidence supporting the allegations of the Accused regarding coercion and that the Trial Panel's judgment was reasonable and supported by the evidence.[7]

19. An examination of the record indicates that the Trial Panel admitted into evidence six (6) statements of the Accused:

- 19 August 2002: Deposition taken in the United States and conducted by Peter McCloskey, Senior Trial Attorney with the ICTY (Exhibit T-3);
- 21 January 2004: Interview conducted in The Hague by Peter McCloskey and Investigator Alistair Graham who served as Team Leader in the Office of the Prosecutor (OTP) of the ICTY (Exhibit T-13);
- 23 May 2004: Interview conducted in The Hague by Peter McCloskey and Alistair Graham (Exhibit T-15);
- 27 May 2004: Interview conducted in The Hague by Alistair Graham (Exhibit T-16);
- 29 October 2004: Interview conducted in The Hague by Peter McCloskey and Alistair Graham (Exhibit T-17); and
- 08 November 2004: Interview conducted in The Hague by Peter McCloskey and Alistair Graham (Exhibit T-18).[8]

20. In concluding that these statements were admissible, the Trial Panel reviewed the Criminal Procedure Code of the former Socialist Federal Republic of Yugoslavia (CPC of SFRY), the Criminal Procedure Code of Bosnia and Herzegovina, the Law on the Transfer of Cases (LOTC) from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in the Proceedings Before Courts in BiH, and the European Convention on Human Rights.[9] As part of

[5] Defense Brief at p. 3.
[6] Defense Brief at pp. 5-6.
[7] Prosecution Response Brief at pp. 7-10.
[8] Verdict para. 86.
[9] Verdict paras. 89-164.

this analysis, the Trial Panel concluded that the statements were lawfully obtained pursuant to the ICTY Rules of Procedure and Evidence (RoPE) and that their admission did not violate the Accused's right to remain silent.[10]

21. For the reasons that follow, this Panel concludes that the Accused validly waived his rights and voluntarily spoke with investigating authorities, such that the Trial Panel properly admitted his statements pursuant to the LOTC and the ICTY RoPE.

### (a) The Issue Was Not Properly Preserved for Appeal

22. Initially, this Panel must determine whether the Accused properly preserved this claim for appeal, that is, whether he timely objected to admission of the statements. At trial, while defense counsel raised objections regarding other evidence, he told the Trial Panel that he had no objection when each of the Accused's statements was offered into evidence.[11] In fact, prior to cross-examining prosecution witness Alistair Graham, defense counsel told the Trial Panel that he would not ask that the Accused's statements be removed from evidence.[12] Later, the Accused and his counsel tried to demonstrate that the Accused made the statements under duress. Prior to the cross-examination of Mr. Graham, the Accused addressed the Trial Panel and argued that the statements were obtained by coercion and deceit.[13] In his closing argument, defense counsel argued that the statements were obtained without proper warnings, under coercive circumstances, and based on improper inducements.[14]

23. This type of argument is not, however, the appropriate way to preserve an issue for appellate review.[15] Rather, to assist the Trial Panel and make the record clear, the objecting party must raise the objection at the time the evidence is offered and detail the grounds for that objection.[16] Absent

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[10] Verdict paras. 133-134, 137, 142-151.
[11] Specifically, during the testimony of Alistair Graham on 27 November 2007, defense counsel indicated that there was no objection to admission of the Accused's statements. See Exhibit T-3 at 4:24:30 to 4:24:46; Exhibit T-13 at 2:31:46-2:31:49; Exhibit T-15 at 2:46:31 to 2:46:47; Exhibit T-16 at 2:53:05 to 2:53:07; Exhibit T-17 at 3:08:15 to 3:08:20; and Exhibit T-18 at 3:22:13 to 3:22:17.
[12] Testimony of Alistair Graham on 27 November 2007 at 3:30:15 to 3:30:30.
[13] Ibid at 4:27:02 to 4:27:33.
[14] See the closing argument of defense counsel on 28 September 2009 at 18:45 to 19:08, 20:51 to 21:06, 39:40 to 40:07, 2:10:39 to 2:14:59, and 2:26:38 to 2:30:22.
[15] See *Prosecutor v. Zrinko Pinčić,* No. X-KRŽ-08/502, Appellate Verdict, 15 April 2010, at para. 19 (explaining that the accused "failed at trial to explain the relevance of the proposed testimony and thus has not properly preserved the issue for appeal."). The Prosecutor, in the response to the Accused's appeal, argues as much.
[16] See *Prosecutor v. Théoneste Bagosora et al.,* No. ICTR-98-41-AR73, Appeals Chamber, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence," 18 September 2006, at paras. 43-46 (addressing the issue of lack of notice, setting

these steps, a trial panel is unable to make a determination as to whether the evidence should be admitted.[17] Because the Accused did not take these steps in this case, this issue has not been preserved for appeal and this Panel therefore need not review it.[18] We note that, in the future, claims not properly raised before a trial panel will be summarily dismissed absent a showing that had such a claim been raised in a timely manner it would have been successful.

24. Even when an issue has been properly preserved for appeal, in order to rise to the level of appellate argument, the appellant may not merely complain that the trial panel got it wrong, but must show why the court erred in rejecting the argument.[19] As a general rule, an appellant is required to explain "the reasoning behind the appeal."[20] Thus, a proper appellate argument should clearly identify an issue and provide a legal argument supported by citation to a statute, rule, prior case, or scholarly article or treatise. Moreover, whenever evidence is cited on appeal, that evidence must be identified by exhibit number and page, and witness testimony must be identified by transcript page, if available, or by date of the quoted testimony, with specific references to the recording time on the CD/DVD.[21] Appellate arguments that do not meet these basic requirements need not be reviewed and may be summarily dismissed.

25. We note that in the instant case, the defense arguments on appeal appear to be the same as those presented to the Trial Panel. That is, the defense has not set out the kind of appellate argument discussed above and has not shown why the Trial Panel erred in its ruling. In the future, on appeal, we expect both the defense and the Prosecutor to not merely reiterate arguments which were unsuccessful at trial.

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out the principle that a party should not be permitted to refrain from objecting at trial and to raise the issue for the first time on appeal, and explaining that objections should be specific and timely and may be raised by motion in pre-trial proceedings).

[17] See K. Broun et al., McCormick on Evidence (6th ed. 2006) at page 96 ("If the administration of the exclusionary rules of evidence is to be fair and workable, the judge must be informed promptly of contentions that evidence should be rejected, and the reasons supporting the contentions.").

[18] Ibid. ("the general approach is that a failure to make a specific objection at the time the offer is made, is a waiver on appeal of any ground of complaint against its admission.").

[19] See *Prosecutor v. Fatmir Limaj et al.,* No. IT-03-66-A, Appeals Chamber Judgement, 27 September 2007, at para. 14 (explaining that a party "may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber"). Accord *Prosecutor v. Mirko Todorović and Miloš Radić,* No. X-KRZ-07/382, Appeal Judgment, 23 January 2009, at paras. 93-94.

[20] Article 295(1)(c) of the CPC of BiH.

[21] Compare *Prosecutor v. Stanislav Galić*, Case No.: IT-98-29-A, Appellate Judgment, 30 November 2006, at para. 11 (in order for the Appeals Chamber to assess a party's arguments on appeal, the appealing party is expected to provide precise references to relevant transcript pages or paragraphs in the trial judgment to which the challenges are being made; "the Appeals Chamber cannot be expected to consider a party's submissions in detail if they are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies").

26. Despite these deficiencies, we conclude that, even if this issue had been properly preserved for appeal and properly argued in the instant case, it is meritless, as discussed below.

### (b) The Statements are Admissible Pursuant to the Law on Transfer of Cases and the ICTY Statute

27. The Trial Panel analyzed the statements of the Accused and concluded that they were admissible pursuant to the LOTC and the ICTY RoPE.[22] The LOTC "regulate[s] the transfer of cases" by the ICTY to the Prosecutor's Office of this Court "and the admissibility of evidence" collected by the ICTY in proceedings before this Court.[23] Article 3(1) of the LOTC provides in part that "[e]vidence collected in accordance with the ICTY Statute and RoPE may be used in proceedings before the court in BiH." The Accused has not raised any argument pertaining to the LOTC.

28. The Trial Panel concluded that the statements of the Accused were obtained in accordance RoPE 42 and 43.[24] Rule 42(A) "Rights of Suspects During Investigation," sets out the rights of a suspect who is to be questioned by the prosecutor, which includes informing the suspect of those rights in a language that the suspect speaks and understands. These rights include (i) the right to assistance of counsel; (ii) the right to free assistance of an interpreter; and (iii) the right to remain silent and to be cautioned that statements are being recorded and may be used in evidence. Rule 42(B) provides that questioning of a suspect "shall not proceed" without counsel absent a waiver of the right to counsel, and that if counsel is waived and if the suspect later desires counsel, questioning shall cease and only resume when the suspect has obtained counsel.

29. Rule 43 "Recording Questioning of Suspects" provides that questioning shall be audio- or video-recorded and that (i) the suspect be informed of this; (ii) breaks in questioning and the times of breaks shall be noted on the recording; (iii) at the end of questioning the suspect shall be given the chance to clarify or add to his statement, and the time of conclusion of the questioning shall be recorded; (iv) a copy of the recording must be provided to the suspect; (v) after a copy has been made, if necessary, the original shall be sealed and signed by the Prosecutor and the suspect; and (vi) the tape must be transcribed if the suspect becomes an accused.

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[22] Verdict paras. 129-151.
[23] "Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in BiH ("Official Gazette" of Bosnia and Herzegovina, No. 61/04).
[24] Verdict paras. 129-151. The Trial Panel also noted that ICTY RoPE 63 and 92 were met.

30. This Panel must assess whether the Trial Panel's determination that the evidence was taken in accordance with Articles 42 and 43 of the ICTY RoPE was reasonable.

31. The defense argues that the Trial Panel erred in finding that the Accused was properly cautioned prior to the interviews.[25] An examination of the evidence shows that prior to and during each of the six interviews, the Accused was advised of his rights pursuant to the RoPE. Specifically, the Accused was advised: (1) of the right not to speak or answer any questions unless he wished to do so;[26] (2) that anything he said could be used as evidence in court;[27] (3) that he had the right to legal assistance and to have counsel present during the interview;[28] (4) that if he waived the right to the presence of counsel, he could still stop answering questions at any time during the interview and request to speak with counsel and the interview would be suspended;[29] (5) he would be provided with counsel free of charge if he could not afford counsel;[30] and (6) he had the right to the assistance of an interpreter.[31] In addition, during the first interview, on 19 August 2002 in Greensboro, North Carolina, the Accused was advised of the "Miranda" warnings by a United States law enforcement official.[32] These warnings are similar to those required by the ICTY.[33]

32. Defense counsel conceded that Mr. Graham provided warnings to the Accused.[34] On appeal, counsel has failed to specify which, if any, of the warnings was not provided. Therefore, based on the evidence, this Panel concludes that the Trial Panel properly admitted the statements after concluding that the applicable ICTY Rules had been satisfied.

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[25] Defense Brief at pp. 2, 3, 6.
[26] See Exhibit T-3 at p. 8; Exhibit T-13 at p. 2; Exhibit T-15 at pp. 1-2; Exhibit T-16 at p. 1; Exhibit T-17 at p. 1; and Exhibit T-18 at p. 2.
[27] See the same pages cited in the previous footnote.
[28] See Exhibit T-3 at pp. 6, 8-9; Exhibit T-13 at p. 2; Exhibit T-15 at p. 2; Exhibit T-16 at p. 2; Exhibit T-17 at p. 2 (noting that counsel was present during the interview), and Exhibit T-18 at page 2 (noting that counsel was present during the interview).
[29] See Exhibit T-3 at pp. 6-7; Exhibit T-13 at p. 2; Exhibit T-15 at p. 2; Exhibit T-16 at p. 2; Exhibit T-17 at p. 2 (noting that counsel was present during the interview); and Exhibit T-18 at p. 2 (noting that counsel was present during the interview).
[30] See Exhibit T-3 at pp. 6, 9; Exhibit T-13 at p. 2 (noting that the Accused had met with counsel earlier that day); Exhibit T-15 at p. 2; Exhibit T-16 at p. 2; Exhibit T-17 at p. 2 (noting that counsel was present during the interview); and Exhibit T-18 at p. 2 (noting that counsel was present during the interview).
[31] See Exhibit T-3 at p. 5 (interpreter sworn); Exhibit T-13 at p. 1; Exhibit T-15 at p. 1; Exhibit T-16 at p. 1; Exhibit T-17 at p. 1; and Exhibit T-18 at p. 1.
[32] See Exhibit T-3 at pp. 6-7.
[33] Pursuant to the United States case of *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), prior to any custodial interrogation a suspect must be warned that: "he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."
[34] Testimony of Alistair Graham on 28 November 2007 at 3:04 to 3:15.

33. The Accused further contends, however, that the Trial Panel erred in admitting the statements because he was not advised that he was a suspect.[35] An examination of the evidence indicates that there was no such error. Prior to each interview, the Accused was advised that he was a suspect in relation to the events that occurred in Srebrenica or as to acts chargeable under the Tribunal's Statute.[36] In addition, during the interview of 29 October 2004, the Prosecutor further advised the Accused that a decision was going to be made regarding whether to charge him in The Hague or to refer his case to Bosnia for further proceedings.[37] The Accused indicated that he understood the situation and had discussed his options with counsel.[38] Therefore, we conclude that the Trial Panel's conclusion that the Accused was cautioned in accordance with ICTY requirements was reasonable and supported by the evidence.

34. The Accused similarly complains that the Trial Panel erred because he was not advised prior to the interviews of the specific charges being considered pursuant to Article 78 of the CPC of BiH and Article 6(3)(a) of the ECHR.[39]

35. The Accused's argument is based on an incorrect analysis of the CPC. CPC Article 78, "Instructing the Suspect on His Rights," sets out, at section (1), the questions that must be posed to the suspect at the first questioning. Article 78(2) explains that, at the beginning of the questioning, the suspect must be informed, among other rights, of "the charge against him" and "the grounds for the charge."

36. A review of Article 78 indicates that it concerns the admissibility of statements taken by a prosecutor or another authorized official from Bosnia and Herzegovina. Chapter 8 of the CPC, titled "Actions Aimed at Obtaining Evidence," contains Article 77, titled "Basic Rules on Questioning," which provides at paragraph 1 that "[t]he suspect under investigation shall be questioned by the Prosecutor or an authorized official."[40] The term "authorized official person," is defined at CPC Article 20(g) to include "a person having an appropriate authorization within the police authorities in Bosnia and Herzegovina, including the State Investigation and Protection Agency . . . Expert associates as well as investigators working for the Prosecutor's Office of Bosnia

[35] Defense Brief at pp. 2, 3, 6.
[36] See Exhibit T-3 at p. 8; Exhibit T-13 at p. 2; Exhibit T-15 at p. 1; Exhibit T-16 at p.1; Exhibit T-17 at p. 1; and Exhibit T-18 at p. 1.
[37] 29 October 2004 interview at p. 2.
[38] Exhibit T-17 at p. 2.
[39] Defense Brief at pp. 2, 3, 6.
[40] Emphasis added.

and Herzegovina under the authorization of the Prosecutor shall also be considered to be authorized officials."

37. The Accused has failed to show that Article 78 of the CPC applies to anyone other than a "Prosecutor or an authorized official" from Bosnia and Herzegovina. Nor has the Accused explained why an investigator from a foreign jurisdiction is required to abide by the requirements set out in the CPC, particularly where comparable warnings were given, and no representative of the Prosecutor's Office of Bosnia and Herzegovina was even present during the interviews.

38. This issue was addressed in *Prosecutor v. Mile Mrkšić et al.*,[41] where the ICTY Prosecutor sought to have introduced into evidence for use on cross-examination statements of each of the Accused made to authorities of the former Yugoslavia in Belgrade.[42] The Panel in that case concluded that although two officers of the ICTY Prosecutor attended the proceedings, the individuals who took the statements — investigators of the military security organ/Military Investigating Judge in Serbia — were not acting under the ICTY Prosecutor's direction, and that therefore the Statute and Rules did not apply to the questioning of the Accused.[43]

39. This Panel thus concludes that where the interviewing procedures set out in Article 78 of the CPC of BiH were not applicable in this case, and where the ICTY investigators complied with the ICTY rules for interviewing suspects, the statements were lawfully obtained.

40. We further conclude that Article 6(3)(a) of the ECHR does not apply here. Article 6(3)(a) provides that individuals "charged with a criminal offense" have the right to detailed information regarding the "nature and cause of the accusation against him." The word "charge" for the purposes of Article 6(1) is defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offense, a definition that also corresponds to the test whether 'the situation of the suspect has been substantially affected.'"[44] At the time the Accused made the six statements, he was not under arrest, charged, or indicted for any crimes by the ICTY or this Court — and he does not claim to have been. Accordingly, where the

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[41] *Prosecutor v. Mile Mrkšić et al.*, No. IT-95-13/1-T, Trial Chamber II, "Decision Concerning the Use of Statements Given By the Accused," 9 October 2006, at paras. 12-17.
[42] Ibid. at para. 1.
[43] Ibid. at paras. 12-17.
[44] *Eckle v. Germany*, Judgment of 15 July 1982, Series A, No. 51 (1983), 5 EHRR 1, para. 73, quoting *Deweer v. Belgium*, (Application No. 6903/75) Judgment of 27 February 1980 at para. 46.

Accused had not been charged with a crime before the ICTY at the time the statements were taken, his claim that he was not advised pursuant to Article 6(3)(a) of the ECHR is meritless.[45]

### (c) The Statements of the Accused Were Voluntary

41. For the reasons detailed above, the Accused argues that the First Instance Panel erred in finding that his statements were made voluntarily to the ICTY personnel. We give substantial deference to the Trial Panel's findings of fact, but review those findings to determine whether they are supported by the evidence. We also determine whether the Trial Panel applied the correct law.[46]

42. "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. 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. . . . [O]nly 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."[47]

43. As an initial matter, and as the Trial Panel pointed out, the Accused presented no evidence at all that he was threatened, coerced, or blackmailed, or that investigators made him any promises or mistreated him while he was in custody.[48] Nor was there any evidence that the Accused was

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[45] See Ovey and White, "Jacobs & White: The European Convention on Human Rights" at p. 161 (4th ed. 2006) ("The protection of Article 6 starts from the time when a person is charged with a criminal offence.").
[46] See *Prosecutor v. Fatmir Limaj et al.*, No. IT-03-66-A, Appeals Chamber Judgement, 27 September 2007, at para. 10 (explaining that an appeals chamber has a duty to apply the correct legal standard and to review relevant factual findings of the trial chamber); see also *Prosecutor v. Marko Škrobić*, No. X-KRZ-07/480, Appellate Verdict, 17 July 2009, at paras. 14-15; *Prosecutor v. Mirko Todorović and Miloš Radić, supra*, at paras. 87-88.
[47] *Prosecutor v. Miloš Stupar et al.*, No. X-KRŽ-05/24, Appellate Verdict, 9 September 2009, at paras. 325-330.
[48] Verdict paras. 128, 139. Factors to evaluate in considering the circumstances of the giving of a statement are set out in *Prosecutor v. Mile Mrkšić et al.*, No. IT-95-13/1-T, Trial Chamber, "Decision Concerning the Use of Statements Given By the Accused," 9 October 2006, at para. 28, and include whether the will of the accused was overborne and whether his statement was coerced, induced, or subjected to any other impropriety.

incompetent at the time of questioning such that he could not have understood or waived his rights.[49] The Accused did not present any evidence regarding these issues to this Panel either. We note that when an appellant raises an argument based on information not admitted into evidence, it is incumbent upon him to make some kind of showing in support of his argument. On appeal, the Accused has only made a multitude of unsupported assertions; this is insufficient.

44. We conclude that the Trial Panel correctly determined that the statements of the Accused were made voluntarily. The Prosecutor has the burden of proof regarding voluntariness and absence of oppressive conduct.[50] While this Panel need not decide at this time the level of proof necessary for the prosecution to satisfy its burden, e.g., preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt, here the Prosecutor established beyond a reasonable doubt that the Accused's statements were voluntary.

45. The fact that the Accused was interviewed six times and that those interviews may have lasted for hours does not automatically lead to the conclusion that his statements were made under duress. "Whether or not conduct is oppressive . . . depend[s] upon many factors, the categories of which cannot be exhausted."[51] It is well established that "statements induced by coercion, force or fraud or oppressive conduct which saps the concentration and . . . the free will of the suspect . . . [and which] weaken[] resistance rendering it impossible for the suspect to think" may amount to oppressive conduct such that a statement resulting from such conduct is unreliable.[52] Factors to be considered include "the characteristics of the person making the statement, the duration of the questioning . . . the manner of the exercise of the questioning. . . . [and] facilities provided such as refreshments or rests between periods of questioning."[53] The age and maturity of the individual are also factors to be considered, along with the individual's familiarity with the police and/or the justice system.[54]

46. Even if the Accused had come forward with some kind of evidence to support his claims, there is no question, as discussed below, that each of the six statements was obtained from him under conditions that can only be characterized as open and fair, and where the investigators were sensitive to the needs of the Accused.

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[49] Verdict para. 125.
[50] See *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Trial Chamber, "Decision on Zdravko Mucić's Motion for the Exclusion of Evidence," 2 September 1997, at paras. 42, 48.
[51] *Prosecutor v. Zejnil Delalić et al.*, *supra*, at para. 66.
[52] Ibid.
[53] Ibid. at para. 67.
[54] Ibid.

(i) Duration of interviews

47. First, it is clear from the transcripts of the interviews and the testimony of Mr. Graham, which the Trial Panel credited,[55] that the interviews were not of unfairly long duration. On every occasion, the Accused was afforded food, drink, and breaks, and during those breaks the Accused was not asked any questions. All of the interviews lasted a reasonable amount of time and took place during normal business hours — not in the middle of the night for instance. The 19 August 2002 interview lasted four and one-half hours, including an hour-long lunch break, a break for "another drink" of water, and a fifteen-minute break.[56] The 21 January 2004 interview lasted approximately three hours.[57] The 23 May 2004 interview lasted approximately six and one-half hours including a thirty-minute lunch break, a twenty-five minute break after that, and a fifteen-minute break after that.[58] The Accused declined an offer of food during this interview.[59]

48. The 27 May 2004 interview lasted three and one-half hours and included a forty-minute lunch break and a thirty-minute break some time after lunch.[60] At one point after the first break, Mr. Graham told the Accused, "If you want to take a break at any time or a coffee just say so."[61] The 29 October 2004 interview lasted six hours and included several breaks, including a thirty-minute lunch break and a thirty-minute break later in the afternoon.[62] Attorney McCloskey was sensitive to the needs of the Accused, saying near the end of the interview that they were going to "wrap it up pretty quick" because "people are getting tired."[63] The final interview, on 8 November 2004, lasted approximately three hours and fifteen minutes, and included two breaks, one for ten minutes and the other for thirty minutes.[64] Near the end of this interview, Attorney McCloskey recognized that the Accused was tired and stopped the questioning; he inquired, however, if the Accused could help them with locations on the map and the Accused agreed to do so.[65]

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[55] Verdict para. 128.
[56] 19 August 2002 Transcript at pp. 1, 28, 59.
[57] Because the tape recorder used during this interview was defective, only a portion of the interview was recorded. See Alistair Graham's "Information Report" dated 23 January 2004.
[58] 23 May 2004 Transcript at pp. 1, 19, 42, 64, 77.
[59] 23 May 2004 Transcript at p. 64.
[60] 27 May 2004 Transcript at pp. 1, 9, 20-21.
[61] 27 May 2004 Transcript at p. 15, 20, 39, 64-65.
[62] 29 October 2004 Transcript at pp. 1, 14, 20, 63, 66.
[63] 29 October 2004 Transcript at p. 65.
[64] 8 November 2004 Transcript at pp. 1, 14, 33, 48.
[65] 8 November 2004 Transcript at p. 45.

49. Other cases have held that questioning of long duration does not automatically amount to a coercive environment. In *Prosecutor v. Delalić,*[66] the Court held that an interview lasting almost five hours conducted by five interrogators who took turns questioning the accused, one of whom was "very tired" at the end of the questioning, was not oppressive. The Court concluded that even if the accused was tired at the end of the interview, there was no evidence that he was "deprived of the ability to make rational decisions"; rather, considering his mental and physical fitness, age, and behavior, and where he was given refreshments and the opportunity to rest, the evidence was that he was "in complete control and was master of the situation."[67]

(ii) Telling the truth

50. Second, telling the Accused that he should tell the truth did not constitute duress.[68] The Accused was admittedly told a number of times that he should tell the truth and not what the investigators wanted to hear. During the 19 August 2002 interview in North Carolina, immediately after the Accused was given his rights under the rules of the Tribunal, Attorney McCloskey told the Accused that he would be asking him questions, "And the most important thing is that you tell the truth. We don't want you providing any answers because you think that's what the tribunal authorities want to hear. We just want the truth. Do you understand that?"[69] The Accused responded "Yes."[70] During the 27 May 2004 interview at The Hague, when the Accused had difficulty recalling what happened on a particular day, Mr. Graham said, "I understand" and "I just want to establish exactly what happened and the truth. If we can't work it out then fine."[71]

51. At the beginning of the 8 November 2004 interview, after the Accused agreed that he had lied to investigators during a previous interview in order to protect another individual, Attorney McCloskey asked the Accused, "Do you understand that you have to tell the whole truth? You can't lie about anybody. Don't make up something because you think we want to hear it. Don't protect anybody by lying. Do you understand that?"[72] The Accused replied, "Yes" and agreed to tell the whole truth.[73]

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[66] *Prosecutor v. Delalić, supra*, at paras. 64-70.
[67] Ibid. at paras. 69-70.
[68] Defense Brief at p. 3.
[69] 19 August 2002 Transcript at p. 9.
[70] 19 August 2002 Transcript at p. 9.
[71] 27 May 2004 Transcript at p. 15.
[72] 8 November 2004 Transcript at p. 2.
[73] 8 November 2004 Transcript at pp. 2-3.

52. On appeal, the Accused has not directed this Court's attention to any case in which this type of frank advice constituted duress, and we did not find any. In the absence of any pressuring or other tactics on the part of the investigators, impressing upon the Accused the importance of telling the truth did not constitute coercion; rather, it helped him avoid prosecution for making false statements.[74]

(iii) Promises, rewards, inducements/coercion

53. Third, no promises, rewards, or inducements were made to the Accused, the Accused was not pressured to speak with investigators, and there is no evidence that the Accused was threatened, beaten, mistreated, or coerced in any way.

54. Contrary to the contention of the Accused, there is no support for his argument that promises were made regarding Australia.[75] Mr. Graham made this clear in the 21 January 2004 interview, telling the Accused, "We also never promised you that you wouldn't be prosecuted and we told you that, if we decided to do so, we could [unintelligible portion] bring charges against you. Is this in harmony with what you understood?" In response, the Accused said, "Yes."[76]

55. The evidence actually shows that the ICTY personnel were considerate of the Accused and dealt with him in a fair and straightforward manner. For example, at the conclusion of the 27 May 2004 interview, Mr. Graham indicated that because the Accused appeared tired he would terminate the interview.[77] Mr. Graham then asked the Accused whether he was happy with the way in which the interview had been conducted, and the Accused said, "Yes, absolutely." Mr. Graham also asked the Accused if he could confirm whether he had been "coached, threatened or directed what to say," and the Accused replied, "No." Following this, Mr. Graham asked the Accused if he could confirm that there had been "no threats, promises or inducements for the answers" that he had given, and the Accused replied, "No" there were "no threats or inducements."[78]

56. During the 29 October 2004 interview, at which the Accused's attorney Mr. Eugene O'Sullivan was present, the Accused said that he was prepared to tell the investigators the entire truth.[79] Attorney McCloskey then asked the Accused whether he understood that no promises or

[74] 19 August 2002 Transcript at p. 9.
[75] 8 November 2004 Transcript at pp. 2-3.
[76] 21 January 2004 Transcript at p. 3.
[77] 27 May 2004 Transcript at p. 20.
[78] 27 May 2004 Transcript at p. 21.
[79] 29 October 2004 Transcript at p. 2.

assurances would be given about what the Office of the Prosecutor would do, and the Accused said, "Yes."[80] Attorney McCloskey also said to the Accused, "Do you know, all I am asking you now is for the truth without any promises?" and the Accused said, "Yes."[81] Thus, this claim lacks merit.

57. The Accused also claims that the Verdict at paragraph 163 is wrong in stating that the defense did not present any evidence about mistreatment.[82] He argues that the defense attempted at trial to introduce fourteen decisions from the ICTY, each ordering 24-hour surveillance of the Accused in his cell for a period of one month, but the Trial Panel did not permit him to introduce this evidence.[83]

58. In paragraph 163 of the Verdict, the Trial Panel explained that the sole evidence the Accused introduced on this point was a letter from the ICTY confirming that the Accused was a suspect during the time he made his statements, and that he was taken into custody at the UN Detention Unit at The Hague on 7 April 2005. The Trial Panel also explained that although the Accused was given time to obtain evidence in support of his contention that he was mistreated, he never provided any. Further, the Trial Panel explained that the Accused's statements were made before he was taken into custody (i.e., when he was still a suspect and not yet an accused), and that the Accused's attorney argued that the 24-hour surveillance began after the Accused was detained at the ICTY.[84]

59. On appeal, the Accused has presented the fourteen decisions regarding the 24-hour surveillance. This Panel has reviewed these decisions, which are orders indicating why surveillance was necessary. We conclude that even if this information had been presented at trial, it is of no import. As the Trial Panel noted, any surveillance took place after the Accused made the statements, such that it could not have had any bearing on the voluntariness of those statements. Thus, even if the defense had attempted to introduce those decisions at trial, they would not have been relevant.

(iv) Other factors

60. Moreover, there is no evidence that the will of the Accused was at any time overborne. There was no evidence that the Accused's willingness to speak was due to the consumption of

[80] 29 October 2004 Transcript at p. 2.
[81] 29 October 2004 Transcript at p. 2.
[82] Defense Brief at p. 3.
[83] Defense Brief at p. 3.

drugs or alcohol, any physical or mental disease, or illness. Neither was there evidence that he was a weak-minded person who could be easily manipulated into giving a statement or making certain comments. Rather, the record reflects an experienced, intelligent, and savvy individual with a remarkable memory for facts and detail who served as a military officer during the war and who subsequently traveled and lived outside of Bosnia and Herzegovina.[85]

61. All of the evidence indicates that the Accused's decision to speak with investigators was made thoughtfully, that he provided responses to questions in a clear and logical fashion, and that he told investigators when he did not have an answer to a question. His sense of control during the interviews is apparent in the fact that he provided false information to the investigators regarding his own involvement in order to curry favor with investigators, and concealed information from investigators regarding criminal actions by his friends.

62. In addition, the interviews were conducted in a manner to avoid confusion; the Accused was questioned by one person at a time, and only two individuals asked questions. Further, there are no allegations that during the interview the investigators ever shouted at the Accused, pounded on the table, displayed a firearm, or took any other action to intimidate him. Rather, the tenor of the interviews, as divined from the transcripts and Mr. Graham's testimony, was calm and relaxed.

(v) Conclusion

63. Accordingly, for all of the reasons set out above concerning the circumstances surrounding the interviews, it is clear that the Accused received appropriate warnings and made his statements voluntarily and with full understanding of his rights.[86]

### 2. The Trial Panel Properly Relied upon the Accused's Statements

64. The Accused also contends that the Trial Panel erred in relying on his statements since he subsequently recanted.[87] An examination of the Verdict indicates that the Trial Panel evaluated these statements with due care, both in isolation and in connection with each other, in order to

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[84] Verdict para. 163.
[85] See *Prosecutor v. Zejnil Delalić et al.*, *supra*, at para. 67.
[86] Given this, this Panel rejects the Accused's claim that the Verdict could not be based upon his statements. The Accused argues that the statements were obtained in violation of CPC Article 77(2) and (3), which provide that "the decision of the Court may not be based on the statement of the suspect" if force or threats were used during questioning. Defense Brief at p. 3. As discussed fully above, no such techniques were ever employed in the course of the questioning.
[87] Defense Brief at p. 8.

review their probative value. Where the Court has affirmatively stated that they are valid, they cannot be disregarded, particularly where their content provides detail about criminal events which may only be recognized by the perpetrator himself. However, they themselves cannot constitute the sole evidence on which a sentencing verdict may be grounded, which specifically was not the case here, as the Accused contends.

65. Rather, the Verdict indicates that the Trial Panel determined that portions of the Accused's statements will only be deemed trustworthy and able to sustain a conviction if they are supported by "substantial independent evidence."[88]

66. An examination of the record indicates that the First Instance Panel had a great deal of evidence to corroborate the Accused's statements. Specifically, the Trial Panel heard the testimony of forty-one Prosecution witnesses[89] and twenty-six ICTY witnesses.[90] The Panel also relied upon statements made to ICTY Personnel by Witnesses A-7 (T-917), A-28 (T-981), Dragan Obrenović (T-984), Rešid Sinanović (1081), Nazif Avdić (T-1082), Aziz Husić (T-1083) and Hasib Ibišević (T-1084).

67. The Trial Panel considered Expert Reports of Richard Butler (T-813), Dean Manning (T-830 and T-833) and Kathryn Barr (T-931 and T-932), as well as the Maloney USNIS (CD-565 a), Kloosterman (CD P563 a & b), de Koeijer (CD P756 a & b - T-834) and De Bruyen (T-939) reports. The Trial Panel reviewed the UNSG Report "The Fall of Srebrenica" (T-1086) and the ICTY Report regarding the 31 August 2004 site visit. Also introduced into evidence were the Missing Person Reports from the ICTY (T-834) and ICRC (T-1111), the PIP (Podrinje Identification Project) List of Officially Identified Victims (T-1114), and the Milići Hospital Surgical Treatment reports.

68. In addition, the Trial Panel reviewed various logbooks including: the Zvornik Brigade Duty Officer Logbook (T-20), Zvornik Brigade Engineering Company Vehicle Logs for July, 1995 (T-52), Zvornik Brigade Vehicle Logs (T-40 and T-1098), the Milići Hospital Logbook (T-736) and

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[88] Verdict para 158.
[89] Ibid. at para. 9.
[90] See ICTY witnesses A-1, A-7, A-12, A-19, A-26, A-29, A-31, A-32, A-47, Jevto Bogdanović, Zlatan Čelanović, Miroslav Deronjić, Dražen Erdemović, Mile Janjić, Mitar Lazarević, Slobodan Mijatović, Marko Milošević, Miloš Mitrović, Dr. Radivoje Novaković, Dragan Obrenović, Vinko Pandurević, Slavko Perić, Dr. Gavrić Popović, Cvijetin Ristanović, P-6, Ostoja Stanišić.

the Milići Hospital's patient Logbook (T- 743). The Trial Panel also relied upon certain established facts in reaching its findings.[91]

69. The First Instance Panel also relied upon materials related to certain plea agreements at the ICTY. Specifically, the Trial Panel considered the Momir Nikolić Sentencing Judgment and Agreed Facts (T-868) and the Obrenović Joint Motion on Plea Agreement dated 20 May 2003 (T-985).

70. This Panel notes that from this wealth of information, the Trial Panel was able to substantially corroborate the Accused's statements and determine them to be reliable. The Accused has not alleged that this determination is unreasonable, but rather argues that his six pre-trial statements are not reliable. Therefore, since the Trial Panel's determination is deemed to be reasonable and is supported by the record, the Accused's allegation is without merit and is dismissed.

### 3. Statements Made to Investigators Regarding Mass Grave Sites

71. Similar to his arguments set out above regarding the interviews by ICTY personnel, the Accused claims that his statements to investigators regarding mass grave sites in the area around Srebrenica and investigative reports should not have been admitted into evidence.[92] The Accused argues that he was "taken advantage of" in that the investigators did not handcuff him during the site visit, which purportedly led him to believe that he was not a suspect.[93] He further argues that investigative reports were wrong in that he did not tell investigators anything and could not have identified any mass grave sites since he was not from the area, and that the reports were inadmissible because they were drafted after the visit and only contained recollections.[94] The Accused claims that he "objected" at trial by cross-examining the investigators regarding why they kept asking him the same questions.[95]

72. The Accused's statements regarding the mass grave sites came into evidence during the testimony of Mr. Graham and Mr. Bruce Bursik, an investigator for the ICTY; in a report regarding

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[91] See, e.g., Established Fact 63 as noted on page 146 of the Verdict, Established Fact 65 as noted on page 156 of the Verdict and Established Fact 66 as noted on page 157 of the Verdict.
[92] Defense Brief at p. 2.
[93] Defense Brief at p. 2.
[94] Defense Brief at pp. 2, 6, 9.
[95] Defense Brief at p. 6.

the site visits with the Accused[96]; and in the interviews of the Accused on 29 October 2004 and 8 November 2004.[97] Specifically, this evidence was as follows: Mr. Graham testified that in the summer of 2004, the Accused showed him and Mr. Bursik the places discussed in the interviews in chronological order, including mass grave sites.[98] They traveled to a place near Lažete, where two of the mass grave sites were located[99]; a place near the Red Dam[100]; an area by a garbage dump and the Drina River[101]; and an area near Branjevo Military Farm.[102] There was no objection to this testimony. Photographs of all of these places were introduced into evidence without any objection.[103] Mr. Graham's report of the sites visit with the Accused and Mr. Bursik, dated 31 August 2004, was also admitted into evidence without objection.[104] Further, as discussed above, there was no objection to admission into evidence of the Accused's statements of 29 October 2004 and 8 November 2004. Even if the Accused had lodged objections to any of this evidence, such objections would have been unsuccessful because all of this evidence was relevant and probative to the Accused's role in the executions.[105]

73. The 31 August 2004 report details the entire site visit, from Monday, 16 August 2004, to Thursday, 18 August 2004. On that Monday, Mr. Graham and Mr. Bursik met the Accused at the Sarajevo airport; Mr. Graham "informed him of his rights and made it clear that they were applicable at all times when sites visits or the events of 1995 were being discussed" and that he "would not discuss the case during meal breaks or 'downtime.'"[106]

74. Mr. Bursik testified that, after the site visit, he returned to the area to verify whether the sites previously unknown to the ICTY that the Accused indicated were actually burial sites.[107] Mr. Bursik testified that there were "quite a few" sites that the Accused showed them that ended up not to be grave sites.[108] Mr. Bursik also testified that the Accused was not handcuffed during the visit

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[96] See Exhibit T-19.
[97] See Exhibits T-17 and T-18.
[98] Testimony of Alistair Graham on 27 November 2007 at 3:32:34 to 3:33:51, 3:39:49 to 3:40:46, 16:57 to 18:46, 4:00:50 to 4:01:06; Testimony of Bruce Bursik on 28 November 2007 at 2:13:21 to 2:16:41.
[99] Testimony of Alistair Graham on 27 November 2007 at 3:49:09 to 3:52:46.
[100] Testimony of Alistair Graham on 27 November 2007 at 3:56:30 to 3:57:07. See Verdict para. 509.
[101] Testimony of Alistair Graham on 27 November 2007 at 3:59:14 to 3:59:32.
[102] Testimony of Alistair Graham on 27 November 2007 at 4:02:03 to 4:02:27.
[103] Testimony of Alistair Graham on 27 November 2007 at 4:06:24 to 4:06:37.
[104] Exhibit T-19; see Testimony of Alistair Graham on 27 November 2007 at 4:11:10 to 4:11:58.
[105] To the extent that the Accused claims that the report should not have been admitted because it was not drafted immediately after the site visit, we reject that claim. The Accused has not provided any support for his argument that only documents drafted simultaneously with an incident may be admissible.
[106] Exhibit T-19 at p. 1.
[107] Testimony of Bruce Bursik on 28 November 2007 at 2:16:41 to 2:18:01.
[108] Testimony of Bruce Bursik on 28 November 2007 at 2:44:25 to 2:45:17.

because he was not detained at that time, plus he and the Accused had good rapport and there was no purpose in restraining him.[109]

75. During the 29 October 2004 interview, the Accused acknowledged that he showed Mr. Graham and Bruce Bursik grave sites that did not really exist because he was hoping to "get some privileges" for his participation, and that he knew it was wrong when he did it.[110] The Accused elaborated on this in the 8 November 2004 interview, when he said that he took Mr. Graham and Mr. Bursik to a site near the dam in Petkovci even though there were no graves there, that he did so to help himself and make his situation easier, and that he knew both at the time of the interview and at the time he showed the site that what he did was wrong.[111]

76. Accordingly, where all of this evidence bore on the Accused's role in the events around Srebrenica, it was relevant and properly admitted by the Trial Panel. Further, as the Trial Panel noted, evidence that the Accused misled investigators showed that he was engaged in a pattern of deception to hamper the investigation and that he lacked remorse for his crimes.[112]

77. The next claim of the Accused concerns the Accused's identification of a house near the Grbavci school from which he made a telephone call, and that he recalled the telephone number to be 592-029.[113] The Accused claims that the Trial Panel erred because "it is absolutely impossible" that the Accused could have remembered the telephone number given the passage of time.[114] There was no error. The Verdict cites the Accused's own statement of May 23, 2004 to ICTY investigators, where he explained that, after prisoners were executed on July 18, he returned to the headquarters and Military Policeman Božo Božić went to Orahovac, the brigade command had contact with Orahovac, it had been ordered after the execution that a telephone had to be set up in Orahovac for communications, and "if I can recall correctly the number of that phone was 592-010."[115] In addition, Mr. Bursik identified a duty officer's log book seized from the Zvornik Brigade and identified the Accused's name with the corresponding telephone number 592-029.[116]

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[109] Testimony of Bruce Bursik on 28 November 2007 at 2:48:38 to 2:49:58.
[110] 29 October 2004 Transcript at p. 66.
[111] 8 November 2004 Transcript at p. 7.
[112] Verdict para. 727.
[113] Verdict para. 480.
[114] Defense Brief at p. 9.
[115] 23 May 2004 Transcript at p. 74.
[116] Testimony of Bruce Bursik on 28 November 2007 at 1:41:37 to 1:55:07. See also Exhibit T-1 (photograph of pertinent page of log book).

78. Similarly, the claim that the Accused did not identify the house to investigators also lacks merit.[117] Mr. Bursik testified that he showed the Accused an aerial photograph of the Grbavci school and the surrounding houses and the Accused drew a circle around some houses.[118] Mr. Bursik then went to the area and found the house, which was not one of the ones the Accused had circled.[119] Mr. Bursik met an individual who said that 592-029 was the telephone number of his house where he lived in July 1995.[120] During the site visit, Mr. Bursik asked the Accused about this discrepancy, and the Accused acknowledged that the house Mr. Bursik found was in fact the house where he had used the telephone.[121] Accordingly, evidence regarding the Accused's identification of the house and the telephone number was properly admitted.

## B. THE ACCUSED'S RIGHT TO PRESENT A DEFENSE WAS NOT VIOLATED (ARTICLE 297(1)(D) CPC OF BIH)

### 1. The Case against the Accused was tried Within a Reasonable Amount of Time.

79. The Accused claims that his right to an "expedient and fair trial" pursuant to ECHR Article 6 and CPC Article 13 was violated because he was arrested in the United States in 2002 and "the proceedings have still been pending" through no fault of the Accused.[122] ECHR Article 6, which is entitled "Right to a Fair Trial," sets out at section (1) that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." CPC Article 13, entitled "Right to Trial Without Delay," similarly provides, at section (1), that the Accused "shall be entitled to be brought before the Court within the shortest reasonable time period and to be tried without delay."

80. This claim is meritless, because the Accused was tried within two years of the date of indictment. On 2 July 2003, the Accused was convicted of two counts of immigration fraud by the United States District Court for the Middle District of North Carolina and sentenced to time served. It was not until 7 April 2005 that he was transferred to the ICTY and held in the instant case in the UN detention unit in The Netherlands, and it was not until 11 June 2007 that authorities of Bosnia and Herzegovina took custody of the Accused. On 20 July 2007, the Accused was indicted, and the

[117] Defense Brief at p. 9.
[118] Testimony of Bruce Bursik on 28 November 2007 at 1:55:49 to 1:57:36.
[119] See the Testimony of Bruce Bursik on 28 November 2007 at 2:53:48 to 2:55:33.
[120] Testimony of Bruce Bursik on 28 November 2007 at 2:02:50 to 2:05:37.
[121] Testimony of Bruce Bursik on 28 November 2007 at 2:54:19 to 2:55:33.
[122] Defense Brief at pp. 1-2.

indictment was confirmed on 27 July 2007 and amended on 4 March 2009. The Trial Panel rendered the Verdict on 13 October 2009, and publicly pronounced it on 16 October 2009.

81. Notably, at oral argument on appeal, defense counsel conceded that the time the Accused spent in the United States concerning the unrelated immigration charges did not count against the "reasonable time" in which to try him. The Accused has not argued, with guidance from cases in the ECtHR, for example, why two years is an unreasonable amount of time. Indeed, the ECtHR cases indicate that a case tried within two years of indictment is not in violation of ECHR Article 6. Accordingly, we conclude that the amount of time for trial in the Accused's case was reasonable, particularly in light of the complexity of the case and the volume of evidence against him.

#### 2. Allegation Concerning CPC Article 3

82. The Accused generally argues that the Trial Panel did not apply CPC Article 3, entitled "Presumption of Innocence and *In Dubio Pro Reo*," and that the Trial Panel's conduct was "directly opposite" of that. CPC Article 3(2), which the Accused cites, provides in full that "[a] doubt with respect to the existence of facts constituting elements of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be decided by the Court verdict in a manner more favorable for the accused." As with other claims, the Accused has not applied this allegation to a specific ruling of the Trial Panel. Absent such application, this Court cannot evaluate this claim, so it is dismissed.

### C. THE VERDICT WAS NOT BASED UPON EVIDENCE THAT MAY NOT BE THE BASIS OF A VERDICT (ARTICLE 297(1)(I) CPC OF BIH)

#### 1. The Trial Panel Properly Relied Upon a Portion of Testimony of Witness A-50

83. The Accused contends here that the Trial Panel erroneously drew conclusions from circumstantial evidence and relied upon the statement of an allegedly non-existent protected witness, Witness A-50, who subsequently recanted his statement.[123]

84. To the extent this argument makes sense — since a non-existent person could not recant a statement — this Court rejects it. The Annex to the Verdict indicates that the Court allowed the Prosecutor's motion to admit the testimony of Witness A-50 from the case *Prosecutor v.*

[123] Defense Brief at p. 4.

*Blagojević*, ICTY No. IT-02-60-T, and that the decision is contained in the confidential Annex to the Verdict. The testimony of Witness A-50 is discussed in the Verdict beginning at paragraph 72. There, the Trial Panel explains that, prior to testifying, Witness A-50 received "all necessary warnings and the advice of counsel" as to how his testimony may be used. The Trial Panel recognized that subsequent to this proceeding, Witness A-50 withdrew part of his statement. Because of this, the Court stated that the withdrawn part of the testimony "will not be utilized in this Verdict" and that the remaining portions will be used as direct evidence, but not to corroborate evidence given by the Accused in his statements. Accordingly, where the Trial Panel did not consider the recanted statements of Witness A-50, this contention is dismissed.

### 2. Intercept Evidence Was Properly Admitted

85. The "intercept" evidence consisted of live testimony of intercept operators and supervisors, along with transcripts of intercepted radio communications.[124]

86. The Accused argues that the First Instance Panel erred in admitting evidence of intercepted communications on the ground that neither authenticity nor reliability was established. Specifically, he argues that (1) the testimony of protected witnesses A-23 and A-24 was not carefully scrutinized; (2) the time and place of origin were taken for granted; (3) there were no recordings to compare with the transcripts; (4) there are weaknesses in the transcripts in that not all speakers were identified, some were mis-transcribed, and there exist different transcripts for the same conversation; (5) no expert testimony was presented to confirm that these were actually transcripts of interceptions; and (6) the Trial Panel was not provided with sufficient information to determine reliability.[125]

87. The Prosecutor responds that the Accused's argument is without merit because the Trial Panel provided "sound and valid" reasoning in support of its decision to admit the evidence. The Prosecutor further notes that because the Accused failed to object to the admission of this evidence, the issue should be deemed waived.[126]

88. The Trial Panel found the intercept evidence to be credible and relevant. Having considered the testimony of seven witnesses, the Trial Panel recognized that while sometimes only partial

[124] See Exhibits T-53, T-54.
[125] Defense Brief at pp. 4-5.
[126] Prosecutor's Brief at paras. 29, 31.

conversations were captured due to the type of transmissions and the geography of the area, the procedures used by the intercept operators insured that the transcripts were accurate and trustworthy.[127] The Trial Panel concluded that this evidence served "to corroborate and clarify the events of July 1995."[128] We note that the Accused has not raised the issue of relevance in relation to any of this evidence.

89. As discussed below, this Panel concludes that the intercept evidence was sufficiently authenticated and reliable, and that the Trial Panel's findings on this issue were reasonable and supported by the evidence such that it properly admitted the intercept evidence.

### (a) Authentication

90. Authentication "requires that the proponent, who is offering a writing into evidence as an exhibit, produce evidence sufficient to support a finding that the writing is what the proponent claims it to be."[129]

91. Six witnesses testified to the methods used to draft the transcripts which constitute the intercept evidence.[130] These witnesses explained that they served in a special unit responsible for intercepting and recording radio conversations between VRS officers from certain units.[131] From the recordings of these conversations, they drafted transcripts[132] in notebooks provided by the army.[133] The notebook covers contained the date on which entries in the notebook began, a notation of the radio device being used, and sometimes a Company Command reference number.[134] The completed notebooks were stored in an officer's vault[135] for years, which was overseen by

[127] Verdict paras. 80 and 667.
[128] Ibid. at para. 80.
[129] McCormick on Evidence, *supra* at page 390.
[130] See Exhibits T-53 and T-54.
[131] See, e.g., the Testimony of Witness A-22 on 15 January 2008 at 4:07:13 to 4:07:42 and 4:16:40 to 4:17:10; Testimony of Witness A-5 on 16 January 2008 at 37:39 to 39:27 and 43:03 to 44:38 and 48:02 to 49:12; and the Testimony of Witness A-24 on 21 January 2008 at 1:32:35 to 1:35:20 and 1:45:40 to 1:45:54.
[132] See, e.g., Testimony of Witness A-22 on 15 January 2008 at 4:21:38 to 4:22:20; and Witness A-6 on 16 January 2008 at 16:21 to 16:44; and Witness A-5 on 16 January 2008 at 49:32 to 50:00.
[133] See the Testimony of Witness A-5 on 16 January 2008 at 1:12:28 to 1:12:42; and Witness A-24 on 21 January 2008 at 1:59:15 to 2:00:23.
[134] See the Testimony of Witness A-24 on 21 January 2008 at 2:06:17 to 2:06:27, 2:06:59 to 2:07:20 and 2:07:41 to 2:09:30.
[135] Ibid. at 1:53:10 to 1:53:28 and Witness A-23 on 21 January 2008 at 46:42 to 47:53.

Witness A-23 until 1998. At some point in 1998 or 1999 the notebooks were provided to the ICTY.[136]

92. Witnesses from the interception unit identified notebooks used by their unit and a typical notebook cover.[137] The transcriptions in the notebooks provided the time that the conversation was initiated, the channel on which it was found, the frequency, and the parties to the conversation, if known.[138] The witnesses also identified transcriptions from the notebooks, since they were in their own handwriting and some even included their initials.[139]

93. There was also testimony from Prosecution expert witness Richard Butler that he was convinced that the transcriptions were authentic. He testified that if he had not been convinced of this then he would not have included the transcriptions in his report. Mr. Butler also testified that he was aware of the origins of the material and how it came into the possession of the ICTY. He testified that initially he was highly skeptical of the information, and that it was only after the material was put through "an extremely rigorous vetting process" — where the information in the intercepts was corroborated with military documents seized from the Zvornik and Bratunac Brigades and other units — that he was satisfied the transcriptions were authentic.[140]

94. Accordingly, where individuals identified the documents as transcriptions of conversations which they had intercepted, and where the contents of the transcriptions, including date, time, frequency, channel, and persons involved in the conversation were corroborated with events on the ground, the Trial Panel reasonably concluded that the transcriptions were sufficiently authenticated.[141]

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[136] See the Testimony of Witness A-23 on 21 January 2008 at 1:06:05 to 1: 09:07.
[137] See the Testimony of Witness A-10 on 15 January 2008 at 3:30:55 to 3:32:04, 3:33:33 to 3:35:44 and 3:47:29 to 3:47:49; Witness A-22 on 15 January 2008 at 4:25:51 to 4:26:25; Witness A-6 on 16 January 2008 at 18:17 to 20:20; Witness A-5 on 16 January 2008 at 50:53 to 52:15 and 53:32 to 56:48; and Witness A-24 on 21 January 2008 at 1:51:15 to 1:52:08 and 2:10:33 to 2:11:19.
[138] Testimony of Witness A-22 on 15 January 2008 at 4:18:02 to 4:18:16 and 4:26:29 to 4:26:48; and Witness A-24 on 21 January 2008 at 1:51:14 to 1:52:08.
[139] See the Testimony of Witness A-10 on 15 January 2008 at 3:46:08 to 3:51:18; Witness A-22 on 15 January 2008 at 4:26:50 to 4:27:56, 4:36:09 to 4:36: 52 and 4:38:26 to 4:38:58; Witness A-6 on 16 January 2008 at 18:13 to 20:20; and Witness A-5 on 16 January 2008 at 53:05 to 55:10 and 1:04:36 to 1:05:13. Given this, the Accused's argument that an expert was required for authentication is meritless. In *Prosecutor v. Popović et al.*, Case No. IT-05-88-T, Trial Chamber II, "Decision on Admissibility of Intercepted Communications," 7 December 2007, at paras. 44-45, the Trial Chamber found important that the prosecution showed handwritten notebooks containing intercepted transmissions to the intercept operators, "who identified their own handwriting and testified that they transcribed the conversations into the notebooks."
[140] Testimony of Richard Butler on 18 March 2007 at 2:28:30 to 2:31:25.
[141] Authenticity can be established by direct or circumstantial evidence. In this case, the information contained in the interceptions can be used not only to corroborate testimony but to circumstantially establish authenticity. See

### (b) Reliability

95. As noted above, the Accused also argues that this evidence was not reliable. The Trial Panel heard testimony from six witnesses from the radio interception unit regarding procedures used to insure the accuracy of the transcriptions. There was testimony that after a conversation was intercepted and recorded, the recording was played and transcribed.[142] If a word or portion of the conversation was unclear, the recording would be repeatedly replayed in order to determine the exact content of the conversation. If after this process the conversation was still unclear, other operators in the unit would assist in clarifying that portion of the conversation. Finally, if a part of the conversation could not be deciphered, this would be noted by a question mark, brackets, three dots, or the words "indiscernible" or "inaudible."[143]

96. The radio operators testified that they understood the importance of accuracy in their transcriptions. They knew that the information they were gathering would be sent to and relied upon by the Command.[144] As a result, they were careful in drafting the transcriptions.[145] When the notebooks containing the transcriptions were full, they were placed in a vault,[146] where they were

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McCormick on Evidence, *supra* at page 393. See *Prosecutor v. Stanišić and Župljanin*, *supra*, Case No. IT-08-91-T, Trial Chamber II, "Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts," 16 December 2009, at paras. 15, 16, 18 ("the Trial Chamber accepts that where a witness is able to identify his or her own voice on an intercept and absent conflicting evidence, the relevant intercept may be sufficiently authenticated"; testimony that may also serve to authenticate relevant intercepts includes: where the telephone intercepts were monitored from, whose telephones were being monitored, what system was used to record conversations, and the chain of custody of the original tapes with the intercepted conversations).

[142] See the Testimony of Witness A-10 on 15 January 2008 at 3:29:27 to 3:29:34; Witness A-22 on 15 January 2008 at 4:21:37 to 4:22:20; Witness A-5 on 16 January 2008 at 49:32 to 50:01; and Witness A-24 on 21 January 2008 at 1:46:52 to 1:47:50.

[143] See the Testimony of Witness A-10 on 15 January 2008 at 3:38:25 to 3:40:33; Witness A-22 on 15 January 2008 at 4:30:54 to 4:31:33, 4:32:14 to 4:32:57, and 4:46:17 to 4:46:23; Witness A-6 on 16 January 2008 at 23:43 to 25:07; Witness A-5 on 16 January 2008 at 57:03 to 57:58; and Witness A-24 on 21 January 2008 at 1:49:22 to 1:50:30.

[144] Indeed, as stated in *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Chamber Judgement, 2 August 2001, at para. 105, "[m]onitoring enemy communications was a standard military practice, employed by both parties to the conflict, the objective being to discover the plans and movements of the opposing side in order to take pre-emptory action." See also *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Trial Chamber II, "Decision on the Defence 'Objection to Intercept Evidence,'" 3 October 2003, at para. 53 (concluding that communications intercepted during an armed conflict, i.e., eavesdropping on an enemy's telephone calls, are not as such subject to exclusion under ICTY Rule 95 [which provides that evidence is inadmissible if it is obtained by methods which cast "substantial doubt" on its reliability or if its admission would "seriously damage" the integrity of the proceedings] ).

[145] See the Testimony of Witness A-10 on 15 January 2008 at 3:40:34 to 3:41:30; Witness A-22 on 15 January 2008 at 4:29:54 to 4:30:50 and 4:31:34 to 4:32:11; Witness A-6 on 16 January 2008 at 25:11 to 26:31; Witness A-5 on 16 January 2008 at 58:01 to 58:57 and 1:11:23 to 1:11:39; and Witness A-23 on 21 January 2008 at 1:16:41 to 1:17:52 and 1:18:34 to 1:20:43.

[146] See the Testimony of Witness A-5 on 16 January 2008 at 1:12:28 to 1:12:42; Witness A-23 on 21 January 2008 at 47:01 to 47:52; and Witness A-24 on 21 January 2008 at 1:53:10 to 1:53:29.

secured and maintained by Witness A-23 until 1998.[147] Witness A-23 testified that during the time the notebooks were under his supervision, no alterations or revisions were made to them.[148]

97. While the Accused contends that the Trial Panel should have more carefully scrutinized the evidence since it was introduced through the testimony of two protected witnesses, both of whom were members of the opposing army, he does not claim that the notebooks were altered or falsified, or that the contents were in any way manufactured. Neither does the Accused question the credibility of four witnesses who testified regarding the accuracy of the notebooks. Notably, the ICTY has found this type of transcription reliable and admissible.[149]

98. In addition to addressing authenticity, Mr. Butler also addressed the issue of reliability of the intercepted conversations.[150] Specifically, Mr. Butler testified that the intercepts in this case were reliable in the sense that the BiH army had the material and technical ability to collect them.[151]

99. Finally, any weaknesses in the evidence — such as where transcripts do not identify a conversant, or where a recording which was the basis of a transcription was not admitted into evidence — go to its weight and not its admissibility.[152] There is no rule that only perfect evidence

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[147] See the Testimony of Witness A-23 on 21 January 2008 at 46:28 to 47:53, 1:05:42 to 1:06:22, and 1:09:09 to 1:10:00.
[148] Ibid. at 1:06:04 to 1:07:17.
[149] Trial and Appellate Chambers of the ICTY have dealt with issues relating to the admissibility of intercepted conversations for years. See *Brđanin*, *supra*, at paras. 65, 68 (concluding that evidence obtained as a result of intercepts of the telephone and fax lines of Radovan Karadzic offered by the prosecution to help establish facts on which the indictment of the Accused was based were relevant and probative). See generally the decisions regarding the admissibility of intercepted communications issued 16 December 2003, 14 June 2004, and 19 July 2004 in *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T. See also *Prosecutor v. Karadžić*, Case No. IT-95-5/18-T, Trial Chamber, "Decision on the Accused's Motion to Exclude Intercepted Conversations," 30 September 2010 (ruling that intercepted evidence, even if obtained in violation of applicable domestic law, should not automatically be excluded from admission into evidence where the Accused did not establish that admitting intercepted conversations would seriously damage the integrity of the proceedings); *Prosecutor v. Stanišić and Župljanin*, *supra*, Case No. IT-08-91-T, Trial Chamber, "Decision Denying the Stanišić Motion for Exclusion of Recorded Intercepts," 16 December 2009 (ruling admissible intercepts previously admitted in the *Brđanin* and *Milošević* cases); and *Prosecutor v. Popović et al.*, *supra* (ruling that intercepted VRS communications were admissible in that, taken as a whole, they were "prima facie credible").
[150] Testimony of Richard Butler on 17 March 2008 at 22:25 to 24:56.
[151] Testimony of Richard Butler on 17 March 2007 at 24:57 to 25:56.
[152] See *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Trial Chamber I, Section A, "Decision on the Admission into Evidence of Intercept-Related Materials," 18 December 2003, at para. 14 (explaining that evidence Guidelines urge the parties to consider "the distinction between *admissibility* of documentary evidence and the *weight* attributed to admitted documentary evidence under the principle of free evaluation of evidence."); and *Prosecutor v. Popović et al.*, *supra*, at paras. 74-77 (concluding that the prosecution had demonstrated that the intercepts as a whole were prima facie relevant and probative, defense challenges to intercepts will play a role in assessing the ultimate weight of the individual intercepts, and that the Court would ultimately have to determine the relevance and probative value of each intercept, considering all evidence bearing on authenticity and reliability). The doctrine of free evaluation of evidence is contained in Article 15 of the CPC of BiH.

is admissible; rather, "it would be unusual not to observe discrepancies ranging through the testimony of . . . different witnesses regarding events occurring . . . years ago."[153]

100. In conclusion, where the intercepts were authenticated and reliable, the Trial Panel properly admitted them into evidence and reasonably relied upon them in reaching the verdict.

### D. THE TRIAL COURT FAIRLY AND IMPARTIALLY DECIDED THIS CASE

101. Here the Accused contends that the Trial Panel did not act as an impartial arbiter, but rather simply accepted the grounds of the indictment prior to hearing any evidence.[154] As support, the Accused points to footnote 139 in the Verdict, which is located at the end of paragraph 197, which discusses when intent can be inferred.

102. Footnote 139 contains citations to *Prosecutor v. Karadzic and Mladic*,[155] *Prosecutor v. Nikolic*,[156] and *Trial of Bruno Tesch and Two Others ("Zyklon B Case")*.[157] As indicated by the parentheticals in the footnote, these cases are cited because they discuss circumstances under which an intent to commit genocide may be inferred. The Accused's contention appears to rest on the fact that the first two of these cases are reviews of indictments and in each case the indictments were confirmed. This is not a basis for suggesting that the Trial Chamber accepted the indictment prior to hearing evidence at trial. Accordingly, this issue is dismissed.

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[153] *Prosecutor v. Popović et al.*, *supra*, at para. 42. See *Blagojević and Jokić*, *supra*, at para. 25 (noting that neither party is under an obligation to tender "perfect evidence"; rather, the "best evidence rule" applies, meaning that the trial chamber will rely on the best evidence available under the circumstances).
[154] Defense Brief at p. 6.
[155] *Prosecutor v. Karadzic and Mladic*, Case Nos. IT-95-S-R61 and IT-95-18-R61, Trial Chamber, "Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence," 11 July 1996, at para. 94.
[156] *Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-R61, Trial Chamber, "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence," 20 October 1995, at para. 34.
[157] *Trial of Bruno Tesch and Two Others ("Zyklon B Case")*, UN War Crimes Commission, Law Reports of Trials of War Criminals (1947), Vol. I at p. 102.

## II. ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS (ARTICLE 299 CPC OF BIH)

103. The standard of review for alleged errors of fact to be applied by the Appellate Panel is reasonableness.

104. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond a reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, such as when an accused is convicted despite a lack of evidence on an essential element of the crime.

105. In determining whether a Trial Panel's conclusion was reasonable, the Appellate Panel starts 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 trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

106. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable trier of fact, or where the evaluation of the evidence is "wholly erroneous."

107. The Constitutional Court has emphasized that proving facts through circumstantial evidence is not by itself contrary to the principle of a fair trial, as set out in Article 6(1) of the ECHR.[158] However, proof of a fact by circumstantial evidence must be established beyond a reasonable doubt and the evidence must be tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like a completed puzzle, can be more compelling than eyewitness testimony, which can be subject to normal human error.

[158] *M.Š.*, AP-661/04 (Const. Ct. of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

### A. ARGUMENTS FOR THE DEFENSE CONCERNING THE STATE OF FACTS AND BRIEF COMMENT BY THE APPELLATE PANEL

108. On the ground of erroneously and incompletely established state of facts, the Accused generally denies all essential factual findings pertaining to his participation in the crimes of which he was found guilty, alleging a lack of evidence.

109. Within this ground of appeal, this Panel analyzed each sub-ground and considered them by individual crime as charged, despite the fact that the appeal lacked organization.

110. In most parts of the appeal, the defense simply states, without reasoning, argument or evidence in support of its claims, that there is no evidence to corroborate certain findings. The remaining parts argue that it is incredible that the Trial Panel accepted certain evidence, i.e., that the Trial Panel did not reach the conclusion suggested by the defense. Instead of specifying the alleged error and presenting compelling reasons why a reasonable trier of fact could not have reached that conclusion, the Defense instead sets out imprecise arguments which are more akin to a commentary than a legal brief. As such, it hardly satisfies the minimum standards for review.

111. We note that for erroneously or incompletely established facts to be found, the defense must point to specific evidence on which the Trial Panel relied and its reasoning, and should clearly state why the factual finding was unreasonable. Absent this, the defense is simply expressing a different view of the facts and adhering to the position taken at trial. We will not evaluate the positions taken by the parties at trial; instead, we will only consider arguments regarding whether the Trial Panel's factual findings were unreasonable. By failing to point out such reasons, the defense has failed to properly raise the issue.[159]

112. Furthermore, according to ICTY jurisprudence based on Article 25 of the ICTY Statute, the Appeals Chamber's function and analysis is different from that of the Trial Chamber. In the adversarial system of the ICTY, the decision-making body considers a case on the basis of the arguments presented by the parties. Therefore, it is incumbent on the parties to present their arguments in a clear, logical and detailed manner, so that the Appellate Panel may perform its duties efficiently and expediently. It cannot be expected of the Appellate Panel to thoroughly consider arguments of the parties if they are incomprehensible, contradictory, not specific, or

[159] *Todorović et al.*, second instance Verdict number X-KRŽ-07/382 of 23 January 2009 at para. 94.

defective. Despite this, in all cases, the Appellate Panel is obliged to ensure that the Accused received a fair trial.[160]

113. Therefore, although many grounds raised on appeal are arbitrary and defective, for the purpose of fairness, we have analyzed in detail the factual findings in the Verdict and their reasonableness. We conclude that the findings are amply supported by the evidence and, accordingly, are reasonable. Later in this Verdict, we provide a summary of the arguments corroborating this decision, as foreseen in Article 306 of the CPC of BiH.

### 1. The Accused's Statements Were Properly Evaluated in Light of Other Independent Evidence

114. All of what is set out above is relevant to the analysis of the Accused's participation in the perpetration of the individual crimes charged. Regarding the part of the appeal alleging essential violations of the Criminal Code, the Trial Panel made a detailed analysis of the admissibility of the statements the Accused gave ICTY Investigators. The defense claims that the Accused withdrew these statements[161] and that, even during the first hearing before the Trial Panel, it objected to the admission of those statements.[162] The defense is incorrect. As explained above, the Appellate Panel reviewed the audio-video recording of the hearing at which this evidence was presented. In response to a question by the President of the Panel about objecting to the tendering into evidence of all statements of the Accused through the end of 2004, the defense responded negatively, that is, it had no objection.[163]

115. The Trial Panel evaluated the Accused's statements with due care, in isolation and in connection with each other, in order to assess their probative value. As mentioned above, the statements cannot be disregarded, considering that they detail criminal events which may only be known by the perpetrator himself. However, they cannot constitute the sole evidence on which a sentencing verdict may be grounded, which was not the case here.

116. This Panel is satisfied that the Verdict properly evaluated the reliability of the Accused's statements and considered them in light of other independent evidence, including circumstantial evidence. The Trial Panel only drew conclusions from circumstantial evidence where there were strong and logical connections so that the factual findings could be the only ones possible.

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[160] *Kunarac et al.*, Appeals Chamber Judgement of 12 June 2002, paragraph 43.
[161] Defense brief at p. 6.

117. Apart from the Accused's statements, there was no evidence, such as eyewitness testimony, on the perpetration of certain criminal offenses, either because the victims were killed or because members of the VRS who testified did not want to inculpate the Accused. However, this testimony, considered in conjunction with the documentary evidence, helped the Trial Panel create a full picture and determine certain details and the sequence of events. In going through this exercise, the Trial Panel properly concluded that those essential factual details matched the Accused's statements and enabled identification of certain situations. This review confirmed all of the essential circumstances of the relevant events as presented by the Accused, except for the fact that he was present, which can only be known to a direct participant. Accordingly, the only logical conclusion is that the Accused's statements concerning his presence and participation in the described events were accurate.

118. This Panel evaluated the reasonableness of the findings in the Verdict with regard to the Accused's statement given during the investigation, and his knowledge of the "ethnic cleansing" plan and as a knowing and willing participant in a Joint Criminal Enterprise (JCE) and concluded that the findings were reasonable. There was no dilemma about the existence of this subjective element on the part of the Accused. His knowledge follows from all of the evidence presented, including his position at the relevant time as an operations officer in the Zvornik Brigade which numbered about 4,000 members, and his key role in terms of operations. Specifically, the responsibilities and duties of the Accused which arose from the *de jure* position of a Brigade security officer were consistent with his *de facto* field activities within the zone of responsibilities of that Brigade, exactly in the manner that he described.

119. Given the foregoing, we are satisfied that the Trial Panel properly evaluated the admissibility of the Accused's statements in light of other independent evidence, and followed the **proper standard in reviewing** the factual findings. Specifically, only if the Panel found other evidence or indications which, considered altogether, constituted a strong circle that corroborated the Accused's statements and led to the only possible conclusion, beyond a reasonable doubt, about the perpetration of the crimes by the Accused, could it find him guilty. Where there is no corroborative evidence for the Accused's statement, the Panel is required to follow the principle of *in dubio pro reo* and acquit the Accused.

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[162] Defense arguments at the session of the Appellate Panel held on 21 October 2010.
[163] Main trial in *Trbić*, held on 27 November 2007.

120. This Panel supports the referenced standard and concludes that all of the Trial Panel's findings were established through the consistent and appropriate application of the referenced standard, which is consistent with all legal principles. This is discussed later in this Verdict concerning issues raised in the Prosecutor's appeal.

### 2. Air Images of Mass Graves Were Properly Admitted

121. The Accused contends that air images (photographs) of mass graves were admitted into evidence despite the fact that no evidence was presented as to who made the images, what equipment was used to make them, and when and how they were made.[164] He points to the Verdict at paragraph 411, which provides that the aerial images depicted the approximate dates of creation of the Kozluk and Čančari Road mass grave sites and when they were disturbed after that date.[165]

122. The Accused has not indicated whether he objected to the introduction of this evidence, and our review of the record indicates that he did not.[166] As discussed above, absent an objection, this issue is not preserved on appeal and may be dismissed by this Panel. Despite this, we conclude that the images were properly admitted.

123. Photographs are admissible under two theories of relevance: as illustrative of a witness's testimony and as independent substantive evidence to prove the existence of what the photograph depicts.[167] Under the first theory, a photograph is admissible under the same relevance theory as demonstrative aids; that is, it is authenticated if the witness testifies that the photograph is a correct and accurate representation of relevant facts personally observed by the witness.[168] "Under this theory, the witness who lays the authentication foundation need not be the photographer, nor need the witness know anything of the time, conditions, or mechanisms of the taking of the picture. Instead, the witness need only have personal knowledge of the facts represented or the scene or objects photographed."[169] "[A] photograph may also be authenticated through circumstantial evidence sufficient to support a finding that the matter in question is what its proponent claims."[170]

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[164] Defense Brief at p. 7.
[165] Defense Brief at p. 7.
[166] Testimony of Dean Manning on 16 June 2008 at 4:54:59 to 4:55:06.
[167] McCormick on Evidence, *supra* at § 215; and M. Brodin and M. Avery, Handbook of Massachusetts Evidence (8th ed. 2007) at p. 595, § 9.6.
[168] Ibid.
[169] Ibid.
[170] Handbook of Massachusetts Evidence, *supra* at p. 595-96, § 9.6.

124. The aerial images to which the Verdict refers were properly admitted under either theory. Dean Manning testified about the forensic process of exhumations of the mass graves in the Srebrenica area as well as the subsequent analyses of the deceased. He explained that he relied on the aerial photographs in order to locate the mass graves.[171] He noted that some of the mass graves were located in such remote areas that they would never have been found if not for the aerial photographs.[172] He further explained that the images showing disturbances in the earth depicted the digging of the mass graves and their subsequent state of being filled in.[173] The images depicted some of the graves being reopened and later refilled with earth.[174] This evidence was confirmed through the discovery of mass graves at those identified locations and by determining that bodies had been removed from certain graves and reburied elsewhere.[175] Some of the aerial images were further confirmed through other witness testimony.[176] Therefore, since the aerial images accurately represented the circumstances surrounding certain mass graves, the evidence was relevant and authentic.

125. This Panel also notes that aerial image evidence has been admitted and relied upon by other courts. See *Prosecutor v. Vujadin Popović et al.*, Case No.: IT-05-88-T, Judgment, 10 June 2010 at paras. 72-75 (where the court finds the aerial images to be probative, relevant, authentic and reliable); *Prosecutor v. Vidoje Blagojević et al.,* Case No.: IT-02-60-T, Judgment, 17 January 2005 at fn. 1397; and *Prosecutor v. Radislav Krstić*, Case No.: IT-98-33-T, Judgment, 2 October 2001 at paras. 114-223, 229-230, 238, 250, 253 and 258. Accordingly, this Panel concludes that the Trial Panel acted properly in admitting the aerial photographs.

### B. FACTUAL FINDINGS REGARDING INDIVIDUAL CRIMINAL ACTS

126. The Trial Panel correctly evaluated the evidence introduced at trial, assessing each piece of evidence individually and in correlation with other evidence, as required by Article 281(2) of the CPC of BiH.

127. The Trial Panel was not obligated to discuss every piece of evidence. Rather, pursuant to CPC Articles 15 and 281, the Trial Panel made a free evaluation of evidence dealing primarily with

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[171] Defense Brief at p.7.
[172] See Testimony of Dean Manning on 16 June 2008 at 45:22 to 46:09 and 1:14:49 to 1:15:14.
[173] Ibid. from 48:50 to 49:57 and 2:12:53 to 2:14:00.
[174] Ibid. from 2:17:36 to 2:18:00 and 2:20:07 to 2:21:13.
[175] Ibid. from 1:15:27 to 1:15:47, 1:47:44 to 1:49:43, 2:08:07 to 2:09:43 and 3:15:10 to 3:16:04.
[176] Ibid. from 1:45:53 to 1:46:18 and 1:57:29 to 1:58:05.

the evidence which was necessary for the purpose of the Verdict[177]; this Panel supports that approach. That is, this Panel is satisfied that the Verdict properly focused on the examination and evaluation of the evidence which served as the basis for finding that the accused committed the criminal offense as charged.

### 1. Substantial Evidence Linked the Accused to the Burial Operation

128. The Accused argues that the First Instance Panel erred in linking him to the July 1995 burial operation. In support of this argument, the Accused claims that he never personally participated in the digging of any graves.[178] This Panel concludes, however, that the Trial Panel's finding was reasonable and supported by the evidence.

129. The participation of the Accused in the burial of executed men in the relevant period can be seen in: (1) his indirect participation in individual burials by being present at the final stage of the executions and (2) his direct participation and contribution by organizing logistics and coordinating specific activities.

130. The first mode of contribution arises exclusively from his participation as a knowing and willing participant in the JCE, whereby he was undoubtedly familiar with all stages of the implementation of the executions. Each execution was followed by a burial operation carried out by members of the Zvornik Brigade Engineering Company with the aim of concealing the crimes, that is, *cleaning up the terrain*. The accused supported the realization of these activities. As he confirmed in his testimony, he was *regularly*, to a greater or lesser extent, present during the executions or their aftermath. He did not have to undertake specific acts in relation to the burials in order to be linked to them. The Verdict elaborates in detail on the foregoing regarding each incident.

#### (a) Ročević School (refuse dump in Kozluk)

131. We note that in the Accused's statement to the ICTY given on 23 May 2004 (Exhibit T-15), he explained that after the executions were completed in Ročević, he was responsible for "the

[177] See ICTY Trial Chamber I Judgment in *Prosecutor v. Dario Kordić and Mario Čerkez*, No. IT-95-14/2-T of 26 February 2001, para. 20, and Appeals Judgment in the same case number: IT-95-14/2-A, of 17 December 2004, para. 382.
[178] Defense Brief at p. 7.

organization of cleaning up the terrain."[179] He also explained that the area had to be sanitized so there would be no indication of what had occurred there.[180] The Accused claimed that Lieutenant Colonel Popović had requested that he go there.[181] He said that he remained in Ročević until approximately 23:00 hours, which was when the burial of 40 to 60 individuals was completed.[182] The Accused said that he then returned to Brigade Headquarters.[183]

132. There is corroborating testimony for the Accused's statements. Sreten Aćimović testified that he saw and spoke with Lieutenant Colonel Popović at the Ročević School between 13:00 and 14:00 hours.[184] This evidence is also consistent with the Accused's statement that Lieutenant Colonel Popović and Sreten Aćimović were at the school when he (the Accused) arrived in the early afternoon.[185] Witness A-13, who was a member of the Military Police unit of the Zvornik Brigade, saw the Accused arrive at the Ročević School.[186] Specifically, he saw the Accused give instructions to a Military Police member to not let civilians enter the school yard.[187]

133. It should be noted that the Accused returned to Brigade Headquarters after the "cleanup," since he was serving as the Duty Officer. According to the Duty Officer's logbook, the Accused registered his first entry at 23:40 hours.[188] This is consistent with the Accused leaving the Ročević School at approximately 23:00 hours.

### (b) Pilica Culture Center and Branjevo Farm

134. In his pre-trial statement of 23 May 2004, the Accused indicated that the First Battalion requested engineering equipment for July 17. The Accused, who was serving as Duty Officer, was told by Obrenović to send an order to the Commander of the Reserve Battalion to assist in the sanitation of the area.[189]

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[179] Exhibit T-15 at p. 45.
[180] Ibid.
[181] T-18 at p. 22.
[182] Ibid. at pp. 45 to 46.
[183] Ibid. at p. 46.
[184] See Testimony of Sreten Aćimović on 3 December 2007.
[185] Exhibit T-18 at p. 10.
[186] See Testimony of Witness A-13 on 12 December 2007.
[187] Ibid.
[188] Exhibit T-20 at p. 35.
[189] Exhibit T-15 at pp. 60-61 and 64.

135. Witness A-50 similarly testified that the First Battalion requested that "one loader, one excavator and a dumptruck with a tarpaulin be in Pilica at 08:00 hours."[190] The equipment was needed to dig pits for the burial of those persons who had been executed.[191] As a result, the Accused contacted the Chief of the Engineering Unit (Jokić) and Captain Milošević, who was the Assistant Commander for Logistics, both of the Zvornik Brigade. The Accused told them that the equipment had to be provided to a certain location and at a certain time.[192] Witness A-50 testified that on the following day, the First Battalion inquired whether the engineering equipment had been obtained and was advised that the Accused would report on the status of the matter.[193] This Panel notes that both of these incidents are noted in the Zvornik Duty Officer's logbook.[194]

136. In his testimony before the ICTY, Vinko Pandurević corroborated this evidence. He testified that, on July 18, he was told by Jokić that the Accused had asked him (Jokić) to provide a machine on July 17 for Pilica.[195] In response to the request of the Accused, engineering equipment (loaders and excavators) was provided on the specified date and time.[196] Vehicle logs of the Zvornik Brigade also indicate that two excavators were sent to the Branjevo Farm[197] on 17 July 1995.[198]

137. This Panel thus concludes that from the Accused's statements and the corroborating evidence, the First Instance Panel could have reasonably found that the Accused organized, facilitated, and coordinated the burials of those persons who were executed. Therefore, the allegation of the Accused that he could not be linked to the burial operation is dismissed as being without merit.

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[190] Testimony of Witness A-50 at 6646 (confidential).
[191] Ibid.
[192] Ibid. at 6647.
[193] Ibid. at 6648-6649.
[194] See Exhibit T-20.
[195] Exhibit O-5 at 31867.
[196] Ibid. at 31867-31868.
[197] The Pilica Dam and the Branjevo Military Farm are both located in Pilica. The bodies of persons executed at both of these locations were collected and buried at the Farm. See the Verdict at pp. 199-207.
[198] See Exhibit T-1098 at pp. 565-566 with an ERN of 0069 5109 to 0069 5110.

### 2. Evidence of DNA Analysis Was Relevant and Probative on the Issues of Identification and the Number of Victims

138. The Accused argues that the Trial Panel erred in admitting DNA evidence since it "has nothing to do with the Accused" and is "completely redundant."[199] This Panel concludes, however, that the evidence was relevant and probative to the issues at trial.

139. An examination of the case record indicates that the Trial Panel relied on DNA evidence to determine the number of identified victims since this manner of analysis was "scientifically accurate."[200] We note that the Accused has failed to explain why this evidence, which did not relate directly to him, was irrelevant; and that he has not provided any basis for his allegation that it was superfluous.[201] The Accused does not question the accuracy of this scientific method of analysis. However, he still questions whether the number of victims was established beyond a reasonable doubt.[202]

140. This Panel notes that the evidence was relevant and probative to the issues of (1) the number of persons killed, and (2) the identity of the victims, and that it further corroborates the testimony relating to the locations of the crimes and their nature and extent. The Appellate Panel notes that DNA evidence was admitted in other cases where it was relevant to the issues at trial. Compare *Prosecutor v. Momčilo Perišić*, Case No. IT-04-81-T, "Decision On Uncontested Srebrenica Expert Reports," 26 August 2009, at paras. 51-56.[203]

141. We are satisfied that the Trial Panel acted properly when it relied on the DNA analysis (2007 Narrative by Dean Manning and a PIP list – a list of officially identified victims) in considering the issue of identified victims and/or their number, since DNA evidence is scientifically accurate (see Verdict para. 397).

142. Using various types of evidence, the Trial Panel also acted properly regarding the allegations in the Indictment as to the identity of certain victims: four Bosniak men who had survived execution by firing squad in the Branjevo Military Farm who were then captured by Military Police (MP) members and the Zvornik Brigade security personnel and executed on or

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[199] Defense Brief at p. 7.
[200] Verdict para. 397.
[201] As previously noted, Article 295(1)(c) of the CPC of BiH requires that a party state "the reasoning behind the appeal."
[202] Ibid.
[203] Accord *Prosecutor v. Vidoje Blagojević and Dragan Jokić,* Case No. IT-02-60-T, "Decision On Prosecution's Motions For Admission of Expert's Statements," 7 November 2003, at para. 38 and fn.2.

about 19 July 1995, and ten men who were taken from the Zvornik Brigade Headquarters infirmary and executed on or about 20 July 1995.

143. Therefore, the DNA analysis was highly relevant to the consideration of both the accuracy of the prosecution's allegations in the Indictment and the Accused's role under these sub-counts of the Indictment. Accordingly, these issues are dismissed as ungrounded.

### 3. The Trial Panel Distinguished Between Victims Executed after the Fall of Srebrenica in July 1995 and Victims from Other Periods

144. The Accused argues that the Trial Panel erred in failing to distinguish between victims executed upon the fall of Srebrenica and those from previous wars.[204] This Panel concludes, however, that there was sufficient evidence for the Trial Panel to find that thousands of Muslim men were detained and executed just after the fall of Srebrenica in July 1995.

145. Analysis of the Verdict indicates that the Trial Panel found that the bodies recovered in the mass graves were those of the "victims of the massacre related to Srebrenica of July 1995." In reaching this conclusion, the Trial Panel relied upon witness testimony and documentary evidence. Specifically, the Trial Panel relied on forensic evidence and the statement and narratives of Dean Manning.[205] Dean Manning testified that he coordinated the exhumation and produced several narratives summarizing the process.[206] He noted that by November 2007, by virtue of DNA analysis, 5021 persons from the Srebrenica missing persons list had been identified. He further stated that, of these persons, 4010 were found in mass graves. According to Dean Manning's testimony, the ICTY inferred that the 4010 had been detained and then executed and buried in the mass graves. Manning emphasized that this number was not final as many more remains were awaiting identification and graves were still being discovered.[207]

146. Other evidence corroborated Manning's testimony and narratives. This Panel notes that the Accused gave several statements describing mass detention and execution of Muslim men in July

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[204] Defense Brief at p. 6.
[205] See Verdict para. 396-399, 440, 446-447, 453-456, 484, 510-512, 519-520, 522, 549-552, 559-560, 561, 624, 626-635, 640-641, 644, 649-659, 699 and 708.
[206] Witness Dean Manning, 16 June 2008, 15:56 to 16:16 and 17:03 to 17:40.
[207] Ibid. 1:00:03 to 1:03:03.

1995. The Accused stated that he knew about the mass executions and burials after the fall of Srebrenica and that he had participated in them.[208]

147. Witness Dražen Erdemović also testified about mass executions in July 1995. He admitted his participation in the mass execution of more than 1000 men and his being sent to another execution site where additional 500 men were to be executed.[209]

148. Witnesses A-1 and A-7 were members of the VRS who testified about the mass executions upon the fall of Srebrenica. Witness A-1 was in charge of logistics. He recalled that, on the occasion of supplying food to soldiers in the field, he saw a pile of dead bodies and the execution of several groups of prisoners, which made him feel sick.[210] Witness A-7 was a guard at the Orahovac school where Muslim men were detained. He remembered the procedure for taking the prisoners away and specifically testified that small military trucks continuously arrived at the building to take away prisoners. The Accused himself testified about the truck size, stating that **small** trucks of the 6th Battalion were used for transportation of prisoners.[211] The trucks returned empty, were filled with more prisoners, and were driven away again. The process was repeated until there were no more prisoners in the school gym, which was full of prisoners when the witness first arrived. Witness A-7 further testified that whenever the trucks would leave, after some time he would hear firing from the direction the trucks went.[212] Therefore, Witness A-7's testimony corroborates this.

149. Witnesses A-26 and A-47 also described the mass executions that took place in July 1995. These witnesses were taken to the execution site and lined up in front of the firing squad but managed to escape. They described the horror they witnessed. Witness A-29 recalled that he saw rows of dead people on the ground while they were being lined up for execution. He also described crawling over dead bodies in an effort to escape.[213]

150. Thus, the Panel concludes, based on the evidence, that the Trial Panel could reasonably have found that the bodies recovered in the mass graves were those of the victims of the mass executions

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[208] See Exhibit T-3, p. 51-52, 55 and 57; Exhibit T-13, p. 4-5, 8, 11 and 17-18; Exhibit T-15, p. 6, 9-13, 15-18, 22-23, 25-27, 30-31, 34-36, 40, 42-45, 54 and 58; Exhibit T-16, p. 16-18; Exhibit T-17 p. 29-30, 36, 46, 49-50, 54-55, 60-61 and 66-67; and Exhibit T-18, p. 4-5, 10-17, 27, 30-31 and 40-43.
[209] See T-875, (Witness Dražen Erdemović, *Prosecutor v. Popović et al* IT-05-88, Testimony of 4 May 2007, p. 10971-10973 and 10982-10986).
[210] See T-885 (Witness A-1, *Prosecutor v. Popović et al.,* supra, Testimony of 22 February 2007, p. 7579-7580.
[211] T-15, para. 531 of the Verdict (Trbić, Interview of 23 May 2004, pp. 31-32).
[212] See T-918 (Witness A-7, *Prosecutor v. Popović et al., supra*, Testimony of 30 January 2007, p. 6527, 6531 and 6539-6541).

that took place in July 1995 after the fall of Srebrenica and not victims from some other time or incident. Therefore, the argument of the Accused is dismissed as ungrounded.

### 4. The Verdict Contained Sufficient Information as to the Number of Victims; the Prosecutor was not Required to Prove the Accused's Knowledge of an Exact Number

151. Regarding the above issue, the Accused further argues that the Verdict lacks exact data on the number of victims and that the number of victims contained in the Verdict is incorrect. We note that, further in the appeal, the Accused seems to contend that the number of victims is irrelevant.

152. With regard to the number of victims of the Srebrenica massacre, the Verdict was based on reliable facts (Section 1 – Reburial Operations, para. 396). Specifically, the First Instance Panel relied on information from the International Commission for Missing Persons (ICMP) that a total of 4195 victims had been identified as of June 2009.

153. The number of victims is important not only for sentencing but primarily for consideration of the Accused's participation in the JCE and his *mens rea*. Even if we take the view that the Accused did not have to know the exact number of victims, and being mindful of the ICTY jurisprudence according to which the crime of genocide may in theory be committed against only one victim,[214] the Accused still knew of the massive scale of the crimes committed within the zone of responsibility of the Zvornik brigade, which had to be planned in order to be committed (although this does not exclude unplanned executions). The First Instance Panel thoroughly discussed this and reached reasonable conclusions in paragraphs 386-392.

### 5. Ample Evidence Was Presented that the Accused Selected School Buildings to Use as Detention Facilities For the Victims

154. The Accused claims insufficient evidence was presented that in the relevant period he acted on the direction of Colonel Ljubiša Beara and selected school buildings to be used as temporary

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[213] See T-889 (Witness A-29, *Prosecutor v. Vidoje Blagojević et al.*, No. IT-02-60, Testimony of 22 July 2003, pp. 1417-1423); and T-884 (Witness A-47, *Prosecutor v. Radislav Krstić*, No. IT-98-33, Testimony of 13 April 2000, pp. 2824-2825 and 2827).

[214] See Bogdan Ivanišević et al., A Guide through the Hague Tribunal, Regulations and Practice, OSCE mission in Serbia, Belgrade, 2008, at p. 67.

detention facilities to hold civilian Bosniak men from the Srebrenica enclave, knowing that these men were captured by VRS soldiers and transported away from the Srebrenica enclave.[215]

155. Contrary to the Accused's claims, the Trial Panel reached its conclusion after a comprehensive analysis not only of the Accused's testimony,[216] but also of other evidence, namely: Momir Nikolić's Sentencing Judgment and Statement of Facts[217]; Richard Butler's Report[218]; UN Secretary General Report "Fall of Srebrenica" of 15 November 1999[219]; testimony of witnesses Slobodan Mijatović,[220] Milovan Đokić,[221] Witness A-41,[222] Mile Janjić,[223] Mevludin Orić,[224]; Milorad Birčaković[225] and Miroslav Deronjić,[226] the statement and testimony of Dragan Obrenović[227]; the ICTY OTP Information Report of 31 August 2004[228]; and the Vehicle Logs for Opel Rekord.[229] By the proper evaluation of all of this evidence, considered in conjunction with the Accused's statements, the First Instance Panel drew the only possible logical and justified conclusion on the knowledge and participation of the Accused concerning these crimes.

156. We note that in the 29 October 2004 statement of the Accused, he claims that as early as the morning hours of 12 July he received the first telephone call from Colonel Ljubiša Beara, Chief of the VRS Main Staff Security Administration, and the initial instructions as to the capturing of Bosniak men, bringing them to the Zvornik Brigade area of responsibility for detention, and executing them.

157. The defense argues, without any factual support, that the Accused did not know Colonel Beara and denies that he met him at the relevant time or acted upon his orders.[230] This Panel concludes, however that the Trial Panel was correct in determining that the evidence presented at trial makes clear that the Accused was in contact with Colonel Beara, received instructions and

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[215] Defense Brief at pp. 6, 8 and 9.
[216] Exhibit T-17, Examination of 29 October 2004.
[217] Exhibit T-868.
[218] Exhibit T-813.
[219] Exhibit T-1086.
[220] Exhibit T-974, Witness Slobodan Mijatović, *Prosecutor v. Božić et al*., No. X-KR-06/236, Testimony of 4 July 2007.
[221] Testimony of 11 February 2008.
[222] Testimony of 4 February 2008.
[223] Testimony in the *Popović* case on 20 November 2007, pp. 17933 – 17934.
[224] Testimony of 28 January 2008.
[225] Testimony of 12 December 2007.
[226] Exhibit T-957, Miroslav Deronjić, *Momir Nikolić* sentencing hearing testimony.
[227] Exhibit T-985, Dragan Obrenović, Guilty Plea Agreement of 20 May 2003 and Exhibit T-983, Obrenović's testimony in the *Blagojević* case.
[228] Exhibit T-19, prepared by Alistair Graham (ICTY Office of the Prosecutor Information Report on August 2004 Site Visit) (confidential), p. 10.
[229] Exhibit T-40.
[230] Defense arguments at Appellate Panel session on 21 October 2010.

specific tasks from him, and met him in person on the critical day, all with the purpose of determining the activities of the Zvornik Brigade Security. This conclusion is corroborated by evidence confirming that the assigned tasks were carried out exactly in the manner described by the Accused.

158. According to the Accused, his first task pertained to sending the Military Police to Konjević Polje to secure the road and guard the column of Srebrenica men. The presence of the MP members at that location is corroborated by ample evidence,[231] including the testimony of witness/survivor Mevludin Orić, who was captured at that location on 13 July, and, together with other captured men, taken to the zone of responsibility of the Zvornik Brigade. This corroborates telephone calls, instructions, and activities concerning the Accused.

159. We note that the fact that no document was introduced into evidence with written orders of Colonel Beara does not mean that he did not issue such orders.

160. The next task of the Accused pertained to the selection of space for placement of a large number of men from Srebrenica.[232] This coincides with the events of 12 and 13 July. The Accused immediately began to perform this task and, in the evening hours of 12 July, together with Drago Nikolić, Momir Jasikovac and Milorad Birčaković (a driver), visited primary schools in Orahovac, Petkovci and Ročević.[233] The Trial Panel's findings on these facts are supported by the evidence.

161. In the morning, Momir Nikolić, Chief of Security and Intelligence for the Bratunac Brigade, received verbal tasks from Lieutenant Colonels Popović and Kosorić pertaining to the forcible transfer and executions.[234] If this specific point in time is accurate, then it is clear that this plan was directly presented from the top tier of the VRS leadership to other participants in the JCE, specifically to those in the operations domain, including the Accused. This detail supports the truthfulness of the Accused's statement on contacts and instructions from Colonel Beara.

162. In addition, according to the lists of members of the Zvornik Brigade who were present that day, Lieutenant Drago Nikolić was not present, which suggests that the Accused performed the role of Chief of Security for the Zvornik Brigade. The correlation between the status of Momir Nikolić,

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[231] Among others, testimony of witness Mile Janjić in *Popović* on 20 November 2007, p. 17933- 17934 - 10 to 15 buses from Potočari boarded by the Bosniak men who were guarded by the Military Police of the Bratunac Brigade, headed towards the school "Vuk Karadžić."; witness Slobodan Mijatović; witness Milovan Đokić; witness Milorad Birčaković.
[232] See Verdict para. 421.
[233] Exhibit T-17 (Interview of 29 October 2004).
[234] Exhibit T-868, Momir Nikolić's Sentencing Judgment and Statement of Facts.

the Chief of Security of the Bratunac Brigade, and that of the Accused indicates that they performed identical duties in two different brigades within the Drina Corps. Therefore, it is logical to conclude that, on the critical day, security officers at the Brigade level were responsible for selecting detention sites. All of this is consistent with the Accused's testimony.

163. That the Accused selected the school buildings in Orahovac, Petkovci and Ročević is also confirmed by documentary evidence: Richard Butler's Report and the vehicle logs for the Opel Rekord vehicle for which Milorad Birčaković was the designated driver. The logs clearly indicate that the Opel visited the mentioned locations on several occasions. Two recorded visits to Orahovac, in the morning hours of 13 July, are of particular importance. Birčaković testified that at around noon that day he used the Opel to escort the convoy to Bratunac, which is entirely consistent with the statement of the Accused. This was the same convoy with which the Accused travelled.[235]

164. Based on all of the foregoing, this Panel concludes that the Trial Panel correctly credited the Accused's statements on this point. There are too many coincidences and details in the facts presented by the Accused for his statements to be fabricated. If all of the facts related to the events that took place that day are considered together – the role of the Accused as the Zvornik Brigade Security Officer, the competence of the security organ for placement of the detained men, the conveyance of orders and directives from the top tier of VRS leadership down the line within the security sector, and the tasks which were assigned to the Security Officer of another brigade, the Accused's direct involvement in the referenced crimes as charged, as found by the First Instance Panel, is clear.

165. The defense also argues that the detention and placement of prisoners was not a crime.[236] We reject this argument and note that there was no evidence that civilians were legitimately detained such that it was necessary to select buildings for their detention. The Verdict presents a detailed analysis of the Accused's role in this heinous crime. Based on this analysis, it is clear that the Accused could not have believed that the victims were only being detained temporarily, and that he knew what their fate would be. There is no question that he participated in the implementation of the plan for their execution and in "ethnic cleansing."[237] The Verdict at paragraph 273 clearly and reasonably sets out the grounds for the Court's findings, taking into account, among other

[235] Exhibit T-17 (Interview of 29 October 2004).
[236] Defense Brief at p. 9.
[237] The 1992 Resolution of the UN General Assembly about the situation in Bosnia and Herzegovina equates ethnic cleansing with genocide. See A Guide through the Hague Tribunal, Regulations and Practice, *supra* at p. 81.

things, the Zvornik Brigade Duty Officer's tasks which required him to be in contact with both the Brigade's subordinate units and its superior command.

166. Finally, as explained above, the extent of the crime was such that it excluded the possibility that an individual who participated in or contributed to it, let alone one in the top tier of the Zvornik Brigade chain of command, would not be aware of it.

167. Having concluded that all of the issues raised on appeal were not substantiated, and that the Trial Panel's conclusions were thoroughly supported and corroborated by evidence, this Panel dismisses the issues raised on appeal as ungrounded.

### 6. The Trial Panel Properly Relied on the Opel Rekord Vehicle Logs

168. The defense argues that the Trial Panel erred in referring to the vehicle logs for the Opel car (Verdict at paragraph 422) operated by Milorad Birčaković, because Birčaković testified that the logs did not correspond to actual trips, locations, or times noted, and because he denied that he had driven the Accused to Kozluk or to Orahovac.[238]

169. The Accused stated that on 12 July, together with Drago Nikolić, Momir Jasikovac and Birčaković, the driver, he visited schools to be used as detention premises. The vehicle logs show that beginning on 13 July and over the next three days, the Opel went to Orahovac, Ročević, Kozluk, Kula and Pilica on several occasions. These were the locations where the captured men were later detained and executed.

170. Birčaković testified that during the relevant period he worked as a driver for the Command, and that he usually used the Opel Rekord to drive security officers from the Zvornik Brigade, namely Drago Nikolić and the Accused. Birčaković claimed that the vehicle logs were not maintained contemporaneously, but were filled in later, towards the end of the day. He also said that the logs were signed by him and usually by the person/officer he drove. He said that the Opel went to several locations, but that the routes recorded in the log did not entirely correspond to the real routes driven.

171. The Trial Panel was not convinced of the reliability of Birčaković's testimony (see the First Instance Verdict at paragraph 444), and this Panel finds that determination to be reasonable. Specifically, in his testimony, Birčaković attempted to diminish the responsibility of the Accused

along with his own participation.[239] His answers to questions were confusing and vague; he mostly could not remember when he visited the above-mentioned locations; he stated that a lot of time had passed; he hardly spoke with anyone at that time; he was sent to escort columns of prisoners but did not know why; and he only saw the Accused in passing and drove him as required but did not remember exactly where and when. This stands in sharp contrast to Birčaković's remarkable recollection of details which did not incriminate the Accused, such as those regarding the funeral of a former member of the Military Police in Kravica.[240]

172. Even if there were minor deviations in entries regarding the mileage and if the logs did not completely reflect the history of the Opel's movements, the logs still indicated that Orahovac, Ročević, Kozluk, Kula and Pilica were visited, and the Accused signed those entries. Those were surely not the routes used to cover up the local drives mentioned by the witness. It would be too much of a coincidence for Birčaković to have entered these routes and for them to correspond to the Accused's statements regarding that day's movements to the locations where the captured men were held.

173. In that regard, this Panel notes that the vehicle logs are not the only piece of evidence on which the First Instance Panel based its conclusions regarding the Accused's movements. The logs are corroborated by numerous pieces of evidence, which were considered in their totality and in correlation with each other.

174. Thus, contrary to the arguments of the Accused, this Panel concludes that the Trial Panel was correct in determining that the Opel vehicle logs were valid and reliable in their essential details.

### 7. Substantial Evidence Was Presented As To the Accused's Guilt Regarding the Events of 13 and 14 July 1995

175. The Accused contends that there is no evidence to support the findings in the Verdict that he committed the criminal offenses as detailed under Section B of the factual findings, subsections (a), (b), (c), (d) and (e) of the reasoning.[241]

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[238] Defense Brief at p. 7.
[239] Witness Milorad Birčaković, testimony of 12 December 2007.
[240] Ibid. at pp. 38-39.
[241] Defense brief at p. 9.

176. This section of the Verdict pertains to the interconnected series of events in relation to which the Accused was found guilty. This Panel is satisfied, after review, that the Accused's contentions are ungrounded, and that the Trial Panel's conclusions are based not only on the statements of the Accused, but on ample substantiating evidence, as set out below.

177. Before concluding that the Accused was guilty, the Verdict set out factual findings as to relevant events, namely that: Bosniak men from the Srebrenica enclave, upon being captured on 13 July 1995, were detained in schools in Grbavci and Orahovac; they were held in inhumane conditions and guarded by members of the VRS; 20 of them were executed by firearm in front of the school in order to control the remaining prisoners; the rest of the prisoners — approximately 1000 of them — were taken to a nearby meadow in Lažete during 14 July and were summarily executed by members of the VRS. These victims were then buried in unmarked mass graves close to the execution site.

178. In explaining the events that took place at the Grbavci school, the Trial Panel found that, even absent direct evidence, the acts of the Accused which he himself described were indisputable, primarily because they fit in with the logical sequence of events, thus excluding any other possibility concerning the nature of the Accused's participation in the crimes.

179. We also conclude that the defense is wrong in arguing that there was no evidence to corroborate the Trial Panel's conclusions; we note that the defense itself presented arguments that lacked support.

### (a) The Accused Supervised and Controlled VRS Soldiers Guarding the School

180. The Accused stated that he and Momir Jasikovac, Commander of the Military Police, were responsible for securing the area, and that he arrived late at night. The Accused described in detail the arrival of the buses holding captured men, the manner in which the men exited the buses, and that they left their belongings at the entrance of the gym before entering the gym. The Accused also stated that he worked on organizing and preparing the killing operation.[242] These statements were corroborated by the testimony of many witnesses: Mevludin Orić; Witnesses A-47, A-26, A-7, A-41, and A-8; Sreten Milošević, Deputy Commander for logistics of the Zvornik Brigade[243]; as well

[242] Verdict para. 477.
[243] Witness Sreten Milošević (3 December 2007).

as Milorad Birčaković, Tanacko Tanić,[244] and Dragan Obrenović.[245] Among them were members of the Military Police of the Bratunac and Zvornik Brigades who confirmed the presence of other members of the VRS, including senior officers Drago Nikolić, Lieutenant Colonel Popović and Colonel Beara, and their participation in securing the school at the relevant time. All of these statements were consistent with the Accused's statements.

181. One of the survivors/prisoners, witness Mevludin Orić, corroborated the statements of the Accused about the captured men leaving their belongings at the entrance of the school. Namely, Witness Orić said that when he was brought in front of the Grbavci school on 14 July he saw a huge pile of clothes and berets next to the red door. That was also corroborated by Witness A-41.

182. All of the Accused's statements about the evening's events were corroborated by the testimony of other witnesses and documentary evidence, including Richard Butler's Report and records of the Zvornik Brigade. Considering all of the circumstances surrounding the case, the only possible conclusion is that the Accused was present at the Grbavci school that evening and controlled and supervised the placement and guarding of the captured men by the VRS. This was consistent with his duties and his role as Drago Nikolić's deputy. Furthermore, at the time when he acted as the duty officer, the Accused's role was to ensure an uninterrupted functioning of the group's command, as the First Instance Panel properly found (see Verdict paragraph 270).

### (b) Sufficient Evidence was Presented that the Accused Issued the Order to Physically Secure the School

183. Contrary to the defense argument, this Panel also concludes that the Trial Panel correctly found that, on 14 July, the Accused provided security forces to control captured Bosniak men held inside the school by asking the 4th Battalion of the Zvornik Brigade to provide ten additional VRS soldiers. Upon their arrival, he assigned them the task of guarding the school.

184. The Accused himself stated that, when the executions began, he had a feeling that there could be major problems. Based on this, he went to a private house and contacted Lazar Ristić of the 4th Battalion by telephone to ask for reinforcements. This was corroborated by Ristić,[246] Assistant Commander of that battalion, who described the conversation and said that he sent ten soldiers to the school and instructed them to report to the Accused. In addition, a note in the

[244] Verdict para. 434.
[245] T-983, Obrenović's testimony in *Blagojević* of 10 October 2003, p. 3031-3032. See also T-813 (Butler's Narrative), paras. 7-8.

Zvornik Brigade Duty Officer's logbook confirms the Accused's telephone call from number 592-029. When Ristić arrived in front of the school later that day, he saw the Accused leaving with two military police officers.[247]

(i) The Trial Panel Properly Evaluated the Evidence

185. The Accused argues that the Trial Panel erred by not accepting the evidence of prosecution witnesses A-7, Tanacko Tanić and Sreten Milošević, or of defense witnesses Čedo Jović and Gordan Bogdanović, who claimed they did not see the Accused in Orahovac and Ročević on 13 and 14 July, but in accepting the statement of Ristić who only saw the Accused briefly when he boarded a truck.[248]

186. According to the Accused,[249] he arrived in front of the Grbavci school in the late evening hours of 13 July 1995; he confirmed his presence and activities on the following day regarding securing the captured Bosniaks held inside the school. Lazar Ristić, Assistant Commander of the 4th Battalion of the Zvornik Brigade, confirmed the presence of the Accused in Orahovac on 14 July, noting that after he (Ristić) arrived in front of the school that afternoon, upon a call from one of his soldiers securing the school, he saw the Accused board a truck and depart with two military police officers.[250]

187. The Trial Panel rightly credited this testimony concerning the presence of the Accused at the school, finding that the testimony of witnesses A-7, Tanacko Tanić, Sreten Milošević, Čedo Jović, and Goran Bogdanović was unreliable. The Verdict logically corroborated this finding by noting that most witnesses were reluctant to name the participants, even though they gave detailed descriptions of actual events. This Panel concludes that this conclusion was proper, bearing in mind that the witnesses referred to by the defense testified that they did not see the Accused, which does not exclude the possibility that he was there. Finally, Ristić testified that he saw the Accused with Čedo Jović and Goran Bogdanović, who denied seeing him at all at the relevant time, although they were engaged in securing the school together.

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[246] Witness Lazar Ristić (11 December 2007).
[247] Verdict para. 481.
[248] Defense Brief at p. 7.
[249] See Exhibit T-17 (Trbić Interview on 29 October 2004).
[250] Verdict para. 481.

188. Other evidence corroborates Ristić's credibility, including the telephone conversation between Ristić and the Accused, such that the Trial Panel could be confident of the veracity of his statements. It is clear from the record that Ristić's testimony was not isolated or illogical, and that it did not contradict the testimony of other referenced witnesses.

189. Based on Ristić's testimony and the statements of the Accused, the Trial Panel properly concluded, beyond a reasonable doubt, that it was the Accused who issued the orders to guard the captured men and who requested ten additional soldiers to guard the school. Therefore, given this series of events — the Accused contacted Ristić and asked for reinforcements, Ristić sent ten soldiers who were instructed to report to the Accused, the Accused was seen in front of the school immediately afterwards, and the Accused was the highest ranking person there — this Panel concludes that the Trial Panel properly reached the only possible conclusion, contrary to the defense arguments, which is that the Accused tasked the soldiers with guarding the school, was in charge of guarding the prisoners, and actively participated in the events of that day.

(ii) The Accused Identified the House from Which he Telephoned Ristić

190. The Accused identified the house from which he made the telephone call to Ristić. The Verdict thoroughly and correctly discusses the sufficiency of the evidence on this issue, contrary to the claim on appeal.[251] As stated above, the Accused here again has presented an unsubstantiated argument which does not properly raise the issue on appeal.

191. As discussed above, during the investigation, ICTY investigators took steps to identify the house from which the Accused made the telephone call. The Accused helped them in this process by circling houses on an aerial photograph of the area, and he subsequently confirmed that the house from which he made the call was across from the school. The investigators also traced the telephone number from which the Accused made the telephone call on 14 July. Also as discussed above, in an attempt to show that the Accused fabricated his statements to investigators, the defense argues that it is impossible for a person to recall a telephone number (which he stated in his 23 May 2004 testimony) after so many years.

192. We note that Stana Vidović,[252] the owner of the relevant house and the person to whom the telephone number was assigned, confirmed that members of the VRS often used the telephone.

[251] Defense Brief at p. 8.
[252] Witness Stana Vidović (26 January 2009).

Thus it appears that the telephone number was regularly used by the VRS in its large-scale military operation as a reliable means of communication.

### (c) The Trial Panel Made Correct Inferences Regarding the Whereabouts of the Accused

193. The defense argues that the Verdict's conclusions at paragraphs 487-494 regarding the movements and activities of the Accused were based on insufficient evidence where the Trial Panel relied on the Accused's statements and reports of investigators.[253]

194. This allegation lacks merit. Apart from the testimony of the Accused, the Trial Panel relied on the following relevant evidence: testimony of Milorad Birčaković, Witness A-50, ICTY OTP Information Report,[254] and an aerial photograph of Orahovac.[255] Based on all of this, we conclude that the Trial Panel's conclusions were sufficiently supported.

195. We note that the aerial photograph was an important piece of evidence. Lazar Ristić made markings on it regarding the events at the Orahovac school; specifically, he marked the position and movements of the Accused, the position of MP and VRS members, and the location of captured civilians.[256] We reject the defense characterization of the photograph as a "space image" and its challenge to its introduction through Ristić on the ground that he was not a "space technology expert." We also conclude that the defense allegations pertaining to Witness A-50 are meritless.

196. Thus, we conclude that the Trial Panel properly drew its factual conclusions from the various pieces of evidence, connecting that evidence and considering it in relation to general factual findings. Accordingly, the Verdict was adequately and properly factually corroborated and not based solely on the Accused's statements.

### (d) The Accused Knew about and Personally Participated in the Executions at Lažete on 14 July

197. The Trial Panel correctly determined that the Accused was present at Lažete, knew of the plan to execute the detained male civilians, and took the steps required to carry out the executions that began on 14 July. The Trial Panel properly evaluated the evidence on this issue.

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[253] Defense Brief at p. 8.
[254] T-19.
[255] T-33.
[256] Testimony at the main trial on 11 December 2007, p. 14.

198. Lazar Ristić testified that when he arrived in front of the school he saw Zvornik Brigade military police and logistics officers. The Accused stated that the prisoners were blindfolded and loaded onto trucks. The testimony of survivors and witnesses who were members of the VRS match the details of the Accused's statements. Survivors/witnesses Mevludin Orić, A-47, and A-26 testified to being loaded onto trucks, blindfolded, and transported to an execution site where they were lined up and fired upon by individuals with automatic weapons.

199. The Accused's responsibility is not only based on his presence at the school and at the Lažete sites, but on his position in the VRS and the participation of those subordinate to him. The Accused's role as Brigade Assistant Chief of Security shows that he was responsible for assisting senior VRS officers in coordinating and supervising VRS members in guarding, loading, and transporting men to the execution site and was aware of the reason for taking them there.

200. No credible evidence suggests that the Accused did not take part in the referenced activities; rather, substantial evidence as reasonably found by the Trial Panel – based on the Accused's own statements, testimony of other witnesses and documentary evidence – shows the contrary. There is no evidence that the Accused opposed acting in such a manner or wished to relinquish his role. The depth of knowledge possessed by the Accused, which would have been otherwise unknown, shows that it came from his own perceptions as a direct participant in the events. It is indisputable that the Accused was present at the various sites that day, knew of the plan to execute the prisoners, had a supervisory role, possessed details regarding organization of the operation, and that later that day, on 14 July, he personally carried out executions using his automatic rifle. The execution operation of approximately 1000 Bosniak men was completed by their burial in unmarked mass graves in Lažete by VRS soldiers of the Zvornik Brigade Engineering Company.

201. The Accused's statements regarding his participation in these events were also corroborated by verifying certain facts he mentioned, such as that there was an excavator at one site during the executions and that the executions were carried out at two adjoining meadows in Lažete. Testimony of survivors/witnesses and members of the Engineering Company confirmed that the burials were carried out using an excavator that was in use the whole day during the executions. Witness Cvijetin Ristanović, a member of the Zvornik Brigade Engineering Company, stated that the morning of 14 or 15 July he received an order from his superiors to take an excavator to the school in Orahovac, which he did. After some time, he heard a truck arrive from which people were unloaded and killed, and he was ordered to dig. This is supported by documentation on the

excavators, loaders, and military TAM trucks used in Orahovac on 14 and 15 July, and by investigation of primary mass graves found at the marked locations.[257]

202. That the Accused was able to show investigators the exact location of the meadows where the mass graves were located supports the fact that this information came from his own knowledge.

203. Thus, where the factual details regarding the burials given by the Accused were corroborated by other evidence, it was logical for the First Instance Panel to credit the Accused's statements about his presence and specific acts of perpetration, which, as discussed above, fit into the causal sequence of events.

### 8. Substantial Evidence was Presented that the Accused was Guilty of Actions on or about 15 July 1995 in the Ročević School and at the Refuse Dump in Kozluk

204. Contrary to the defense claims of a lack of testimony about the alleged events, the Trial Panel's decision regarding these charges was based on abundant evidence. It primarily grounded its conclusion on the statements of the Accused, which it reasonably concluded were corroborated by other evidence.

205. There is no question that, similar to the events that transpired at other execution sites, VRS members, including members of the Zvornik Brigade, took the captured men from the school in Ročevići and brought them to the area of the refuse dump in Kozluk where they were summarily executed. On 15 July 1995, at Ročević and Kozluk, approximately 500 Muslim men were killed; their bodies were buried in mass graves the following day. The Trial Panel's reasoning on this issue, which this Panel concludes is correct, is set out at paragraphs 542-584 of the Verdict.

206. The Accused's statements as to his role in these crimes were corroborated by ample evidence: the testimony of Sreten Aćimović,[258] Mitar Lazarević,[259] Mile Janjić,[260] Slobodan Matijević,[261] Milorad Birčaković, Miloš Mitrović,[262] Witnesses A-8,[263] A-13,[264] A-7,[265] A-45,[266] the

[257] See the section on aerial photographs at paras. 121-125 of this Verdict.
[258] Witness Sreten Aćimović (3 December 2007).
[259] T-966, Witness Mitar Lazarević in *Prosecutor v. Popović et al.* IT-05-88, Testimony of 26 and 27 June 2007.
[260] T-965, Witness Mile Janjić, testimony in *Popović*.
[261] Witness Slobodan Mijatović, Testimony in *Božić et al*.
[262] T-880, Witness Miloš Mitrović, Testimony in *Blagojević*.
[263] Witness A-8 (10 December 2007).
[264] Witness A-13 (12 December 2007).
[265] T-918, Witness A-7, Testimony in *Popović*.
[266] Witness A-45 (15 January 2008).

Opel vehicle log,[267] the Information Report of the ICTY OTP,[268] Dean Manning's Report[269] and 16 June 2008 testimony, the Zvornik Brigade Engineering Company Vehicle Logs for July 1995, aerial photographs of Kozluk,[270] and Richard Butler's Report, along with the Trial Panel's established facts. All of this evidence corroborates the Accused's investigative statements about this factual event.[271]

207. Witness Aćimović described the events that took place prior to and upon his arrival at the Ročević school, confirming the Accused's account as to the context of the events and the participants. We conclude that the Trial Panel properly credited the testimony of this witness, who stated that he arrived at the school in the morning at about 10:00 or 11:00 hours and overheard Lieutenant Popović on the telephone asking for "one man or two men who had previously been in Petkovci or Orahovac to be sent over." The Accused subsequently confirmed that Popović probably had either him or Jasikovac in mind.

208. Witness A-13, a member of the Military Police of the Zvornik Brigade, testified that he saw the Accused arrive at the school at about 14:00 hours and talk with a military police officer. This military police officer subsequently told Witness A-13 that the Accused had told him not to allow civilians to approach the schoolyard.

209. It follows from this that the Accused was trusted to coordinate and take military actions. Together with Nikolić and Jasikovac, the Accused effectively implemented and supervised field activities, directly contributing to the plan and acting in accordance with his supervisory role. In the first execution at the Grbavci school, these three men proved their competence, such that they were engaged for the executions that followed.

210. The Trial Panel found that the Accused's testimony with regard to these activities was credible, and determined, among other things, that on that day he opened fire at the captured men in front of the school and killed at least five men. Witness Aćimović confirmed that there were dead bodies in front of the school.[272]

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[267] Entry for Ročević for 15 July 1995, T-40 (Opel vehicle log).
[268] T-19 (ICTY OTP Information Report regarding August 2004 site visit (Confidential).
[269] T-830 (1st Manning Report), Annex A.
[270] T-841B (Photograph made on 5 and 17 July 1995.) and -841C (Photograph made on 7 and 27 September 1995).
[271] T-15 (Trbić 23 May 2004 Interview); T-16 (Trbić 27 May 2004 Interview); T-17 (Trbić 29 October 2004 Interview) T-18 (Trbić 8 November 2004 Interview).
[272] Witness Sreten Aćimović (3 December 2007); Mitar Lazarević confirmed that that was exactly what Sreten Aćimović told him (T-966, witness Mitar Lazarević, Testimony in *Popović*, p. 13390), Verdict para. 571.

211. It is clear that the Trial Panel's determination was correct where: the Accused admitted his active participation in these activities, there was evidence that Lieutenant Colonel Popović coordinated the execution plan and was beyond a doubt present at the school, and there was evidence that the Accused was aware that civilians would be killed. No credible evidence challenges this finding of the Verdict. The Verdict's findings and conclusions are based on a detailed analysis of all of the evidence, including the Accused's actions.[273]

212. The execution plan for the prisoners at Kozluk was similar to that for Orahovac and Petkovci; the prisoners were taken to Kozluk by TAM trucks. Evidence of this was presented by eye-witnesses A-7 and A-8, both Military Police members, and witness Mitar Lazarević. This information also corroborates the Accused's account of that day's events.

213. The Trial Panel also properly credited the Accused's statement concerning his participation later that day in Kozluk when he carried out executions for at least 20 minutes. The Accused stated that he did this when he returned to the execution site in Kozluk accompanied by Birčaković, the driver. This is also corroborated by the documentary evidence discussed above – the Opel vehicle logbooks and Birčaković's testimony that he drove the Accused to Kozluk on the evening of July 15th.[274]

214. The Accused's ultimate goal was achieved as approximately 500 men were executed at the town refuse dump at Kozluk, on the left bank of the Drina River. The following day, the Zvornik Brigade Engineering Company buried the victims in mass graves there and at nearby locations. There were no survivors. Evidence on this issue consisted of documentary evidence mostly regarding forensics, and the testimony of Witness A-45 and Miloš Mitrović, who personally participated in the burial of the bodies.

215. On appeal, the defense did not sufficiently support its argument that the Trial Panel's factual findings and conclusion on this issue were incorrect. We have reviewed this issue and conclude that nothing raises doubt as to the reasonableness of the Trial Panel's determinations that the appellant was present and participated in the executions of civilians.

[273] Verdict paras. 177-189.
[274] Milorad Birčaković, 12 December 2007, Transcript p. 38.

### 9. Substantial Evidence Was Presented that the Accused Was Guilty of Actions on 15 July 1995 at Petkovci

216. With regard to the charges concerning the Accused's actions at Petkovci, without providing any reasoning or focused argument, the defense simply states, "the contested Verdict is lacking evidence for these arguments."[275]

217. We conclude that substantial evidence supports the Trial Court's conclusions on this issue, namely the testimony of survivors and witnesses: Witnesses A-29[276] and A-31,[277] Ostoja Stanišić,[278] Commander of the 6th Battalion, and his deputy Marko Milošević,[279] as well as Richard Butler's Narrative, Dean Mannings's first and second reports, aerial photographs of the Petkovci Dam,[280] and the Zvornik Brigade Engineering Company vehicle logbooks for 15 July 1995. The Trial Court properly evaluated the weight and probative value of the Accused's statements, and the evidence listed above substantially corroborates these statements regarding these events and activities.

218. According to the Accused's statements, he arrived at the Petkovci school between midnight and 01:00 hours on 15 July 1995 where he saw VRS soldiers guarding the prisoners and placing them on small military trucks for transport to the dam execution site.[281] The Accused reached the school along with Drago Nikolić, who spent most of his time at the dam. In front of the school building, on the concrete playground, the Accused saw 10-15 bodies. Regarding his actions at that point, the Accused stated: "In front of the school I immediately got involved into that activity, the same one I did in Orahovac. I was with Popović in that area. And I continued with the same activity as I did in Orahovac."[282] According to his statements, small military trucks of the 6th Battalion transported the prisoners to the Petkovci dam.[283] The dead bodies were transported along

[275] Defense Brief at p. 10.
[276] T-896, Witness A-29, *Prosecutor v. Blagojević and Jokić*, IT-02-60, testimony on 21 and 22 July 2003, (Testimony of witness A-29 in the *Blagojević* case).
[277] T-903, Witness A-31, *Prosecutor v. Krstić*, IT-98-33, testimony on 14 April 2000 (Testimony of witness A-31 in the *Krstić* case), pgs. 2963-2964.
[278] T-970, witness Ostoja Stanišić, *Prosecutor vs. Popović et al*., IT-05-88, Testimony of 16 and 17 May 2007 (Testimony of witness Ostoja Stanišić in the *Popović* case).
[279] T-967, Testimony of witness Marko Milošević in the *Popović* case.
[280] T-840B and T-840C.
[281] T-15 (Trbić interview of 23 May 2004), pp. 30-32; T-16 (interview of 27 May 2004), pp. 14, 17; T-19 (ICTY Information Report on the site visits in August 2004) (Confidential), p. 3; T-17 (Trbić interview of 29 October 2004), p. 60; T-18 (Trbić interview of 8 November 2004), pp. 3-5.
[282] T-15 (Trbić interview of 23 May 2004), p. 30.
[283] T-15 (Trbić interview of 23 May 2004), pp. 31-32.

with the last group of the prisoners who were to be executed. The Accused accompanied the last group of prisoners to the dam at about 05:00 hours, just before dawn.[284]

219. This Panel is satisfied that the First Instance Panel acted reasonably in concluding that substantial evidence supported the Verdict, including evidence regarding the Accused's involvement in the manner described. The First Instance Panel arrived at its factual findings by evaluating the evidence individually and in tandem with other pieces of evidence and considered the accuracy and reasonableness of the Accused's arguments. As similarly noted above, this claim is arbitrary and ungrounded.

220. The Accused's statements are consistent with those of survivors and witnesses. Witness A-29 testified that he was taken out of the classroom in which he had been placed after midnight,[285] and that he had heard rapid firing such that it was clear to him that those who had been taken out before him had been executed. This sequence of events is consistent with the statement given by witness Ostoja Stanišić, who said that he heard rapid fire from the direction of the free territory (the direction of the dam) at about 23:00 to 24:00 hours. This is when the executions likely began, just before the Accused arrived. Again, this account of the sequence of events is consistent with the Accused's statement that the operation of taking the prisoners out and transporting them had already began when he arrived at the school.

221. The Accused's statements about seeing dead bodies in front of the school were corroborated by the testimony of survivors/witnesses A-29 and A-31, which the Trial Panel properly evaluated. Witnesses Dragan Obrenović and Ostoja Stanišić corroborated the Accused's account, as well as the fact that 6th Battalion trucks were used to transport the bodies and the last group of prisoners from the school, to the dam.[286]

222. We conclude that the Trial Panel properly found the Accused's testimony accurate and reliable in terms of the timing of his arrival at the dam (at about 05:00 hours), with the last group of prisoners. The Accused also said that upon his arrival he saw dead bodies covering an area as large

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[284] T-19 (ICTY Information Report on the site visits in August 2004) (Confidential), p. 4; T-17 (Trbić, interview of 29 October 2004), p. 61; T-18 (Trbić, interview of 8 November 2004), p. 5.
[285] T-896, testimony of witness A-29 in *Blagojević,* p. 1408.
[286] T-970, testimony of witness Ostoja Stanišić in *Popović*, p. 11610-11612; Witness Dragan Obrenović, T-985 (Obrenović, Joint Motion on Plea Agreement dated 20 May 2003), p. 16661 – Ostoja Stanišić informed him that the prisoners were executed near the school and that the 6th Battalion soldiers took their bodies away to bury them. Marko Milošević also confirmed that Ostoja Stanišić told him that he had sent members of the 6th Battalion to the school in Petkovci to clean the area near the school (p. 1334).

as a football field, on which occasion a loader/excavator and bulldozer dug a grave and then covered it. This was also corroborated by the testimony of Witnesses A-29 and A-31.

223. The complexity of the execution plans, the large number of individuals to be executed, and the short time allocated to perform this task warranted the presence of top-ranking VRS officers at the site — Beara, Popović, Nikolić, and the Accused — to supervise the operation. Only these individuals, by virtue of their authority, could ensure that the operation was carried out as planned. There was substantial evidence of the Accused's intent, given that he acted jointly with and supervised VRS soldiers loading and transporting prisoners to the dam, being aware that they would be executed there.

224. The fact that the executions took place in different places but in a similar manner shows a high level of organization within the VRS. This well-established pattern of operations included using trucks for transport, carrying out the executions in close vicinity to pre-prepared mass graves, and using heavy machinery – bulldozers and loaders — to bury the bodies.

225. In addition, the Accused showed investigators the execution site and the graves at the Petkovci dam plateau during a visit to the area in August 2004.

226. In sum, we conclude that the Trial Panel correctly found that the details presented by the Accused in his statements fit with the testimony of other witnesses, as well as the physical and documentary evidence. We note that it is almost inconceivable that without having witnessed these events the Accused could have accurately described what was happening in front of the school, the existence of bodies of already-killed prisoners there, the manner in which the prisoners were loaded onto trucks and driven away, the participation of VRS soldiers, the fact that the bodies in front of the school were transported with the last group of prisoners to the dam, and the fact that the Accused took this truck to reach the dam and arrived at approximately 05:00 hours. All of these details form links in the chain of events that occurred that critical evening. Thus, the Verdict reasonably found that the Accused, together with other participants in the JCE and acting in his area of responsibility, participated in the execution operation of at least 179 Bosniak men who had been detained at the Petkovci school.

### 10. Substantial Evidence Was Presented that the Accused Was Guilty of Actions on 15 July 1995 at Kula Grad

227. The Accused argues that the First Instance Panel erred in finding him guilty of charges concerning Kula Grad and that this was based on erroneously established facts. He contends that

the evidence was insufficient in that no information was presented as to the place, participants, or time that the crimes allegedly occurred.[287] The Accused does not, however, explain how a reasonable trier of fact could not have reached this conclusion in light of the evidence.

228. We conclude that the Verdict presented sufficiently clear and specific grounds for its finding that, on 15 July 1995 in Kula Grad, Zvornik, the Accused coordinated and supervised VRS soldiers in executing a group of captured Bosniak men from the Srebrenica enclave, including Rešid Sinanović, son of Rahman, born 15 October 1949.

229. We note that here, as with other defense arguments on appeal, the defense did not present any arguments in support of its contention that the First Instance Panel's conclusions were unreasonable.

230. According to the Verdict, the last time Rešid Sinanović was seen alive was on 15 July 1995, when he was captured with a group of men after escaping from the hospital.[288] The Accused confirmed that this group was arrested at the border crossing in Karakaj on that day. After these individuals were arrested, the Accused and Duško Vukotić, Captain 1st Class, interrogated Sinanović.

231. The relevant findings of the Trial Panel (at paragraph 604) are in pertinent part:

> On a TAM truck vehicle, on 15 July, members of the 1st Battalion transported these detainees to the execution site in the area of Kula Grad and executed them in the evening hours.[289] Evidence corroborates the allegations in the Amended Indictment that this group of detainees together with Rešid Sinanović was executed in Kula Grad on 15 July 1995 and that their mortal remains were later on transferred to Kamenica.[290]

232. The Accused told investigators that Kula Grad had been an execution site, that he had been there, that on 15 July 1995 his driver was present at the execution site, and that the bodies of the men were moved from the execution site and primary grave site of Kula Grad to Kamenica.[291] Documentary evidence corroborates this, such as the Zvornik Brigade vehicle logbook for the Opel Rekord, which indicates that the Accused's driver Milorad Birčaković drove the Opel on 15 July

[287] Defense Brief at p. 10.
[288] Zvornik Brigade Operations Duty Officer logbook for 15 July 1995.
[289] T-18 (8 November 2004 Interview to ICTY Office of the Prosecutor), p. 22.
[290] T-18 (8 November 2004 Interview to ICTY Office of the Prosecutor), p. 23.
[291] T-18 (8 November 2004 Interview to ICTY Office of the Prosecutor), p. 23.

1995 to the area of Zvornik and Divič and he took a local ride in the Zvornik area.[292] Forensic evidence from the secondary grave Kamenica also corroborates this, since Sinanović's body was recovered there.

233. We conclude that, contrary to the argument on appeal, the facts were sufficiently precise regarding the time, place, and participants in these crimes. All of the evidence indicates that the killings were committed on 15 July in the area of Kula Grad and that, consistent with the previous executions, the perpetrators were VRS members supervised and coordinated by the Accused.

234. We also conclude that the Trial Panel's finding that the appellant was present during the executions of the civilians was reasonable and based on the evidence.

235. We think that it is unreasonable to expect that, when mass systematic executions are committed, given the number of activities taking place within a short time frame (five days), there would be evidence as to the precise hour and minute of each particular execution and the names of all of the participants. Rather, it is sufficient that the time frame be indicated approximately.

236. What is essential, and what the Trial Panel found, is the fact that the captured men were surrendered to the zone of responsibility of the Zvornik Brigade and of the Accused, since he was the Brigade's security officer and therefore responsible for the security of the prisoners. The Accused stated that he had been present when the men were executed, and the Trial Panel corroborated this by reliable evidence. The Accused did not have to personally carry out the executions; he was, however, present and in charge of the coordination and supervision of the soldiers doing so.

237. Therefore, we conclude that the Trial Panel established a reasonable connection between the direct acts of perpetration by the unidentified members of the VRS and the role and position of the Accused. Here again the Defense has failed to do anything more than generally deny the Trial Panel's findings.

238. The defense raised an issue on appeal regarding a document provided by the Prosecutor's Office which includes among the names of victims the name of a person who was not a victim. Because the defense has not articulated a legal issue regarding this, we cannot evaluate it.

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[292] Kula Grad was located in the zone of responsibility of the Zvornik Brigade. More precisely, it is situated in the area of the town of Zvornik where the Opel Rekord car was driven that day. See Verdict para. 609.

Specifically, the defense neither stated which individual was not a victim nor specified the document to which it referred.

239. We also note that the defense did not show that the Trial Panel's conclusions on this issue were unreasonable, or that any reasonable trier of fact could not have reached the same conclusions. Accordingly, this ground of appeal is dismissed as ungrounded.

### 11. Substantial Evidence Was Presented that the Accused Was Guilty of Actions on 16 and 17 July 1995

240. As with previous issues, the defense on appeal argues simply that the Verdict's findings that the Accused: "[o]n 16th and 17th July coordinated . . . the supply of fuel and ammunition," was part of the "regular assignment of a duty officer in the brigade, and there is no evidence whatsoever to prove that these activities constituted the participation of the Accused in the committed crimes."[293]

241. This Panel is satisfied that substantial evidence was presented that as many as 1200 Bosniak men were executed at the Branjevo Military Farm, Pilica, including men from the Kula school, and that approximately 500 Bosniak men were executed in the Pilica Culture Center. These executions were committed at the time and place and in the manner described in the Verdict, and the Accused, in his capacity as the duty operations officer on the pertinent dates, coordinated the operation by relaying oral and written instructions and reports among supervising officers of units in the field and coordinated logistics support needed for the action to be successful.

242. There is no question, in our opinion, that these actions were criminal, and they cannot be characterized as the performance of regular assignments of a duty officer, as argued by the Accused.

243. Nothing about these events was regular; rather, they constituted the systematic commission of a brutal execution of approximately 1700 innocent civilians. The Accused knowingly and intentionally participated in these crimes, using his position to ensure that steps were taken to achieve the ultimate goal.

244. A duty operations officer, simply put, acts as a liaison among participants in a chain of command both down the chain as well as horizontally with other commands participating in combat activities that are not in the chain. A duty operations officer would be aware of all essential

[293] Defense Brief at p. 10.

information, since it is that person's responsibility to transmit the information to either the Command or to subordinate units in the field. The Accused, as a duty operations officer, was the one through whom information related to combat activities was relayed. He was also aware of assignments of subordinate units, since he coordinated the activities of those units and reported to the Command on their progress.

245. While performing these duties, the Accused, as the Verdict properly found, was not merely a messenger; rather, he reported on events, issued instructions, and resolved logistical problems. In this capacity, he was a key link in transporting prisoners to the execution sites and in their execution.

246. The Trial Panel reasonably found that the Accused played a central role in communications on the pertinent days and therefore rendered the following conclusion:

247. The Trial Panel primarily drew its conclusions on this point from the Zvornik Brigade Duty Officer logbook and from intercepted conversations, the content of which was corroborated by the testimony of Witnesses A-5, A-6, and A-10, as well as by the Accused himself. We conclude that the Trial Panel properly credited this testimony since it was relevant and credible. The Accused's communications show the breadth of his knowledge of and involvement in what was happening in the field. The relevant parts of these conversations are quoted on pages 212-215 of the [BCS version of the] Verdict. In many of the conversations, the speakers do not even use coded terminology, but openly discuss the executions. For example, during one conversation on 17 July 1995 between the Accused, General Krstić, and Lieutenant Colonel Pandurević, in reference to a report from the previous day, Krstić asked, "Have you killed the Turks up there?" and the Accused responded, "All in all, we have."[294]

248. The Accused also coordinated logistics support by organizing fuel and ammunition resupply for the military units participating in the summary executions and the burial of the victims, Bosniak men. Finally, the Accused acknowledged that he had been appointed duty operations officer on certain dates precisely because of his experience and proven abilities in previous operations, as discussed above. In this position the Accused had full knowledge of what was happening and zealously acted to efficiently implement the execution plan.

[294] Verdict para. 673.

249. That the Accused took his responsibilities seriously is evident, for example, from his zeal to procure fuel in order to transport prisoners to the execution site. The Accused made a number of telephone calls over a short period of time in order to obtain this fuel; specifically, at the request of Lieutenant Colonel Popović, he had four telephone conversations between 13:56 and 13:58 hours on 16 July in order to obtain 500 liters of diesel D2 fuel. Once he had been granted the necessary authorization by the Command of the Drina Corps, he secured the fuel from the Zvornik Brigade tanks. The Accused also secured the necessary equipment and machinery in order to clear the terrain the day after the mass executions.[295] The Trial Panel properly credited the evidence regarding these actions, as discussed above in paragraphs 134 - 137.

250. The defense has failed to show that the Trial Panel's conclusions regarding this aspect of the Verdict were not reasonable. The Trial Panel summarized the Accused's participation and role in the relevant events in the Verdict at paragraph 687 as follows:

> The entries that [the Accused] made in the Duty Officer Logbook, corresponding intercepted conversations, and statements by witnesses and [the Accused] himself place him at the heart of the final stages of the murder operation and burials. As he noted himself, by the morning of 16 July he "had experience in the organization in the killing of prisoners"[296] and suggested the fact that he "had already known what was going on" was one of the reasons he became duty officer during this period.[297] The Panel finds that as Duty Officer, [the Accused] knew what was happening, received and passed on orders and information, gave instructions and solved logistical problems. His role and participation were significant to the smooth-running and completion of the killing operation.

251. In sum, this Panel entirely upholds the findings of the Trial Panel and dismisses the grievances of the appeal on this issue as unfounded.

### 12. Substantial Evidence Was Presented that the Accused Was Guilty of Actions Taken on or about 19 July and on 20 July

252. The defense argues that item (g) of the Verdict's factual findings does not include a single act concerning the Accused.[298]

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[295] Verdict para. 684.
[296] T-13 (Interview of Milorad Trbić with ICTY OTP on 21 January 2004), p. 12. *See also* T-982, Testimony of witness A-50 (confidential, p. 6630, 6684).
[297] T-13 (Interview of Milorad Trbić with ICTY OTP on 21 January 2004), p. 15.
[298] Defense Brief at p. 10.

253. In addition to being imprecise, we conclude that this contention is meritless, particularly where the Accused's connection with the crimes was as a knowing and willing participant of the JCE.

254. The Accused's *actus reus* consisted of direct participation, assistance, and contribution to accomplishment of the common goal. Assistance and contribution do not imply his presence at the time of perpetration of individual crimes. What is essential is that he was aware of the common plan, accepted it, and implemented it by closely cooperating with other members of the JCE and its principal perpetrators.

255. The presence of the Accused, as the top ranking officer and deputy chief of security in the Brigade at the pertinent sites, and his knowledge and willingness to implement this criminal plan constitutes an essential contribution to the perpetration of the offenses charged.

256. Regarding the four Bosniak men (discussed at Verdict paragraph 690) who had survived execution by firing squad at the Branjevo Military Farm and were subsequently captured and executed, the Accused gave specific information regarding the location where the men were captured. The Accused stated that they were seized at Ugljevik road and taken to the Zvornik Brigade.[299] The witness mentioned at Verdict paragraph 693[300] testified about the identification and interrogation of the four men, and confirmed that he had interrogated them in the presence of Drago Nikolić. The Trial Panel considered other relevant evidence in this regard, namely: the testimony of Nebojša Jeremić[301] and Fuad Đozić,[302] the record of the Zvornik Brigade Military Police,[303] and Richard Butler's narrative (at paragraphs 8.18 and 8.13-8.19).

257. From the time the four men were captured in the Zvornik Brigade area of responsibility, the Accused and Drago Nikolić, as Zvornik Brigade security officers, were responsible for their security.

258. The Accused may be held responsible for the killings of the men even if he did not shoot or issue orders to shoot, because he failed to guarantee their safety. The Accused, as Assistant Chief of Security of the Zvornik Brigade Drago Nikolić, who was to "assist the coordination with

[299] T-3 (Trbić 19 August 2002 US deposition), p. 60.
[300] Verdict fn. 1190.
[301] Testimony of witness Nebojša Jeremić on 19 December 2007.
[302] T-820.
[303] T-822 and T-825.

reference to the matters pertaining to the capturing, imprisonment and execution of prisoners,"[304] supervised the members of the VRS who did the shooting. Thus, the Accused enabled the execution of Bosniak civilians since, to the perpetrators, his presence guaranteed that a tacit order would be carried out.

259. The defense has not offered sufficient reasons for this Court to conclude that the Trial Panel made an unreasonable inference on this issue. The evidence clearly supports the Trial Panel's findings. Therefore, this Panel is satisfied that the Trial Panel justifiably found that the Accused was present when the men were executed.

260. The same reasoning and conclusion about the Accused's participation also applies to the capture/surrender of nineteen wounded Bosniak men from the Srebrenica enclave. These nineteen men were admitted to the Milići Hospital. On or about 14 July 1995, eleven of them were transferred to the Zvornik Hospital, and then transferred again to the Zvornik Brigade infirmary. On or shortly after 20 July 1995, ten of the eleven men were removed from the infirmary and summarily executed by the VRS. The names of the victims are set out in the Verdict (see Verdict paragraphs 699 through 705).

261. The Trial Panel's conclusions were reasonably drawn from all of the evidence, including the testimony of Dr. Jugoslav Gavrić,[305] Zoran Begović,[306] and Dr. Radivoje Novaković,[307] and documentary evidence.[308]

262. The Trial Panel found that there was no direct evidence that the Accused was specifically involved in this event. However, as with other executions of captured men, the Accused's

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[304] Verdict para. 267.
[305] T-964 Jugoslav Gavrić, *Prosecutor v. Popović et al*., IT-05-88, testimony dated 21 March 2007 (testimony of witness Jugoslav Gavrić in *Popović)*, pgs. 9110 to 9130.
[306] T-961 Zoran Begović, *Prosecutor v. Popović et al.,* IT-05-88, testimony dated 21 March 2007 (testimony of witness Goran Begović in *Popović)*, p. 9142.
[307] T-881 Dr. Radivoje Novaković, *Prosecutor v. Popović et al.,* IT-05-88, testimony on 20 March 2007 (testimony of witness Dr. Radivoje Novaković in *Popović)*, pgs. 9025 through 9098.
[308] O-5 Transcript of Testimony of Pandurević Vinko, in *Popović,* T-736 (Milići Hospital Patient Logbook, 13-14 July 1995; T-737 (Nine patient forms from the Milići Hospital for specialist treatment dated 13-14 July 1995); T-738 (Milići Hospital surgical treatment reports); T-743 (Milići Hospital patient logbook entries 11-15 July 1995); T-744 (Eleven patient files from surgical ward, Sveti Nikola Hospital in Milići dated 13 and 14 July 1995); T-745 (Medical documents x-ray and diagnosis July 1995); T-740 (Note of Release of Patients from Milići Hospital to Zvornik signed by Dr. Davidović). T-1080 (Letter from Dr. Davidović dated 24 July 1995 to General Krstić, Commander of Drina Corps – 18 Muslim patients treated and sent to Zvornik on orders of Main Staff). T-240 (Zvornik Hospital Logbook, Patient 4605 onwards); T-1111 (ICRC Missing List 8th Ed.); T-985 (Obrenović Joint Motion on Plea Agreement dated 20 May 2003).

responsibility follows from his position and role, as well as from the fact that the security of all of the men who were captured and/or surrendered was the responsibility of the Zvornik Brigade.

263. As stated above, the defense has not articulated why the Trial Panel's findings were allegedly incorrect. Accordingly, this issue is dismissed.

### 13. Reburials

264. As part of the plan to conceal the July executions, primary mass graves in Lažete (Orahovac), the dam in Petkovci, Kozluk, and at the Branjevo Military Farm, were exhumed and the bodies moved to unmarked secondary graves. There were a number of unmarked secondary graves located along the road to Čančari, at least 13 of them, and also eight sites near Liplje and seven sites near Hodžići.

265. The Accused argues that the Trial Panel did not make any determination regarding when or how the Accused committed the crimes.

266. To the contrary, we conclude that the Trial Panel's findings were based on the evidence. The Trial Panel found that the reburial operation, which began in September 1995, was completed by November 1995. Before drawing a conclusion on the time that the reburial took place, the Trial Panel analyzed the relevant evidence, including the following: statements of the Accused,[309] Dragan Obrenović,[310] A-45,[311] and A-50; testimony of Dean Manning; aerial photographs showing disturbance of mass graves and the formation of secondary graves during this time;[312] Richard Butler's narrative; and an order issued to the Accused by the VRS Main Staff on maintaining records of fuel consumption.

267. Thus, this Panel concludes that the Verdict provided a satisfactory temporal framework regarding the reburial operation.

268. We further conclude that the Trial Panel, at Verdict paragraphs 717-727, provided a detailed explanation of the active participation of the Accused, which included his trips to the four primary grave sites, record keeping, controlling the distribution of fuel required for the operation, and

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[309] T-3 (19 August 2002 US deposition) and T-15.
[310] T-983, Dragan Obrenović, *Prosecutor v. Blagojević et al.* Testimony dated 2 October 2003.
[311] Testimony of Witness A-45 on 15 January 2008.
[312] T-830 (First Manning Narrative).

coordinating the Zvornik Brigade engineering unit to rebury the bodies. All of these activities constituted supervising, controlling, and coordinating the activities of VRS soldiers.

269. There is no question that the Trial Panel correctly found that the VRS Main Staff provided five tons of fuel for the reburial operation in the zone of responsibility of the Zvornik Brigade, or that the Accused was tasked with keeping records regarding the distributed fuel. The Trial Panel based such findings on the following evidence: Order of the VRS Main Staff 03/4-2341; Intercepts dated 22 September 1995 (at 18:44); and the testimony of Witnesses A-45 (15 January 2008), A-50, Dragan Obrenović in *Blagojević*; and Richard Butler's narrative.

270. The Defense argues unsuccessfully that the order to keep fuel records did not refer to the Accused, but rather referred to an officer with a name similar to that of the Accused.

271. It is clear that the order referred to the Accused. The Trial Panel explained that the order, which refers to "Captain Milorad TRPIĆ" simply contained a typographical error. There was no "Captain Trpić" in the Zvornik Brigade at the relevant time, but only a "Captain TRBIĆ," a man with the same rank and first name. That the order was intended for the Accused is corroborated by the fact that he confirmed that the order was given to him, as well as by the testimony of Obrenović in *Blagojević* and the testimony of Witness A-50.

272. While the defense argues that witness Damjan Lazarević claimed he had to provide the Accused with an accounting for the fuel, we note that the file does not contain the testimony of this witness. The Trial Panel, after reviewing the testimony of Witnesses A-45 and A-50 and the ICTY Information Report dated 26 August 2002, correctly resolved the issue of the Accused's claims that a member of the Engineering Unit named Lazarević was his contact during the reburial operation. Specifically, Witness A-45 confirmed that every morning Lazarević would report to the Accused on the work that had been done the previous evening, and the Accused would give instructions on the next steps. All of the foregoing supports the conclusions of the Verdict on the role of the Accused in the reburial operation.

273. The reburial operation was a continuation of actions perpetrated as part of the JCE which began in July of that year. The Trial Panel properly concluded that the Accused was aware of the implications of moving the bodies, and that he took specific steps to implement the common goal, including controlling the distribution of fuel. Contrary to the defense claims on appeal, there was substantial evidence that the Accused was aware of why the fuel was needed. This evidence shows, as set out in the Verdict, that the Accused was committed to performing his role in the plan.

274. We further note, as discussed above, that the defense did not offer any support for its arguments. In conclusion, we dismiss these contentions as ungrounded.

### 14. Evidence that the Accused Was In the Field Was Not Inconsistent With Evidence that He Was the Duty Officer

275. The Trial Panel set out a detailed analysis of the Accused's movements during the pertinent time period in relation to each of the charges in the Indictment.

276. The defense contends, at one point in the Appeal, that because the Accused was the duty operations officer, he had to be present in the Command at all times.

277. The Accused's responsibilities as duty officer in the Brigade on 10 and 11 July, duty officer at the Forward Command Post (FCP) in Kitovnica on 12 and 13 July, and duty operations officer in the Zvornik Brigade on 16 and 17 July[313] *do not exclude* his presence at various locations and times outside of the Command, as explained in the Verdict. In fact, performance of his assigned duties, which included coordination of numerous VRS troops to advance the massive genocidal plan, required the Accused's presence at these locations.

278. Contrary to the defense allegations, the comprehensive and complex operation to execute detained Bosniak men and bury their bodies to conceal the crimes necessitated coordination. The Accused performed these duties by being the focal point of the coordination activities, which he directed both from the closed area inside the Command and from the field.

279. The Verdict does not discuss, and we did not find, any evidence that the Accused remained inside the Command; to the contrary, and as discussed above, the evidence was that the Accused worked in the field when necessary. Accordingly, this issue is dismissed.

[313] Defense Brief at p. 11.

## III. VIOLATIONS OF THE CRIMINAL CODE (ARTICLE 298 OF THE CPC OF BIH)

280. The defense argues that the principle of lenity was violated because the First Instance Panel applied the CC of BiH instead of the Criminal Code of SFRY (CC of SFRY), since the latter was in force at the time the crimes were committed and it is more favorable to the Accused than the CC of BiH. The defense argues that after the General Framework Agreement (Dayton Accord) was signed in 1995, direct application of the ECHR and its Protocols was introduced, including Protocol 6, which meant that the death penalty was no longer a viable sanction so that capital punishment legally ceased to exist. According to the defense, the CC of SFRY should have applied because it is more lenient than the CC of BiH for the crime of genocide because its maximum punishment ranged from between 15 and 20 years, compared to the maximum punishment under the CC BiH of long-term imprisonment.[314]

281. The Trial Panel concluded that "[t]he punishment prescribed by the CC of BiH is obviously more lenient than the capital punishment that was in force at the time of the perpetration of the criminal offense."[315] We conclude that the Trial Panel properly determined that, since the CC of BiH is more lenient, pursuant to Article 4, it applied to these crimes.[316] Application of the rule of lenity is a legal imperative consistent with international norms.

282. The Verdict established that Article 171 of the CC of BiH, which defines the offense of genocide (of which the accused was convicted) was in most aspects identical to Article 141 of the CC of SFRY; that is, that the acts which constituted genocide under the CC of BiH were also punishable under the CC of SFRY.

283. The issue is whether the CC of SFRY (which the defense argues applies here) may be considered to have been amended to revoke the death penalty, and how that affects the determination of which is the more lenient law *(lex mitior),* consistent with the principle of lenity.

284. We conclude that the defense arguments are meritless.

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[314] *Obiter dictum:* The Appellate Panel notes that the defense on Appeal did not contest, at least explicitly, the existence of elements of the relevant criminal offense, hence pursuant to Article 306 of the CPC of BiH, the issue was not considered.
[315] Verdict para. 165.
[316] Article 4 of the CC of BiH provides in full: (1) The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense. (2) If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied.

285. Contrary to the defense arguments on appeal, the signing of the Dayton Accord **did not amend** the then-applicable CC of SFRY. Rather, upon the signing of the Dayton Accord, the ECHR and its Protocols were incorporated into the national legislation. Protocol 6 to the ECHR requires that national law be amended to abolish the death penalty, with an exception for time of war. Acceptance of Protocol 6 did not automatically amend the national law.

286. By accepting the ECHR and Protocol 6, BiH undertook to amend the law to revoke the death penalty and to not impose the death penalty during the amendment process. This did not result in an automatic amendment. Accordingly, we conclude that between 1995 and 1998 the death penalty was still the law; that is, there was no law setting the maximum punishment at 15 to 20 years in prison, as the defense argues on appeal.

287. Genocide is punishable under both the CC of SFRY and the CC of BiH. Under Article 141 of the CC of SFRY, genocide was punishable by *at least five years of imprisonment or the death penalty*, while under the CC of BiH it is punishable by *at least ten years of imprisonment or long-term imprisonment*. This Court has determined that assessing which law is more lenient requires a consideration of the principle of alternatives, according to which the determination of which law is more lenient is made by considering the potential sentence imposed for the crime.

288. By considering the actual sentence imposed for genocide here, it is clear that the Verdict correctly determined that the CC BiH is the more lenient law. This is despite the fact that the minimum punishment for this crime under the CC SFRY is five years imprisonment. The Accused received a sentence of 30 years (long-term) imprisonment, which is very close to the maximum sentence of imprisonment that may be imposed under the CC BiH.

289. Clearly, capital punishment is more severe than long-term imprisonment. We note that under customary international law, a suspect has a right to not be executed, and BiH secured that right by adopting the 2003 Criminal Code.

290. Further, the *ratio legis* of Article 4(2) of the BiH CC requires *application of the law which is more lenient to the perpetrator* — not simply application of *the more lenient law*. Where the Accused's punishment was close to the maximum that could have been imposed, the Trial Panel correctly concluded that the CC of BiH was more lenient here. We note that this very issue was

decided in the same way by the Constitutional Court of Bosnia and Herzegovina in the *Abduladhim Maktouf* case.[317]

291. The *Maktouf* Decision concludes as follows:

> In practice, legislation in all countries of the former Yugoslavia did not provide the 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 Krstić, Galić, etc.). At the same time, the SFRY Criminal Code did not stipulate either long-term imprisonment or a life sentence, but that the death penalty be imposed in the 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.

292. The Decision further states: "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." Thus, the discussion on this issue is concluded.

[317] Decision made on 30 March 2007.

# IV. DECISION AS TO SANCTION — ARGUMENTS OF BOTH APPEALS

## A. PROSECUTION APPEAL OF THE SENTENCE (ARTICLE 300 OF THE CPC OF BIH)

### 1. Issues Raised on Appeal

293. In his appeal, the Prosecutor contends that the Trial Panel erred in sentencing the Accused to thirty years in prison, arguing that the sentence was lenient, inadequate, unfair, and incommensurate, such that it did not meet the purpose of punishment under Article 39 of the CC of BiH. The Prosecutor argues that the sentence did not reflect the scale, brutality, systemic nature, or gravity of the offenses, the level of threat and the devastating impact on Bosniaks in eastern Bosnia, or recognize the central role that the Accused played as a midlevel organizer and perpetrator in the genocidal acts perpetrated in the Zvornik Municipality in 1995.

294. The Prosecutor explains that the sentence was inadequate, given the severity and scope of the crimes, and particularly because genocide is the "ultimate crime." The Prosecutor also argues that the sentence fails to impose a sufficient punishment given the large number of victims, the terrible suffering they endured, and other aggravating factors.

295. Further, the Prosecutor argues that such a sentence does not reflect the continued suffering experienced by the community in that an entire generation was wiped out and only a few returned to the area of Srebrenica. The Prosecutor also argues that such a sentence does not serve the purpose of deterrence, nor does it show the community that terrible crimes will be punished severely. Compared with other sentences imposed in cases before this Court, the Prosecutor argues that this one is plainly unfair.

296. In sum, the Prosecutor argues that the only adequate sentence for the Accused, as a key perpetrator of genocide against Bosniaks of eastern Bosnia, is long-term imprisonment for 45 years, and that the Verdict should be modified accordingly. The Prosecutor directs this Court's attention to the following aggravating factors, contending that the Trial Panel did not give them sufficient weight: the role of the Accused, the duration of the crime, the number of victims, the continuity of the crime and its impact on the victims, and the attitude of the Accused towards the crimes. The Prosecutor further contends that the Trial Panel gave too much weight to mitigating circumstances, and argues that the Panel erred by concluding that the Accused's liability, by virtue of his military rank, was less than that of the more senior planners of the crimes.

### 2. Findings and Conclusions of the Appellate Panel

297. We conclude that the Trial Panel properly considered both aggravating and mitigating circumstances in crafting a sentence (see Verdict pages 287 through 295).

298. In concluding that the sentence was thoughtfully reasoned and appropriate, we note that the Prosecutor's appeal somewhat recasts the issues considered by the Trial Panel at sentencing. Our review of the Trial Panel's sentencing considerations shows that they were appropriate. A review of the elements of this section of the Verdict shows that the Trial Panel's analytical and factually corroborated conclusions were reasonable and reflective of the true role and position of the Accused.

299. We are cognizant of the Accused's liability regarding the gravity and consequences of his crimes, and are sure, based upon our review of the Verdict, that the Trial Panel was as well (see Verdict paragraph 847). To the extent that the Prosecutor contends that the circumstances of the crime of genocide should also be considered as legally aggravating circumstances, we disagree. This would result in a double punishment of the Accused, particularly where the Trial Panel already took the aggravating circumstances into consideration. Moreover, the way they are argued by the Prosecutor touches on the portion of the Verdict pertaining to the acquittal (para. 82 of the appeal).

300. Accordingly, we conclude that the Prosecutor's claim regarding the length of the sentence imposed is ill-founded.

## B. Effect of the appeal by the Defense for the accused (Article 308 of the CPC of BiH)

301. While the Accused did not explicitly argue that the sentence imposed by the First Instance Panel was in error, because the Accused claims erroneously or incompletely established facts and violations of the Criminal Code, we consider his appeal to also allege that the sentence was in error and he should not be subject to forfeiture (Article 300 of the CPC). On this point, we conclude that the First Instance Panel correctly assessed all of the appropriate factors concerning punishment pursuant to Article 48 of the CC of BiH, including extenuating circumstances raised by the Accused, and that it properly weighed those circumstances, individually and together, to arrive at a lawful and just determination regarding the appropriate sanction. Accordingly, this argument is dismissed.

# V. PROSECUTION APPEAL ON THE GROUNDS OF ERRONEOUSLY AND INCOMPLETELY ESTABLISHED STATE OF FACTS

## A. PROSECUTION ARGUMENT THAT THE ACQUITTING PART OF THE VERDICT SHOULD BE REVERSED AND THE ACCUSED FOUND GUILTY

302. The Prosecutor appealed from the acquitting part of the Verdict on the ground of erroneously and incompletely established facts, namely: under Count 2a (executions at the Bratunac Stadium); under Count 1 ("mopping up" the area around Srebrenica); factual determinations regarding JCE at the level of the Corps, Main Staff and the Bratunac Brigade; and the use of forensic evidence.

303. We analyze the Prosecutor's arguments as a group, in the order in which they are presented on appeal.

304. The Prosecutor contends that the First Instance Panel, which devised a standard of corroboration or "reliability," did not follow that standard.

305. The Prosecutor does not, however, point to any piece of evidence or fact that the Trial Panel did not consider. Instead, the Prosecutor simply alleges that the First Instance Panel should have, but did not, convict the Accused based on his statements regarding his participation in the crimes (Prosecutor's brief at paragraph 13).

306. The First Instance Panel explained that the Verdict could not be based solely or primarily on the confession of a suspect/accused absent corroborating or "independent" evidence. Based on our review, there was substantial corroborating evidence regarding the convicting part of the Verdict. Regarding the acquitting part, the Trial Panel rightly determined that the Accused could not be convicted based solely on an uncorroborated confession.

307. The First Instance Panel properly applied this "reliability" test in all parts of the Verdict in making factual findings.

308. We conclude that the Trial Panel did not inconsistently apply the reliability test (see Verdict paragraph 158).

309. We note that the Prosecutor urged this Court to draw conclusions regarding the Accused that were not supported by the evidence, i.e. that he could have had *de facto control* of the Bratunac Brigade Military Police, which was assigned to search the terrain around Srebrenica (Prosecutor's

brief at paragraph 18). On this point, the Verdict provides: "[T]he Panel was not presented with a single piece of evidence to prove that the Accused Milorad Trbić, as an Assistant Chief of Security in the Zvornik Brigade, had any authority over the events in the Bratunac Brigade's area of responsibility. . . . that the Accused could only supervise members of the Zvornik Brigade's Military Police, but by no means other VRS soldiers in the Bratunac Brigade's area of responsibility."[318] Recognizing the structure and organisation of the VRS security bodies and the lack of evidence linking the Accused to the Bratunac Brigade's area of responsibility, the Trial Panel ruled correctly on this point.[319]

310. In its brief, the Prosecution raises issues previously presented at trial. As discussed above, this is an inappropriate way in which to present issues for this court's review. We note that this Court, as the Appellate Panel, has the responsibility to assess the facts in the Verdict and the legal conclusions of the Trial Panel in line with the claims of the appeal.

311. We also note that neither the Accused nor the Prosecutor may base a legal argument on their view of the facts on appeal; rather, the parties are bound by the evidence at trial and may argue on appeal that the Trial Panel erred in some way in assessing those facts. The admissibility of evidence is a determination made exclusively by the Trial Court. Here, the Prosecutor's argument regarding a "match between the confession details and criminal offense facts" is unpersuasive, particularly where the specific information provided by the Accused was already known to the police and the public (see Verdict paragraph 162).[320]

312. A further note on the First Instance Panel's application of the reliability test discussed above. In his statements, the Accused mentioned information related to Bratunac. The Prosecutor argues that these statements were not credited in the Verdict, while statements concerning events in the Zvornik Municipality were credited. The latter statements, however, were corroborated by other evidence, while the statements concerning incidents in Bratunac were not corroborated. The First Instance Panel could not convict the Accused based on these uncorroborated statements.

313. The Trial Panel also drew appropriate legal conclusions from the evidence it evaluated under the reliability standard. For example, the Trial Panel concluded that the Accused was a

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[318] Verdict para. 839.
[319] See diagram at Verdict para. 736.
[320] The major premise (*praemissa maior*) is the norm itself, while the minor premise (*praemissa minor*) concerns the existence of facts under this norm. The inference is a general premise applied to a concrete case. The application of a general norm is not possible without a legal syllogism. See R. Lukić, Metodologija prava (Methodology of Law), Naučna knjiga, Belgrade, 1979, p. 232.

member of the JCE in reference to the area of responsibility of the Zvornik Brigade, but not in the area of responsibility of the Bratunac Brigade, such that he could not have been criminally liable for the events there.

314. In narrowly construing the JCE, the Trial Panel *inter alia* relied on the testimony of Richard Butler,[321] cited in the Prosecutor's appeal, regarding the scope of responsibility of the Zvornik Brigade and the Accused's responsibility in light of the Rules of Service of the former JNA which had been adopted by the VRS.

315. We review here the implications of the Accused's role as Assistant Security Officer in the Zvornik Brigade with a rank of Captain in order to show his knowledge and awareness of the heinous crimes in which he participated as a knowing and willing member of the JCE.

316. The organization of the Zvornik Brigade leadership is explained in the Verdict at paragraph 263, which notes that, organizationally, the security organs were directly subordinate to the commanders, while in terms of their specialization they were subordinate to the Department of Security of the Drina Corps and the Administration for Security of the VRS Main Staff. The Accused was the Assistant to the Chief of Security in the Brigade, Drago Nikolić, who was responsible for providing technical management and assistance to the Military Police. As Nikolić's assistant, his role was to "assist the coordination with reference to the matters pertaining to the capturing, imprisonment and execution of prisoners."[322] Given the size of the Zvornik Brigade, it was necessary to have an Assistant Chief of Security, so that when Nikolić was absent the Accused could fill his role.

317. On 16-17 July 1995, the Accused also acted as duty operations officer, as defined in the Instruction on the Work of Command-Headquarters from 1983.[323] The post of duty operations officer necessitated communication with subordinate and superior commands, as well as other commands and headquarters, and required that information received by him be forwarded verbatim.

318. As explained above, the duty operations officer was the liaison among participants in the chain of command and with other units and was aware of all essential information, since he was required to transmit it. On the relevant days, the Accused was working at the "heart" of the

[321] Verdict para. 838.
[322] Verdict para. 267.
[323] Verdict para. 272.

operation, coordinating and reporting on all activities of all units in the Zvornik Brigade area of responsibility to the Command.

319. The Accused was found guilty of genocide through the commission of individual crimes (described in detail in the convicting part of the verdict) and as a participant in a JCE. The Verdict discussed at length the origin of the plan, its participants, preparations for its implementation, and its execution. The participants in the JCE included Colonel Ljubiša Beara, Chief of the Security Administration of the Main Staff; Lieutenant Colonel Vujadin Popović, Assistant Commander for Security of the Drina Corps; Lieutenant Drago Nikolić, Assistant Commander for Security of the Zvornik Brigade, and the Accused as the Brigade Security Officer.

320. That the Accused was a member of the JCE along with the others is reviewed in detail in the Verdict. Ample evidence on this point was presented by the Prosecution.

321. Before any individual is found guilty, that person's role and activities must be specified as precisely as possible, avoiding generalizations. Consistent with this, recognizing the existence of a comprehensive plan, the Accused may only bear responsibility for his role, in light of the fact that he was not at the very top of the command. A broader plan could have been known to officers who were senior to the Accused in the VRS Main Staff.

322. The Trial Panel's conclusions regarding the role of the Accused were proper. The Trial Panel considered the Accused's actions in the framework of the activities of the Zvornik Brigade and its area of responsibility. The Trial Panel correctly did not consider the Accused's liability as if he were a JCE participant at the level of the Corps and Main Staff or at the level of the Bratunac Brigade of the VRS, as addressed by the Prosecutor on appeal (see paragraph C.26). To the contrary, the Panel concluded, at Verdict paragraph 833, that the evidence was insufficient to show that the Accused was a member of the JCE regarding the activities of the Bratunac Brigade.

323. The Trial Panel also correctly evaluated the facts regarding the Accused's individual liability, consistently applying the same reliability test to the factual findings in all parts of the verdict.

### B. FINALLY, THE PROSECUTOR ALLEGES THAT THE FIRST INSTANCE PANEL ERRED IN NOT LINKING PRIMARY AND SECONDARY GRAVES, WHICH THE PROSECUTOR ARGUES SHOULD HAVE BEEN DONE TO ESTABLISH FULL RESPONSIBILITY OF THE ACCUSED (SEE PARA. 66 OF THE APPEAL).

324. The Prosecutor argues that the First Instance Panel erred when it refused to make findings linking primary and secondary mass graves using DNA evidence, which, according to the Prosecutor, allows for such linkages to be established.

325. We note, with regard to the previous issue, that we have upheld the Panel's factual findings in relation to the existence of the JCE and the Accused's liability for crimes committed in the area of responsibility of the Zvornik Brigade. The Verdict clearly delineated between the units of the Drina Corps in the execution of the overall plan, under which the assembly, capture and detention of Muslim men was primarily under the direction of the Bratunac Brigade, and detentions and executions of the men after they were detained in the northern sites were under the direction of the Zvornik Brigade.[324]

326. Regarding the instant issue, we conclude, for the reasons set out in the Verdict at paragraphs 396 to 412, that there was no error and that the Trial Panel considered this issue systematically and thoroughly. The Trial Panel relied upon forensic evidence and testimony to establish a link between the primary and secondary mass graves, which the Prosecution does not refute. The Prosecution argues on appeal that the Trial Panel relied upon DNA (see the Manning Report 2007 and PIP list). We conclude that the Trial Panel, based on the admitted evidence, presented convincing factual findings pertaining to the link between the primary and secondary mass graves.

[324] Verdict para. 387.

## VI. APPEALS OF THE AGGRIEVED PARTIES

327. Aggrieved parties Šuhra Omerović, Nurija Hurić, Mejra Hurić, Naza Hadžić, Mustafa Hadžić, Enver Hadžić and Habiba Sinanović have appealed from the section of the Verdict regarding the decision on the costs of the criminal proceedings and property law claims, pursuant to Article 293(4) of the CPC, and have moved this Court to revoke part of the Verdict and reconsider or modify it accordingly.

328. We are mindful of the pain and suffering that the victims have, and continue to experience due to the Accused's crimes. However, we conclude that the Trial Panel did not err in determining that the victims pursue their property claims by civil action, and that the Accused be relieved of the obligation to pay the costs of the criminal proceedings. Accordingly, these costs will be borne by the budget of the Court.

329. In the Verdict at paragraphs 873 and 875, the Trial Panel elaborated on its reasons to refer the victims to pursue their property law claims by taking civil action. The Trial Panel was correct.

330. Under the circumstances of this case, considering the length of the proceedings, the difficult legal issues presented, and the fact that the Accused was in custody throughout, determination of property claims by the Court would have been impractical (see Article 198(2) of the CPC).

331. To the extent that certain aggrieved parties, Naza Hadžić, Mustafa Hadžić and Enver Hadžić, contend that the First Instance Panel did not address their property law claims at all, we note that in the operative part of the Verdict, pursuant to Article 198 (2) and (3) of the CPC, the Trial Panel referred the victims, including those with potential property law claims, to pursue civil action.

332. Because the victims have not shown that they were directly affected by the Court's order that the Accused be relieved of the obligation to pay the costs of the proceedings, they may not challenge that order. We uphold the Trial Panel's decision regarding the sentencing part of the Verdict, in terms of Article 188(4) of the BiH CPC. Given the Accused's poor financial standing, he is relieved of the obligation to pay the costs of the criminal proceeding and, pursuant to CPC Article 189(1), this Court will bear the costs of the proceedings in view of the acquitting part of the Verdict.

333. We stress that no part of the instant Verdict, or that of the Trial Panel, should be considered to express any opinion as to the merits of the victims' claims while they seek their rights in another proceeding.

## CONCLUSION

334. Where the appeals of the Accused, the Prosecutor, and the Victims are unfounded, pursuant to Article 313 of the CPC of BiH, they are dismissed. The Verdict is upheld.

**RECORD KEEPER:** **PRESIDING JUDGE**

**JUDGE**

**Medina Džerahović** **Redžib Begić**

**LEGAL REMEDY:** No appeal lies from this Verdict.