Bosnia and Herzegovina

Court of Bosnia and Herzegovina

Number: **S1 1 K 003372 12 Krž 13** (Ref. X-KR-10/893-1)

Pronounced on: 15 February 2013
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Before the Panel composed of: **Judge Redžib Begić, Presiding**
Judge Azra Miletić, Reporting Judge
Judge Dragomir Vukoje, Panel member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja

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SECOND INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:
Dubravko Čampara

Defense Counsel for the Accused Franc Kos:
Attorneys Dušan Tomić and Predrag Drinić

Defense Counsel for the Accused Stanko Kojić:
Attorneys Milan Romanić and Slobodan Perić

Defense Counsel for the Accused Vlastimir Golijan:
Attorneys Rade Golić and Radivoje Lazarević

Defense Counsel for the Accused Zoran Goronja:
Attorneys Slavko Ašćerić and Petko Pavlović

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Number: S1 1 K 003372 12 Krž 13
Sarajevo, 15 February 2013

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division[1] composed of Judge Redžib Begić as the Presiding Judge and Judges Azra Miletić and Dragomir Vukoje as Panel members, with the participation of Legal Advisor Melika Murtezić as the Record-keeper in the criminal case against the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja for the criminal offense of Crimes against Humanity – Persecution under Article 172(1)(h) of the Criminal Code of Bosnia and Herzegovina (CC of BiH) in conjunction with paragraph 1(a) of the same Article, as read with Article 29 of the CC of BiH, deciding on the Appeal by the Prosecutor's Office of BiH No. T20 0 KTRZ 000538 10 of 15 October 2012, Appeal by the Defense Counsel for the Accused Franc Kos, attorneys Dušan Tomić and Predrag Drinić, Appeal by the Defense Counsel for the Accused Stanko Kojić, attorneys Milan Romanić and Slobodan Perić and the Accused Stanko Kojić himself, Appeal by the Defense Counsel for the Accused Vlastimir Golijan, attorneys Rade Golić and Radivoje Lazarević, and the Appeal by the Defense Counsel for the Accused Zoran Goronja, attorneys Slavko Ašćerić and Petko Pavlović from the Verdict of the Court of BiH No. S1 1 K 003372 10 Krl (Ref. X-KR-10/893-1) of 15 June 2012, having held sessions on 13 February 2013 and 15 February 2013, in accordance with Article 314 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH)[2] rendered the following

V E R D I C T

The Appeal of the Prosecutor's Office of BiH No. T20 0 KTRZ 000538 10 of 15 October 2012 **is dismissed as unfounded**, whereas Appeals of the Defense for the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja are partially granted to the effect that the Verdict of the Court of BiH No. S1 1 K 003372 10 Krl (Ref. X-KR-10/893-1) of 15 June 2012 **is revised** with respect to the decision on criminal sanction, so that for the criminal offense of Crimes against Humanity under Article 172(1)(h) and paragraph (a) of the same article of the CC of BIH of which the Accused have been found guilty, they are sentenced as follows:

the Accused Franc Kos to the sentence of a long-term imprisonment of 35 /thirty five/ years,

[1] Hereinafter: the Appellate Panel/Panel.
[2] Official Gazette of Bosnia and Herzegovina, nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09 and 93/09.

the Accused Stanko Kojić to the sentence of a long-term imprisonment of 32 /thirty two/ years,

the Accused Vlastimir Golijan to the sentence of imprisonment of 15 /fifteen/ years,

the Accused Zoran Goronja to the sentence of a long-term imprisonment of 30 /thirty/ years.

The first-instance verdict shall remain unchanged in other parts.

REASONING

I. PROCEDURAL HISTORY

A. THE FIRST INSTANCE VERDICT

1. Under the Verdict of the Court of BiH No. S1 1 K 003372 10 Krl (Ref. X-KR-10/893-1) of 15 June 2012, the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja were found guilty that by the acts described in the operative part of the first instance verdict they committed the criminal offense of Crimes against Humanity-Persecution under Article 172(1)(h) of the CC BiH in conjunction with paragraph (a) of the same Article, as read with Article 29 of the CC of BiH.

2. Having applied the above provisions of the law and pursuant to Article 285 of the CPC of BiH along with Articles 39, 42.b and 48 of the CC of BiH, the Trial Panel sentenced the Accused Franc Kos to a long-term imprisonment of 40 (forty) years, the Accused Stanko Kojić to a long-term imprisonment of 43 (forty three) years, the Accused Vlastimir Golijan to imprisonment of 19 (nineteen) years and the Accused Zoran Goronja to a long-term imprisonment of 40 (forty) years.

3. Under Article 56(1) of the CC of BiH the time the Accused spent in custody was credited towards their sentence, starting from 10 June 2010 in relation to the Accused Franc Kos, and from 25 February 2010 in relation to the Accused Stanko Kojić, Vlastimir Golijan and Zoran Goronja.

4. Pursuant to Article 188(4) of the CPC of BiH the Accused were relieved of the obligation to cover the cost of the criminal proceedings, while pursuant to Article 198(2) of the CPC of BiH the aggrieved parties and families of those killed were instructed to take civil action to pursue their claims under property law.

B. THE APPEALS

5. The Prosecutor's Office of BiH appealed the first instance Verdict on the following grounds: essential violation of the criminal procedure provisions, erroneously and incompletely established facts, violation of the criminal code and decision on the criminal sanction. The Prosecution moves the Appellate Panel to grant the Appeal and, pursuant to Article 315(2) of the CPC of BiH, hold a trial in order to repeat the evidence "that caused the state of facts to be erroneously... established", or to revise the first instance Verdict and find the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja guilty of the criminal offense of Genocide under Article 171 of the CC of BiH, in conjunction with Article 29 of the same Code, and sentence the Accused Franc Kos, Stanko Kojić and Zoran Goronja to a long-term imprisonment of 45 years, and Vlastimir Golijan to imprisonment of 20 years.

6. Defense Counsel for the Accused Franc Kos, attorneys Dušan Tomić and Predrag Drinić, also appealed the first instance Verdict on the following grounds: erroneously and incompletely established facts, violation of the criminal code and decision on the criminal sanction, moving the Appellate Panel to grant the Appeal and revise the contested Verdict in such a way so as to change the qualification of the criminal offense from Crimes against Humanity under Article 172(1)h), in conjunction with paragraph (a) of the same Article of the CC of BiH, to either War Crimes against Civilians under Article 142 of the CC of SFRY or War Crimes against Prisoners of War under Article 144 of the CC of SFRY and sentence them accordingly, or to revise the contested Verdict and sentence the Accused to a significantly lesser prison term than the one imposed on them under the first instance Verdict.

7. Defense Counsel for the Accused Stanko Kojić, attorney Milan Romanić, appealed the first instance Verdict on the following grounds: essential violation of the criminal procedure provisions, erroneously and incompletely established facts, violation of the criminal code and decision on the criminal sanction, moving the panel of the Appellate Division of the Court of BiH to grant the Appeal, revoke the first instance Verdict and order a retrial before the second instance Panel. Co-counsel for the Accused Stanko Kojić, attorney Slobodan Perić, also appealed the Verdict due to essential violation of the criminal procedure provisions, erroneously and incompletely established facts, violation of the criminal code and decision on the criminal sanction, moving the Appellate Panel to revoke the first instance Verdict and revise it in such a way so as to either acquit the Accused Stanko Kojić or sentence him to a significantly lesser prison term, or to revoke the Verdict and order a retrial before the second instance Panel. The Accused Stanko Kojić himself appealed the first instance Verdict, moving the Appellate Panel to conduct his trial under the old code that was in effect at the time of the commission of the offense.

8. Defense Counsel for the Accused Vlastimir Golijan, attorney Rade Golić, appealed the first instance Verdict on the following grounds: erroneously and incompletely

established facts, violation of the criminal code and decision on the criminal sanction, moving the Appellate Panel of the Court of BiH to grant the Appeal in its entirety and revise the contested Verdict in its convicting part in such a way so as to sentence the Accused Vlastimir Golijan below the legally prescribed minimum level, or to revoke the first instance Verdict and order a retrial to be conducted before the Appellate Panel of the Court of BiH. Co-counsel for the Accused Vlastimir Golijan, attorney Radivoje Lazarević, also appealed the Verdict due to essential violation of the criminal procedure provisions, with the same motion as the one presented by Chief Counsel for the Accused Golijan.

9. Defense Counsel for the Accused Zoran Goronja, attorneys Slavko Ašćerić and Petko Pavlović, appealed the first instance Verdict on the following grounds: essential violation of the criminal procedure provisions, erroneously and incompletely established facts, violation of the criminal code and decision on the criminal sanction, moving the Appellate Panel to accept their argumentation concerning essential violation of the criminal procedure provisions, which occurred in the course of the first instance proceedings, and to revise the first instance Verdict in such a way so as to sentence the Accused Zoran Goronja within a legally prescribed range, with proper application of human rights guarantees.

10. The Prosecutor's Office of BiH responded to Defense Appeals, moving the Appellate Panel to dismiss as unfounded the Appeals filed by the Defense for the Accused Franc Kos, Stanko Kojić, Stanko Kojić himself, Vlastimir Golijan and Zoran Goronja.

11. All Defense teams responded to the Appeal by the Prosecutor's Office of BiH, moving the Appellate Panel to dismiss the Appeal as unfounded, except for the Defense Counsel for the Accused Stanko Kojić, attorney Milan Romanić, who in his response moved the Appellate Panel to grant both Prosecution and Defense Appeals.

12. At the sessions of the panel of the Appellate Division held on 13 February 2013 and 15 February 2013, in accordance with Article 304 of the CPC of BiH, the appellants maintained their motions and grounds presented in their appellate briefs. In addition to addressing the Court verbally, the Accused Franc Kos and Stanko Kojić submitted their addresses in writing.

II. GENERAL ISSUES

13. Prior to providing reasoning for individual grounds of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC of BiH the appellant must include in the appeal both the legal grounds for contesting the verdict and the reasoning behind the appeal.

14. Since pursuant to Article 306 of the CPC of BiH, the Appellate Panel reviews the Verdict only within the limits of the grounds of appeal, the appellant is obliged to draft the appeal in such a manner that it can serve as the basis for reviewing the Verdict.

15. In this respect, the appellant must identify the grounds on which he contests the

verdict, specify which part of the verdict, evidence or action of the Court he contests, and present clear arguments in support of his claim.

16. A mere arbitrary indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes, does not constitute a valid ground to review the first instance verdict. Therefore, the Appellate Panel dismissed as unfounded all unreasoned and unclear grounds of appeal.

III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF BIH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

A. STANDARDS OF REVIEW

17. A Verdict may, pursuant to Article 296 of the CPC of BiH, be contested on the grounds of essential violations of the provisions of criminal procedure. The essential violations of the criminal procedure are prescribed under Article 297 of the CPC of BiH.[3]

18. Given the gravity and importance of violations of the procedure, the CPC of BiH differentiates between the violations which, if their existence is established, create an irrefutable assumption that they negatively affected the validity of the rendered Verdict (absolutely essential violations) and the violations for which the Court evaluates, in each specific case, whether the established violation had or could have negatively affected the validity of the verdict (relatively essential violations).

19. Absolute essential violations of the CPC of BiH are listed in Article 297(1) subparagraphs a) through k) of the CPC of BiH.

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[3] Article 297 **Essential Violations of the Criminal Procedure Provisions,** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the verdict who did not participate in the main trial or who was disqualified from trying the case by a final decision; b) if a judge who should have been disqualified participated in the main trial; c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language; d) if the right to defense was violated; e) if the public was unlawfully excluded from the main trial; f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority; g) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction; h) if, in its verdict, the Court did not entirely resolve the contents of the charge; i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code; j) if the charge has been exceeded; k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.

20. Should the Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC of BiH, except in the cases set forth under Article 314(1) of the CPC of BiH.[4]

21. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise "... if the Court has not applied or has improperly applied some provisions of this Code during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict."

22. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-procedural substantial violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

B. APPEAL BY THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

1. First sub-ground: Article 297(1)(b) of the CPC of BiH: Prosecution submits that a judge who should have recused himself participated in the main trial

(a) The Appellate Panel finds that the Prosecution arguments are unfounded and that the contested Verdict does not contain essential violation under Article 297(1)(b) of the CPC of BiH

(i) Arguments of the Prosecutor's Office of BiH

23. The Prosecution submits that at the plea hearing held before the Preliminary Hearing Judge on 8 September 2010, the Accused Vlastimir Golijan fully confessed to the commission of the criminal offense charged against him under the confirmed Indictment, at which time the proceedings were severed in relation to him. On 23 September 2010, at the hearing scheduled to consider the statement on the admission of guilt, the Accused

[4] Article 314 **Revision of the First Instance Verdict:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts and in the case of violations as per Article 297, Paragraph 1, Item f) g) and j) of this Code.
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Vlastimir Golijan maintained his statement that he was guilty, confessing to the act of commission as described in the confirmed Indictment. The Panel, composed of Judges Mira Smajlović, Zoran Božić and Mitja Kozamernik, did not accept the statement on the admission of guilt by the Accused Golijan given that, although he confessed to the facts of the offense, he stated he did not understand the legal qualification of the crime of Genocide under Article 171 of the CC of BiH. Following this decision, the Panel joined the case with the case against the three other Co-Accused (Franc Kos, Stanko Kojić and Zoran Goronja) and the main trial was conducted before the same Panel that had ruled earlier on the acceptance of the statement on the admission of guilt by the Accused Vlastimir Golijan. The Prosecution submits that for reasons prescribed under Article 29(d) and (f) of the CPC of BiH, this Panel had to recuse themselves from taking further action in this case.

(ii) Findings of the Appellate Panel

24. Article 297(1)(b) of the CPC of BiH prescribes that the Court will find an essential violation of the criminal procedure provisions "... if a judge who should have been disqualified participated in the main trial." Moreover, it is prescribed under Article 29(d) of the CPC of BiH that a judge may not perform his duties as judge "... if he has participated in the same case as the preliminary proceedings judge or preliminary hearing judge or if he participated in proceedings as prosecutor, defense attorney, his legal representative or power of attorney of the injured party or if he was heard as a witness or expert witness." Within the meaning of Article 29(f) of the CPC BiH, the reason for disqualification is the existence of circumstances that raise a reasonable suspicion as to the impartiality of a judge.[5]

25. First, the Appellate Panel notes that under Article 29 of the CPC of BiH it is not explicitly prescribed that a judge (or judges) deciding on the statement on the admission of guilt, having decided not to accept the statement, should withdraw from participating in the main trial and deciding on the merits of the case. This procedural situation is not envisaged in the law as implying absolute inadequacy of a judge to perform his duties as judge in a concrete criminal case. Within the meaning of Article 29(f) of the CPC of BiH, the Appellate Panel analyzed whether in the present case there are reasons that may raise a reasonable (not the slightest) suspicion as to a judge's impartiality. In this regard, the application of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is of key importance, bearing in mind that the impartiality of a judge, under this provision of the Convention, involves two components: objective and subjective. Impartiality of the court primarily relates to its treatment of parties to the proceedings. In deciding on it, the European Court of Human Rights (ECtHR) relies on subjective and objective criteria. A subjective test concerns "the personal conviction of a given judge in a given case", the so called "personal impartiality of a judge [which] is to be presumed until there is proof to the contrary..." An objective test relates to "determining

[5] Article 29 of the CPC of BiH: "A judge cannot perform his duties as judge if: ... (f) if circumstances exist that raise a reasonable suspicion as to his impartiality."

whether [a judge] offered guarantees sufficient to exclude any legitimate doubt...” about the existence of impartiality. According to the objective test, it has to be established whether, entirely aside from the personal conduct of a judge, there are facts that can be established and that can lead to suspicion about his impartiality. What is important here “... is the confidence which the courts... must inspire in the public and, above all, as far as criminal proceedings are concerned, in the Accused.”[6]

26. In light of the foregoing, the Appellate Panel finds that in the present case there are no facts or circumstances that would raise suspicion about the impartiality of the Trial Panel in this case. The fact that it was the Panel in the same composition that had decided on the statement on the admission of guilt of the Accused Vlastimir Golijan and later conducted the main trial and rendered the contested Verdict, does not in itself point to the conclusion about suspicion as to their impartiality. The Trial Panel based its decision not to accept the statement on the admission of guilt by the Accused Vlastimir Golijan on reasons having to do with *the quality of his confession,* and hence at that time the Trial Panel did not go about analyzing the evidence that was enclosed with the Indictment and subsequently presented at the main trial. The Appellate Panel considers it necessary to note that the parties and defense counsel did not move for disqualification of the Trial Panel on these grounds either before the commencement or during the main trial.[7] The facts that form the basis of this ground of appeal were known to the Prosecution before the commencement of the main trial. However, the Prosecution decided to object on this ground only in their Appeal from the first instance Verdict, which in principle is acting contrary to Article 14(2) of the CPC of BiH because the Prosecution is “... bound to objectively study and establish with equal attention facts that are exculpatory as well as inculpatory for... the Accused.” In principle, immediately upon learning that there are reasons which, in the Prosecution's view, raise a reasonable suspicion as to the court's impartiality, the Prosecution should react without waiting for the decision on the merits, rather than wait for the decision on the merits and only then react by raising this ground of appeal because the Trial Panel refused to accept legal qualification of the offense from the Indictment.

(iii) Conclusion

27. Therefore, the Appellate Panel concludes that the appeal grounds suggesting essential violation of the criminal procedure provisions under Article 297(1)(b) of the CPC of BiH are unfounded, and as such are dismissed.

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[6] See *mutatis mutandis*, Judgment in the Case of *De Cubber v. Belgium* of 26 October 1984, Series A no. 86, pg. 14, paragraph 26

[7] Case no. X-KR-10/893-1, *Kos et al.,* Transcript of the pre-trial hearing of 9 November 2010, pg. 3

C. APPEALS BY THE DEFENSE FOR THE ACCUSED FRANC KOS, STANKO KOJIĆ, VLASTIMIR GOLIJAN AND ZORAN GORONJA

1. First sub-ground: Article 297(1)(c) of the CPC of BiH: Defense submits that the main trial was held without the attendance of the person whose attendance at the main trial is mandatory under the law

(i) Arguments of the Defense for the Accused Stanko Kojić

28. Attorney Milan Romanić, Defense Counsel for the Accused Stanko Kojić, submits that essential violation of the criminal procedure provisions under Article 297(1)(c) of the CPC of BiH was committed when a portion of the main trial was held without the attendance of the second listed Accused Kojić. Defense Counsel Romanić indicated that following his removal from the courtroom the Accused Kojić was not given the opportunity to return, but was immediately taken under escort to the KPZ /Penal and Correctional Facility/ Kula. Further, Defense Counsel Romanić indicated that following his client's removal from the courtroom, the Presiding Judge failed to inform him of the course of the main trial that proceeded without his attendance. Such conduct of the Trial Panel, in the view of the Defense, resulted in the violation of rights of the Accused under Articles 261 and 262 of the CPC of BiH, as well as Articles 247 and 242(3) of the CPC of BiH, and ultimately constituted a violation of Article 6 of the ECHR.

(ii) Findings of the Appellate Panel

29. Absence of the accused, or "Ban of Trial in Case of Absentia", as prescribed under Article 247 of the CPC of BiH, implies a situation in which it is not possible to secure the presence of the accused at the main trial whether because he is a fugitive or in hiding or there are other difficulties associated with informing the accused of the proceedings against him. Given that the Accused Stanko Kojić was in custody for the entire duration of the proceedings in this case, that he was duly summoned to the hearings and brought to the Court by the court police, the Appellate Panel notes that it cannot be considered that he was *in absentia* within the meaning of Article 247 of the CPC of BiH. The Accused Kojić left the courtroom because he was allegedly "tired and his ears were buzzing", after which the Trial Panel ordered, upon the motion of the Defense, his examination by the team of medical experts who concluded that the Accused Kojić did not suffer from a temporary or permanent mental illness, but of …, which does not make him unfit to follow and actively participate in the proceedings. Additionally, the team of medical experts concluded that the Accused Kojić deliberately malingered, based on his own conception of a mental illness, with the aim of evading to participate in the criminal proceedings. Therefore, the Trial Panel properly established that the Accused Stanko Kojić was informed of the charges against him, that he attended main trial hearings to which he was duly summoned

and cautioned about the consequences of his failure to appear before the Court, but that as a result of malingering health problems (which follows from the Report by the team of medical experts), on a number of occasions he refused to attend or abandoned the main trial hearing. Based on the above facts, the Trial Panel properly found that the Accused Kojić failed to attend hearings without any justification, that is, the Accused Kojić knowingly and voluntarily waived his right to be present in the courtroom. An accused's attendance at trial is his right, but on the other hand an accused does not have the right to obstruct the work of judicial institutions by abusing his rights.

30. Resumption of the trial without the attendance of an accused, seen in the context of guarantees provided for in Article 6 of the ECHR, is possible. The standards set by Article 6 of the ECHR require that the accused be immediately informed in detail in a language he understands about the nature and reasons for charges against him, which undoubtedly was done in the present case on a number of occasions. From the time of his arrest the Accused Kojić was continuously informed of the charges against him, the confirmed Indictment was read at the main trial and the Accused Kojić was in attendance most of the time during the presentation of evidence at the main trial. Furthermore, an accused has the right to examine or request examination of the prosecution and defense witnesses, but, contrary to allegations raised by the Defense in their Appeal, this right is not absolute in the sense that it is not possible for an accused to waive this right. Given that for the entire duration of the proceedings the Accused Kojić was aware of the charges against him, that he was timely informed, summoned and brought to hearings, that he was fit to attend these main trial hearings, that his Defense Counsel were always present at the main trial hearings and that the Accused Kojić each time clearly, deliberately and explicitly waived his right to attend the trial, the Appellate Panel holds that the Accused Kojić was in no way prevented from attending, following and participating in the main trial, but he voluntarily waived this right, thereby accepting that the main trial be conducted without his attendance. Although the CPC of BiH does not envisage exactly this type of situation, it follows from Article 242(2) of the CPC of BiH that it is allowed to remove an accused from the courtroom if in spite of cautions by the presiding judge he “persists with disruptive conduct” and to resume with the proceedings in attendance of his Defense Counsel, which was indeed done at the main trial hearing held on 10 April 2012 because the Accused Kojić threw insults at Defense Counsel for the first listed Accused Kos, Duško Tomić, during his presentation.

(iii) Conclusion

31. Therefore, the Appellate Panel concludes that the Trial Panel, having applied the principles derived from Article 6 of the ECHR and the ECtHR’s case law, properly decided to resume the main trial in situations when the Accused Stanko Kojić knowingly and voluntarily waived his right to attend the trial (either by failing to appear before the Court or abandoning the main trial hearing), and as a result the arguments in the Appeal by the Defense for the Accused Kojić concerning the procedural decision to resume with the main trial without the attendance of the Accused Kojić are entirely unfounded.

2. Second sub-ground: Article 297(1)(d) of the CPC of BiH: Defense alleges violation of the right to defense

(a) Arguments of the Defense for the Accused Stanko Kojić

32. Defense submits that the right to defense of the Accused Stanko Kojić has been violated at the very outset of the main trial on 14 December 2010 when, following the reading of the Indictment and responding to the question put to him by the Presiding Judge, the Accused Kojić said he did not understand a thing, which elicited no reaction from the Presiding Judge.

(i) Findings of the Appellate Panel

33. Article 260(2) of the CPC of BiH prescribes that "[a]fter the indictment has been read, the judge or the presiding judge shall ask the Accused whether he has understood the charges", which was done in the present case. The above quoted provision further prescribes that "[i]f the judge or the presiding judge finds that the Accused has not understood the charges, the judge or the presiding judge shall summarize the content of the indictment in a manner understandable to the Accused." Failure of the judge or the presiding judge to ask and check if the Accused understood the charges does not imply unlawful trial and decision. This violation in itself does not constitute an essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH, but it is necessary to prove that the failure of the presiding judge to ask and check if the accused understood the charges resulted in the accused having a wrong defense at trial, including the presentation of evidence and defense strategy, if the accused has decided to present his own defense. In such a case there is an essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH, in conjunction with Article 260 of the CPC of BiH, because the Court failed to apply the provision of the law that could have an influence on the lawful and proper rendering of the verdict.[8] However, in the concrete case the Accused had a defense team made up of two attorneys, and it clearly follows from those instances when the Accused Kojić himself actively participated in the presentation of his defense that he *de facto* understood the charges against him in the confirmed Indictment. In the context of the entire main trial in this criminal case, it follows that the statement of the Accused Kojić that he did not understand the charges was given for the purpose of frustrating the conduct of the criminal proceedings because the evidence and conduct of the Accused Kojić do not cast any doubt on the conclusion that he fully understood charges against him, and, besides, he also had a defense team. A formal oversight by the Presiding Judge in this concrete case did not result in any violation of the

[8] Joint project of the Council of Europe and the European Commission, Commentary on the Criminal Procedure Code of Bosnia and Herzegovina, p. 667.

Accused Kojić's right to a defense, nor did it have an influence on the lawful and proper conduct of the criminal proceedings in relation to the Accused Stanko Kojić.

(ii) Conclusion

34. Therefore, the Appellate Panel finds that there is no essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH, nor is there a violation of Article 297(2) in conjunction with Article 260 of the CPC of BiH (relatively essential violation).

(b) Arguments of the Defense for the Accused Vlastimir Golijan and Zoran Goronja

35. Defense submits that the Trial Panel, having rendered a decision to accept as proven the facts established in the ICTY judgments, which the Defense could not appeal, violated Article 6(2) of the ECHR and the principle of the presumption of innocence.

(i) Findings of the Appellate Panel

36. As it clearly follows from the first instance Verdict, in the course of the proceedings and based on Article 4 of the 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 (the LOTC), specific facts established in the proceedings before the ICTY were accepted as proven.

37. The argument in the Defense Appeal that by denying the right to appeal the decision to accept as proven the facts established in the proceedings before the ICTY, the Court violated the principle of fairness, and that, accordingly, the Verdict is based on evidence that cannot be the basis for the Court's verdict, is entirely unfounded. Article 4 of the LOTC prescribes that "[a]t the request of a party or *proprio motu,* the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY [adjudicated facts] or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings." Article 1(1) of the LOTC prescribes that "[t]he provisions set forth in this Law shall regulate the transfer of cases by the ... ICTY to the Prosecutor's Office of BiH and the admissibility of evidence collected by the ICTY in proceedings before the courts in BiH", while paragraph 2 of the same article reads that "[i]n case the provisions set forth in this Law do not provide for special provisions for the matters referred to in paragraph 1 of this article, other relevant provisions of the BiH Criminal Procedure Code... shall apply." Article 318 of the CPC of BiH prescribes that "[t]he parties, the defense attorney and persons whose rights have been violated may always file an appeal against the decision of the Court rendered in the first instance unless when it is expressly prohibited to file an appeal under this Code", while paragraph 2 of the same Article reads that "[a] decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal against the verdict."

38. It is true that the LOTC neither prescribes nor prohibits the right of appeal from the Court's decision on acceptance of established facts in accordance with Article 4 of the

LOTC. However, it is also true that it does not prescribe a specific form in which such a decision should be made and the criteria that should be taken into consideration when making a decision.

39. Given that the provisions of the LOTC for matters not regulated under this law point to the application of relevant provisions of the CPC of BiH, the Appellate Panel considers it proper to decide on this type of issues in the form of decision, since the decision on this issue is rendered after hearing from the parties (most frequently upon their motion too) and since it has to have a reasoning which ought to explain if the proposed facts meet certain criteria of admissibility. These admissibility criteria have been taken over by the Trial Panel from the practice of the ICTY, which is fully supported by this Panel too. The Defense, essentially, does not challenge either the criteria that were applied or the concrete facts that were accepted as proven.

40. Further, contrary to the Defense arguments, the Appellate Panel holds that the decision to accept as proven facts established in the ICTY proceedings has the character of a procedural decision, from which no interlocutory appeal may be filed, but may be contested only in an appeal from the verdict.

41. It clearly follows from the first instance Verdict, as well as the specific decision on this issue, that only the facts that are distinct, concrete and identifiable, do not constitute conclusions, opinion or verbal testimony, and most importantly do not contain characterizations of essentially legal nature, were admitted. In addition, the admitted facts meet other criteria too: they contain essential findings of the ICTY and have not been substantially changed, they do not attest either directly or indirectly to the criminal responsibility of the Accused, they have been contested at trial and form part of a judgment which has either not been appealed or has been finally settled on appeal, they are not based on plea agreements or voluntary admission of guilt and finally they originate from the case in which the Accused had a legal counsel and opportunity to present his defense.

42. In light of the above, this Panel upholds the conclusion of the Trial Panel that the facts accepted as proven in the said decision meet all the admissibility criteria and that they in no way violate the right of the Accused to a fair trial and his presumption of innocence. This is especially so because in the course of the proceedings these facts were treated as evidence, which the Defense could refute or disprove with counterarguments or their own evidence.

43. Further, the essence of the decision on admission of facts is to contribute to the efficiency of the proceedings and to the respect of the right of the Accused to a trial within a reasonable time and to strike a balance between the rights of the Accused to a fair trial and reducing to a minimum the number of witnesses who testify in relation to the same circumstances in several different cases. The decision on admission of facts is therefore a purely procedural action of introducing evidence in the proceedings, of course if the evidence (in this case the facts) meets the criteria on admissibility.

44. In view of the foregoing, it is fully justifiable for the evidence to be admitted

into the case-file by means of procedural decisions and for the assessment of evidence, in terms of its contents and probative value, to be done at the end of the main trial when the Panel has before it all the presented evidence and is able to evaluate "every item of evidence and its correspondence with the rest of the evidence" in accordance with Articles 15 and 281(1) and (2) of the CPC of BiH.

45. If this Panel were to accept Defense arguments on the admissibility of the appeal against the decision to accept facts during the proceedings, the same principle would have to be applied in relation to the admission of every other piece of evidence, in which case the trial would have to be halted until each and every such decision became final. Apart from the fact that this is not prescribed under the CPC of BiH, this course of action both from the aspect of procedural efficiency, but also the right of the Accused to a trial within reasonable time, would be absolutely unacceptable.

46. Finally, the Appellate Panel notes that in their Appeal the Defense does not dispute the content of the accepted facts (which they could have done in the Appeal from the Verdict), nor do they point to the evidence suggesting a potentially different state of facts, but the Defense objects only to the principle whereby this type of decision is not appealable. Additionally, in the course of the main trial the Defense had opportunity to present evidence in order to refute the state of facts resulting from facts accepted as proven in accordance with Article 4 of the LOTC.

(ii) Conclusion

47. Therefore, the Appellate Panel concludes that the acceptance as proven of facts established in the ICTY proceedings in accordance with the LOTC does not constitute an essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH, nor has there been a violation of the right to a defense in this regard.

3. Third sub-ground: Article 297(1)(i) of the CPC of BiH: Defense submits that the verdict "is based on evidence that may not be used as the basis of a verdict under the provisions of the [CPC BiH]"

(a) Arguments of the Defense for the Accused Franc Kos

48. Defense for the Accused Franc Kos submits that the finding and opinion of the expert witness Slobodan Kosovac is a piece of evidence "that may not be used as the basis of a verdict under the provisions of the [CPC of BiH]." The Defense argues that the admitted Report prepared by expert witness Kosovac contains certain technical deficiencies that prevented the Defense from reviewing and examining it ("... footnotes in

the Report are absolutely unclear and uncorroborated, especially in the absence of the supporting systematized material"[9]), which ultimately impaired the Defense's cross-examination of expert witness Kosovac.[10]

(i) Findings of the Appellate Panel

49. Article 270 of the CPC of BiH regulates "examination of the experts", and in paragraph (5) of this article it is prescribed that "[t]he written findings and opinion of the expert shall only be admitted as evidence if the expert in question testified at the main trial." Article 101 of the CPC of BiH, which is not specifically invoked by the Defense but they essentially paraphrase it, refers to the earlier phase of the criminal proceedings and prescribes that "[t]he expert witness shall present his findings and opinion as well as worksheets, drawings and notes to his appointing authority." The obligation of presenting *worksheets* does not apply to the examination of expert witness at the main trial, at which time the parties and the defense counsel may put questions to the expert witness, or, in this concrete case, bearing in mind that it was the Defense for the second listed Accused Kojić that proposed expert witness Kosovac, other defense teams had the opportunity to cross-examine him. The CPC of BiH does not prescribe the format, from a methodological point of view, for the written findings and opinion of the expert. Deficiencies pointed out by the Defense for the Accused Kos are relevant from the aspect of authenticity and the assessment of competence and skill of an expert, but they do not bring into question the lawfulness of this evidence. The right of the Defense to cross-examine the expert was not denied given that the Defense was present during the presentation of findings and opinion of this expert, and that they were in possession of the written finding and the supporting material.

(ii) Conclusion

50. Therefore, the Appellate Panel concludes that arguments of the Defense for the Accused Franc Kos claiming that the finding and opinion of the expert witness Slobodan Kosovac is a piece of evidence "that may not be used as the basis of a verdict under the provisions of the [CPC of BiH]" are unfounded.

[9] Appeal by the Defense for Franc Kos from the Verdict of the Court of BiH No. S1 1 K 003372 10 Krl of 15 June 2012, pg. 16, para. 51.

[10] Defense for the Accused Kos did not allege essential violation of the criminal procedure provisions, but as part of the ground of appeal of erroneously and incompletely established facts they submit that there are "...certain elements that suggest essential violation of the criminal procedure provisions... which ultimately had an effect on the established state of facts. The aim of the Defense is not to have the Verdict revoked, but revised." (Appeal by the Defense for Franc Kos, pg. 13, para. 38).

(b) Arguments by the Defense for the Accused Stanko Kojić, Vlastimir Golijan and Zoran Goronja

51. Defense submits that the contested Verdict is based on evidence "that may not be used as the basis of a verdict under the provisions of the [CPC of BiH]", namely the evidence which the Trial Panel, by its Decision of 14 October 2011, admitted into the record in accordance with the LOTC: transcripts of testimony by Momir Nikolić, Dragan Obrenović, Joseph Kingori, Robert A. Franken, Leendert Cornelis van Dujin, Vincentius Egbers and Miroslav Deronjić, as well as interview statements given to the ICTY investigators. Defense submits that the above evidence is unlawful and that it has been admitted into the record contrary to the principle of the legality of evidence. In relation to the use of witness statements by Dražen Erdemović, the Defense for the Accused Vlastimir Golijan argues in particular that Exhibit T-68 does not meet the requirements set forth under Article 5 of the LOTC.

(i) Findings of the Appellate Panel

52. Contrary to arguments of the Defense, the Appellate Panel finds that the interview statements and transcripts which the Trial Panel decided to admit into the record meet the requirements set forth under Articles 3(1) and 5(1) of the LOTC for the reasons noted below.

53. Article 3(1) of the LOTC reads that "[e]vidence collected in accordance with the ICTY Statute and RoPE may be used in proceedings before the courts in BiH." Further, Article 5(1) of the LOTC reads that "[t]ranscripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue." Relying on Article 5 of the LOTC, the Court may accept testimony given by a witness in the proceedings before the ICTY provided that the transcript of his examination was made in accordance with relevant provisions of the RoPE, and that the witness was warned about his rights. Accordingly, in the view of this Panel, the Trial Panel properly considered as admissible the statements which Momir Nikolić and Dragan Obrenović gave to the ICTY investigators in the capacity of witnesses, as well as transcripts of testimony given by witnesses Joseph Kingori, Robert A. Franken, Leendert Cornelis van Duijn and Vicentius Egbers. That the Trial Panel correctly applied the LOTC is evidenced by the fact that, in the same Decision, the Trial Panel refused to accept Statements of facts and Acceptance of Responsibility given by the Accused Momir Nikolić and Dragan Obrenović before the ICTY because these were one-sided portrayals of events at which time they were not under oath nor were they cross-examined.

54. In relation to the deceased witness Miroslav Deronjić, the Appellate Panel holds

that the Trial Panel properly applied Article 7 of the LOTC, which similarly to Article 273(2) of the CPC of BiH envisages “exceptions from the imminent presentation of evidence” by having the records of statements given during the investigative phase read at the main trial. Although the relevant provision of the CPC of BiH is explicit in this sense, the Trial Panel properly did not find that the application of Article 7 of the LOTC derogated this provision of the CPC of BiH because the witness gave his testimony before the ICTY under oath and was cross-examined on that occasion, which surely makes his testimony more detailed and objective than the record of statement given during the investigative phase, which, according to Article 273(2) of the CPC of BiH, “... may be read... if the person(s) who gave the statement(s)... [is] dead”, which is the conclusion entirely upheld by this Panel too.

55. The Defense challenges the possibility for the admission of this evidence and generally the application of the LOTC in an arbitrary fashion and purely as a matter of principle, without pointing to the concrete legal grounds or requirements that have not been met, which is why these arguments of the Defense are dismissed as unfounded. The application of provisions of the LOTC is not contrary to guarantees provided by Article 6 of the ECHR (Right to a fair trial).

56. In relation to the admission of witness statements by Dražen Erdemović, the Trial Panel properly applied provisions of Articles 3 and 5 of the LOTC, and, as a result, all statements that were given by this witness after the judgment that found him guilty following the signing of plea agreement became final, were entered into the case record. Contrary to arguments of the Defense for the Accused Vlastimir Golijan, statements of 24, 25, 26 and 27 June 1997 were not entered into evidence, but the statement given by this witness on 12 August 1998, which in terms of its content is a summary of his earlier statements, but it was given after Dražen Erdemović had been found guilty, that is, after 5 March 1998.[11] Statements given by this witness during 1996 were not admitted into evidence. The fact that this witness*, inter alia*, received warnings that are normally given to suspects during the interview, as alleged by the Defense, does not mean that he still had the status of a suspect in those cases, given that he had already been sentenced for his participation in the incident at the Branjevo farm, that is, he had the status of a convicted person.

57. Moreover, it follows from the contested Verdict that the Trial Panel has done its utmost to provide for the cross-examination of this witness by the defense teams, but it was objectively impossible because the witness has been relocated to a third state for the reasons of his own security, that is, the orders for the protection of this witness issued by the ICTY are still in force.

58. Admitting the statements and testimony of these witnesses into evidence did not violate the right to a defense since the conviction is not based to a decisive extent on this

[11] On 5 March 1998, Dražen Erdemović was sentenced by the ICTY to 5 years in prison following the signing of the plea agreement with the OTP.

evidence, but they were mostly used as the supporting or *controlling* evidence, that is, evidence that is used to support directly or indirectly the probative value of other adduced evidence.

(ii) Conclusion

59. Therefore, the Panel concludes that arguments of the Defense alleging essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH, that is, that the Verdict is based on evidence "that may not be used as the basis of a verdict under the provisions of the [CPC of BiH]", are unfounded.

(c) Arguments of the Defense for the Accused Vlastimir Golijan

60. Defense Counsel for the Accused Vlastimir Golijan submits that, having decided to enter into evidence the statement given by the Accused Franc Kos in the capacity of a suspect, the Trial Panel committed essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH. Defense further argues that the admission of this statement violated the right to a fair trial and that there has also been a violation of the right to a defense because the Defense could not use this statement during their cross-examination.

(i) Findings of the Appellate Panel

61. Article 273(3) of the CPC of BiH reads that "[i]f the Accused during the main trial exercises his right not to present his defense or not to answer questions he is asked, records of testimonies [statements] given during the investigation may, upon decision of the judge or the presiding judge, be read and used as evidence in the main trial only if the Accused was, during his questioning at investigation, instructed as provided for in Article 78 Paragraph (2) Item (c) of [the CPC BIH]." The Defense does not contest the existence of requirements provided for in this article. Defense Counsel and the Accused Golijan himself were familiar with the contents of the statement given by the Accused Franc Kos during the investigation, which on the occasion of his testimony at the main trial gave them the opportunity in their cross-examination to point to any potential discrepancies between his investigative statement and his testimony at the main trial. Although they were formally prevented from presenting the statement to the Accused Kos, they were fully familiar with the statement and, in fact, they were not prevented from following that line of cross-examination. The Defense objects to the admission of this statement into evidence in an arbitrary fashion and purely as a matter of principle, without indicating in relation to which circumstances or questions the Defense was prevented from cross-examining the Accused Kos.

(ii) Conclusion

62. Admission of the statement given by the Accused Franc Kos during the investigation does not constitute an essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH, as the Defense wrongly submits.

4. Fourth sub-ground: Article 297(1)(k) of the CPC of BiH: Defense submits that the operative part of the verdict contradicted the reasoning of the verdict, the verdict "[does] not cite reasons concerning the decisive facts", "the verdict [is] incomprehensible" and the reasoning of the verdict contradicted the operative part of the verdict

(a) Arguments of the Defense for the Accused Franc Kos, Stanko Kojić and Zoran Goronja

63. The Defense for the Accused Franc Kos and Zoran Goronja submit that the Trial Panel failed to give reasons on essential elements of the criminal offense of which the Accused have been found guilty.

64. Defense for the Accused Stanko Kojić submits that the contested Verdict is **incomprehensible** because it contains a factual description of elements of the criminal offense of War Crime against Civilians, whereas the Accused have been found guilty of the criminal offense of Crimes against Humanity under Article 172(1)(h) of the CC of BiH. The Defense also submits that the factual description does not make a clear distinction between the acts of the first listed Accused Kos and the second listed Accused Kojić. Further, the contested Verdict is incomprehensible, in the view of the Defense, because it is stated in the reasoning "that there is no room for the qualification of inhumane treatment as referred to in Article 172(1)(k) of the CC of BiH", while at the time of individualization of guilt and meting out of the sentence, the Trial Panel noted that in relation to the Accused Kojić it was mindful of the fact that after the execution "he bragged about the number of those killed and [that] he 'finished off' the wounded in a way that represented a further torture for them." The appellants argue that the contested Verdict is **contradictory** because it contains generalized formulations concerning the attack and transfer of the civilian population. The Defense also submits that the contested Verdict does "not cite reasons concerning the decisive facts" arguing that the Trial Panel failed to give reasons as to why it did not give full credence to the testimony of the second listed Accused Stanko Kojić. In his Appeal, the Co-counsel for the Accused Kojić, attorney Slobodan Perić, submits that the contested Verdict does not contain reasons concerning the evaluation of the Defense evidence.

(i) Findings of the Appellate Panel

65. Primarily, the Appellate Panel considers it necessary to note that challenging the veracity of factual findings does not constitute a ground of appeal under Article 297(1)(k) of the CPC of BiH, but rather under Article 299 of the CPC of BiH ("Incorrectly or Incompletely Established Facts"), which will be considered in Section IV of the present Verdict. An absolutely essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH exists where a first instance Verdict, as an official judicial document, contains certain defects in the operative part and/or reasoning of such nature that they prevent a review of the lawfulness and validity thereof. Having reviewed the

contested Verdict conscientiously and in detail with respect to the possible existence of defects that might constitute an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH, the Appellate Panel concludes that the contested Verdict does not contain defects referred to in sub-paragraph k), as argued in the Appeals, which is why arguments of the Defense are dismissed as unfounded.

66. The factual description of the acts in the operative part is clear, determined and complete and contains facts and circumstances that constitute essential elements of the criminal offense of which the Accused have been found guilty. It clearly indicates the place and the time of the commission of the criminal offense, as well as a complete rendering of the acts of the Accused. It comprises all essential elements of the criminal offense under Article 172(1)(h), in conjunction with paragraph (a) of the same Article of the CC of BiH, with a precise description of the individual criminal acts cited. The fact that the factual description of the offense contains elements that are at the same time essential elements of some other offense (of War Crimes against Civilians, as argued by the Defense) does not, in itself, make the operative part deficient within the meaning of Article 297(1)(k) of the CPC of BiH because it is necessary to evaluate all facts described in the operative part and then based on such evaluation give a legal qualification of the offense, which the first instance Panel did properly in the contested Verdict.

67. The Reasoning of the Verdict lists all the evidence, its contents and evaluation of its credibility. The contested Verdict also provides reasons on the decisive facts relevant for ruling in this criminal case, with a detailed and comprehensive evaluation of each piece of evidence, individually and its correspondence with all the other evidence. The Reasoning of the Verdict contains a detailed analysis of all individual elements of the criminal offense of Crimes against Humanity under Article 172(1)(h), in conjunction with paragraph a) of the same Article of the CC of BiH, as well as reasons that guided the Panel not to accept the legal qualification from Article 172(1)(k) of the CC of BiH (inhumane treatment). Facts that do not constitute elements of the criminal offense, of which the Accused have been found guilty, can and should be evaluated (if relevant) from the aspect of mitigating or aggravating circumstances when meting out the criminal sanction, which the Trial Panel did in the present case. Therefore, contrary to the Defense arguments, such action by the Trial Panel does not make the Verdict deficient within the meaning of Article 297(1)(k) of the CPC of BiH. The operative part and reasoning of the Verdict clearly identify all four of the Accused and, in situations where only the term *Accused* is used, it is entirely clear from the specific section, paragraph or sentence to which of the accused persons a specific finding or conclusion of the Trial Panel refers.

(ii) Conclusion

68. Therefore, the Appellate Panel concludes that the contested Verdict does not contain defects within the meaning of Article 297(1)(k) of the CPC of BiH, as the Defense submits, and hence the arguments of the Defense are dismissed as unfounded.

5. Fifth sub-ground: Article 297(2) of the CPC of BiH

69. The essential violation (the so called relatively essential violation) of the criminal procedure under Article 297(2) of the CPC of BiH occurs "... if the Court has not applied or has improperly applied some provisions of this Code during the preparation of the main trial or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict." When a verdict is disputed on the grounds of relatively essential violations of the criminal procedure, the appeal has to indicate not only the acts and omissions which resulted in the omission or improper application of the relevant procedural law provisions, but it also has to explain how and why they affected or could have affected the rendering of a lawful and proper verdict. Otherwise, examining whether a relatively essential violation was made or not would become an *ex officio* review.

(a) Defense alleges error in application of Article 3 of the CPC of BiH (*in dubio pro reo* principle)

(i) Arguments of the Defense for the Accused Franc Kos

70. Defense for the Accused Franc Kos submits that the misapplication of the *in dubio pro reo* principle resulted in erroneously established facts, which impacted the length and type of the criminal sanction imposed on the Accused Kos.

(ii) Findings of the Appellate Panel

71. The principle of *in dubio pro reo* is one of the direct consequences of the presumption of innocence, and it is explicitly prescribed under the law that in case of a doubt the Court must decide "... in a manner that is the most favorable for Accused." Any doubt with respect to the existence of a legally relevant fact must be reflected in favor of the accused. The facts that are to the disadvantage of the accused (*in peius*) must be established with full certainty and if there is a doubt in relation to these facts they cannot be considered as having been established or proved. The facts that are in favor of the accused are considered as established even when they are only probable, that is, when their existence is doubted.

72. The Appellate Panel is satisfied that the Trial Panel evaluated each piece of evidence individually and its correspondence with other evidence and that, based on such evaluation, it then drew inferences about the existence of legally relevant facts. Therefore, from the formal legal point of view, the Trial Panel acted fully in accordance with the obligations prescribed under Articles 15 and 281(2) of the CPC of BiH. However, the Appellate Panel notes that the application of the *in dubio pro reo* principle should be analyzed in relation to the Defense arguments alleging erroneous and incomplete establishment of facts, that is, in the context of probative value of the presented evidence. For this reason, a detailed analysis (within the arguments of the Appeal) will be outlined in Section IV of this Verdict (Incorrectly or Incompletely Established Facts).

(b) Defense alleges error in application of Article 15 of the CPC of BiH (the principle of free evaluation of evidence)

(i) Arguments of the Defense for the Accused Stanko Kojić

73. Further, the Defense submits that the Trial Panel erroneously applied provisions of Articles 15 and 281(2) of the CPC of BiH, that is, that there is a violation of the principle of free evaluation of evidence, in support of which the Defense refers to the evaluation of the finding by the medical expert, evaluation of the testimony by the Accused Franc Kos and Stanko Kojić, protected witness Z-1 and witness Jugoslav Petrušić.

(ii) Findings of the Appellate Panel

74. When evaluating the existence or non-existence of facts, the Court shall not be bound or limited by formal evidentiary rules. Free evaluation of evidence is free of legal rules that would *a priori* determine the value of certain evidence. The value of evidence is not pre-determined, either in terms of quality or quantity.

75. The evaluation of evidence includes both rational and psychological assessment and, although there are no legal or formal rules of evaluation, it is associated with the rules of human thinking and experience. The Appellate Panel is satisfied that the Trial Panel evaluated every individual piece of evidence and its correspondence with other evidence in the contested Verdict, as the Court was bound to do in line with the principle of free evaluation of evidence. Contrary to arguments of the Appeal, the Trial Panel explained how they evaluated every individual piece of evidence - they first named every piece of evidence, then presented its content (the relevant portion of the evidence) and after that reasoned its probative value based on authenticity, and tied the evidence to the conclusions of the Court in relation to essential elements of the criminal offense. The Trial Panel gave special attention to particularly relevant evidence, primarily the testimony of protected witness Z-1 and the Accused Franc Kos and Stanko Kojić, and in doing so the Trial Panel analyzed in detail the facts that are identical in their testimony, in particular the discrepancies, and reasoned as to why and to what extent it gave credence to a certain piece of evidence.

(iii) Conclusion of the Appellate Panel

76. Therefore, the Appellate Panel concludes that the Trial Panel entirely followed the process of free evaluation of evidence, precisely as it is defined under the CPC of BiH, and that there has been no violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH, in conjunction with Article 15 of the same Code. Whether the Trial Panel assigned adequate probative value to a specific piece of evidence in the context of establishing relevant facts, that is, whether it could have properly found the facts it determined on the basis of the specific piece of evidence, is a process considered through the analysis of the established state of facts, which will be analyzed within the arguments of the Appeal in Section IV of this Verdict..

IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF APPELLATE REVIEW

77. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.

78. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond 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, as when an Accused is convicted despite a lack of evidence on an essential element of the crime.

79. In determining whether or not a Trial Panel's conclusion was reasonable, 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 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.

80. 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 tribunal of fact or where the evaluation of the evidence is "wholly erroneous."

81. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.[12] However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

[12] *M.Š.*, AP-661/04 (Constitutional Court of BIH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

B. APPEAL BY THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

(a) Appellate Panel finds that the Prosecution arguments alleging incorrectly or incompletely established facts are unfounded

(i) Prosecution arguments

82. The Prosecution submits that the following **decisive facts** have been **erroneously established**: 1) The Accused did not have genocidal intent and they were not aware of genocidal intent of principal perpetrators; 2) The order to execute the captured Bosniak men and boys was issued to the Accused only upon their arrival at Branjevo; 3) The Accused did not hear Vujadin Popović saying in front of the *Kula* school that all captives should be killed; 4) Milorad Pelemiš, Commander of the 10th Sabotage Detachment of the VRS Headquarters, was not aware of the real nature of the task he assigned to the Accused; 5) Witness Z-1 changed his testimony at the main trial with respect to the time of conversation of the Accused Franc Kos and Brane Gojković with the VRS officers; 6) The number of Bosniaks killed at Branjevo is 800 persons. The erroneously established state of facts in the contested Verdict resulted, in the Prosecution's view, from the erroneous evaluation of the testimony of protected witness Z-1.

(ii) Arguments of the Defense for the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja

83. The Defense objected to facts from the testimony of protected witness Z-1 being accepted by the Trial Panel as proven. They submit that the facts relevant for the evaluation of his testimony are his personal participation in the incident, the fact that he concluded a plea agreement with the Prosecution and the sanction he received as a result of the plea agreement. These facts, in the view of the Defense, point to the conclusion that the Trial Panel should not have accepted as credible the testimony of protected witness Z-1.

84. The Defense challenged the existence of the widespread and systematic attack, as well as that acts of the Accused were part of the attack; the existence of discriminatory intent of the Accused; and that victims had the status of civilians, rather they submit that they had the status of prisoners of war. With respect to the issue of whether substantial elements of the criminal offense of Crimes against Humanity have been proved, the Defense point to the ICTY case law in relation to defining specific elements of the offense, as well as elements of the criminal offenses of War Crimes against Civilians and War Crimes against Prisoners of War, all the while arguing that substantial elements of the criminal offenses have not been proved.

85. Moreover, the Defense for the Accused Stanko Kojić submits that the Trial Panel erroneously established facts concerning his health condition.

(iii) Findings of the Appellate Panel

a. Health condition of the Accused Stanko Kojić

86. Contrary to arguments of the Defense for the Accused Kojić, the Appellate Panel holds that the Trial Panel properly established all facts and circumstances relevant for the evaluation of health condition of the Accused Kojić. In view of the fact that there were contradictory medical experts' findings in the case-file on this issue, the Trial Panel properly decided to solicit a report by the team of medical experts (Dr. Omer Ćemalović, neuropsychiatrist, Dr. Senadin Ljubović, neuropsychiatrist, Dr. Mirjana Musić, psychologist, and Dr. Marija Kaučić Komšić, neuropsychiatrist). The team of medical experts concluded in their report that the Accused Kojić "did not show authentic psychotic symptoms nor is he developmentally disabled person; his intellectual capacity falls into the category of average with IQ of 82." Medical experts concluded in their report, with a high degree of confidence, that the Accused Kojić "has a number of permanently deformed personality traits in the emotional and behavioral aspects" and that "basic pathological traits of his personality include: emotional immaturity and instability, impulsiveness, suggestibility, lack of empathy and compassion, incorrigibility of his unacceptable behavior patterns and inability to learn from his mistakes." Therefore, the Trial Panel correctly accepted the conclusion by the team of medical experts that the Accused Kojić "deliberately malingered mental illness and that the medical records [did] not contain a single document from the war that would undoubtedly suggest that the Accused Kojić behaved as a mentally unstable person at the time." In addition to the finding and opinion of the team of medical experts, the Trial Panel also made note of the fact that the Accused Kojić participated in other criminal proceedings in which "his accountability at the time of the offense was never questioned."

87. The Defense for the Accused Kojić finds support for their arguments in the previous medical report, as well as the one obtained in the process of early retirement of the Accused Kojić. The Trial Panel properly refused to accept this finding as credible and relevant to the present proceedings, and it issued an order for super-expertise. The Defense arguments do not cast doubt over the fairness of the procedure in which the team of medical experts produced their finding and opinion, and moreover they do not question the professionalism and objectivity of the medical experts on the team.

b. Existence of the widespread and systematic attack

88. The Appellate Panel is satisfied that the Trial Panel properly found that the attack launched by the VRS on the safe area of Srebrenica was by its nature widespread and systematic, and that it was directed against the Bosniak civilian population. In their arguments the Defense failed to bring into question the validity of the definition provided in the contested decision: "Widespread or a widely spread attack is defined as involving a crime that can be widespread or committed on a large scale 'due to either a cumulative effect of a series of inhumane acts or a singular effect of an inhumane act of extraordinary magnitude.' A systematic attack is defined as involving a 'pattern of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis.'"

89. In accordance with the aforementioned definition of the attack, the Trial Panel properly found that the described actions of the VRS army and MUP units have the characteristics of a widespread and systematic attack. That is to say, an attack on the safe area began with a shelling of both Srebrenica and the surrounding villages, which continued unabated for several days. The shelling was followed by the military capture of Srebrenica, which resulted in the flight of the Bosniak population from the area. One part of the population fled to the UN base in Potočari, and the other part (mostly men) set out on a journey through the woods to reach the free territory. The Bosniak population was the target of the attack, in as much as the women, children and the elderly were subjected to unbearable living conditions in Potočari, and then forcibly transferred, and the men in as much as the column in which they were moving was the target of shelling, ambushes and executions, which points to the discriminatory character of the attack itself. As a consequence of this attack, the Bosniak population disappeared from the Srebrenica safe area.

90. The attack on the Srebrenica safe area was also systematic. Before the launching of the attack, preparations were made when different orders and directives were issued by the VRS military leadership. An order for general mobilization was issued and combat readiness was raised to a high level. The attack that followed after months of preparations was carried out according to a specific plan i.e. by shelling the surrounding villages in order for the Bosniak population to gather in a small territory in the Srebrenica proper, stirring fear and panic. All the events following the military taking of Srebrenica were organized and carried out in an equally systematic manner. Women, children and elderly were transported by buses and trucks, while all men were subjected to an identical pattern of treatment: they were imprisoned, transported to the places of detention and then killed in the same manner, from firearms, and thereupon buried in mass graves.

91. Furthermore, the Trial Panel explained in detail both the participation of the Accused in the attack and their knowledge of the attack. It follows from the evidence that the Accused themselves, as members of the 10th Sabotage Detachment, participated on two occasions in the attack on Srebrenica. At the end of June, when as part of preparations for the final military taking of the Srebrenica safe area and under the command of the Detachment Commander Milorad Pelemiš they fired a few projectiles at random targets from a hand-held rocket launcher *(zolja)* and from their automatic weapons. The second time, on 11 July 1995, following the intensive shelling that went on for days and after most of the population left Srebrenica proper looking for shelter at the UN Base in Potočari, together with the Detachment Commander Pelemiš and General Ratko Mladić, as well as other VRS high-ranking officers, they were among the first to enter Srebrenica proper, raiding the houses and directing the population to Potočari.

92. Moreover, with respect to the existence of a nexus between the acts of the Accused and the attack, the Trial Panel properly found that, as part of the attack on the Srebrenica safe area, members of the 10th Sabotage Detachment summarily executed at the Branjevo Farm a group of around 800 Bosniak civilian men from Srebrenica who had been transported earlier to the execution sight, some of them with their hands tied by ligatures and blindfolded. The participation of the Accused in the attack on Srebrenica,

the manner in which they carried out executions at the Branjevo farm and the number of victims (men were lined up and killed from firearms, including automatic weapons, machine guns, light machine guns and pistols) are all facts and circumstances that point to the only logical conclusion, which is that the acts of the Accused, by their nature and consequences, objectively formed part of the attack.

c. <u>The attack was directed against civilians</u>

93. Contrary to the arguments of the Appeal, the Appellate Panel holds that the presented evidence does not support the conclusion that the attack was exclusively of military nature, targeting the 28th Division forces. As correctly outlined in the contested Verdict, the number of Army of BiH members in the enclave and in the column was not such to influence a predominantly civilian character of the population since the vast majority of population in the enclave were civilians. The Trial Panel properly invoked the position of the ICTY from the *Blaškić* case that "presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic." The Appellate Panel is satisfied that the Trial Panel correctly decided not to allow presentation of evidence the purpose of which was to prove crimes that were allegedly committed beforehand against the Serb civilians in the area because for the existence of the attack against a concrete group it is irrelevant whether the other party also committed crimes against civilians of the opposing side, that is, reprisal cannot be a justification for the crimes committed. The *tu quoque* defense, namely that violations of international humanitarian law are justified on account of violations by the other belligerent party, even if it were true, has no place in modern international law, and reprisal against civilians is banned in all armed conflicts.

94. Furthermore, with respect to the status of men who were executed at the Branjevo farm, this Panel holds that the Defense arbitrarily challenge their status as civilians by invoking different examples from the ICTY's case law that are of no relevance to the present case and that concern defining the notion of prisoner of war, while failing to make a link between these theoretical legal definitions and factual circumstances of the present case. As the Trial Panel properly found, it follows from testimonial evidence that most men were wearing civilian clothes, which is corroborated by the witnesses' descriptions of the men who were first detained in the school and subsequently taken to the Branjevo farm and executed there. In view of the number of those killed, the fact that someone among those killed might have been a member of the Army of BIH, and that he even potentially wore parts of military clothing, does not diminish or bring into doubt the soundness of the Trial Panel's finding that men were executed at the Branjevo farm solely because they were Bosniaks.

d. <u>Persecution</u>

95. In their Appeals the Defense analyze in detail the ICTY's case law thus far in relation to defining persecution, with a focus on discrimination as one of the requisite elements for defining and proving persecution. The Defense interpretation contained in their Appeals is neither contrary nor does it challenge the definition from the contested

Verdict. Under Article 172(2) of the CC of BiH "[p]ersecution means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity." Persecution is a form of discrimination on racial, religious and political grounds intended to be and resulting in an infringement of an individual's fundamental rights.

96. In the present case, the Trial Panel found that the Accused "committed persecution on the national, ethnic and religious grounds by depriving the captured Bosniak men of their lives." The Defense does not essentially challenge the fact that the victims or those killed were Bosniaks. They, however, argue that there was no discriminatory intent on the part of the Accused. This argument of the Defense, in the view of this Panel, is not supported by evidence. It is clear that the victims were selected exclusively based on their national, ethnic and religious identity, that the committed acts constituted persecution, that it was known to the Accused and that it follows from their conduct as perpetrators of the offense that they had discriminatory intent.

97. The Appellate Panel considers the argument put forward by the Defense for the first listed Accused Franc Kos, namely that Accused Kos could not have shared discriminatory intent with other perpetrators on account of the fact that although a member of the VRS, he was not a Serb but a Slovenian, to be unfounded too. This fact, in the view of this Panel, is not decisive in nature, given that the Accused Kos voluntarily became a member of the VRS and he clearly shared discriminatory intent with other members of the VRS in relation to victims who were executed at the Branjevo farm solely because they were Bosniaks. It follows from the testimony of witness Z-2 that after he got off the bus at the Branjevo farm, members of the Detachment escorted him, with one of them asking him for money, and as the witness did not have any, he kicked him in the stomach and asked if "anyone wants to cross himself with a sign of cross, to be spared?"

98. Witness Z-2 further testified: "Then I thought to myself, I will not respond. I have my own religion and I want to stay in my religion. If I am to be killed, if I am to vanish, so be it. My religion is my religion and I respect my religion. If you do not value yours, you do not value that of the other person either."[13]

99. It follows from the testimony of the Accused Kos that Z-1 was hitting a man, asking for money, and saying that he was going to have him convert to Christianity (*by crossing him with a sign of cross*).

100. For the purpose of explanation, the Appellate Panel finds it necessary to note that the contested Verdict contains a detailed explanation of the use of the term *Bosniak,* "which was not generally accepted at the time of the commission of the criminal offense." This Panel accepts the conclusion that Bosniaks as a group were discriminated on national, ethnic and religious grounds.

[13] Protected witness Z-2 testified at the main trial hearing held on 24 May 2011.

101. Based on the above, the Appellate Panel holds that the arguments of the Defense are unfounded and fail to bring into question the correctly established state of facts with respect to the evidence of the existence of discriminatory intent on the part of the Accused and the evidence of persecution as the most serious form of the criminal offense of Crimes against Humanity under Article 172(1)(h), in conjunction with subparagraph (a) of the same Article of the CC of BiH.

e. Testimony of protected witness Z-1

102. The Appellate Panel is satisfied that the Trial Panel properly evaluated the testimony of protected witness Z-1 both individually and its correspondence with other presented evidence, and that it rightly "observed considerable differences [between the testimony of this witness]... and testimony of other witnesses and the Accused Franc Kos and Stanko Kojić." In this regard, the Appellate Panel upholds the Trial Panel's analysis of statements by witness Dražen Erdemović. Although witness Erdemović was not cross-examined in the present criminal case, his statements given before the International Criminal Tribunal for the former Yugoslavia (ICTY) are relevant for assessing the veracity of testimony of the Accused Franc Kos and Stanko Kojić and protected witness Z-1 because all four of them participated in the execution of Bosniaks at the Branjevo farm.

103. The Trial Panel properly found that it cannot be considered as proved in the present case that it was at the time when Major Pećanac addressed members of the 10th Sabotage Detachment at the base in Dragasevac that the order to kill the captives at the Branjevo farm was issued. Contrary to the testimony of witness Z-1, the Accused Franc Kos and Dražen Erdemović "do not claim that the order for killing the captives in Branjevo was issued on that occasion", but it follows from their testimony that they received the order only upon their arrival at the Branjevo farm.

104. Contrary to the arguments of the Prosecution's Appeal, this Panel holds that the fact that witness Z-1 claimed that the order for killing was issued before their departure for Branjevo, on its own, does not contribute to the credibility of this witness. The Prosecution fails to evaluate the testimony of witness Z-1 in its entirety, but it draws the Panel's attention to claims which, seen outside of the context of the entire testimony, support the Prosecution's legal qualification of the offense contained in the confirmed Indictment. However, if a trier of fact considers and analyzes the entire testimony of witness Z-1, it follows, as correctly found by the Trial Panel, that witness Z-1 in this part of his testimony is attempting to diminish his role by claiming that "he objected to Pelemiš's order, of which he informed him in his office, after which Pelemiš allegedly cursed his Croatian mother, cocked his pistol and pressed it against the witness's back of the head saying that he had to leave for Branjevo nevertheless." However, these claims by protected witness Z-1 are not corroborated by other evidence. It does not follow from the presented evidence, as correctly found by the Trial Panel, that any of the Detachment members opposed leaving for Branjevo before the actual departure. Witness Dražen Erdemović even volunteered to carry out the task (guarding the captives). Furthermore, the presented evidence points to the conclusion that Dražen Erdemović opposed to carry out the task at the Branjevo farm

after he learnt that he was going to take part in the execution of Bosniaks.

105. Given the discrepancy between the testimony of protected witness Z-1 and the Accused Franc Kos as to when they received the order for execution, this Panel notes that it is relevant in this context to consider witness Erdemović's testimony before the ICTY. It follows from his testimony that members of the 10th Sabotage Detachment received the order for execution only upon their arrival at the Branjevo farm. Bearing in mind, on the one hand, that facts to the detriment of the Accused must be proved with certainty and beyond a reasonable doubt, and that witness Erdemović was the first participant in this incident who came forward and described his participation in it, as well as participation of other members of the Detachment, this Panel concludes that it has not been proved in the present case that the Accused Kos, Kojić, Golijan and Goronja knew of the order for execution prior to their departure for Branjevo.

106. Contrary to the arguments of the Defense appeals, witness Erdemović's testimony was evaluated with full respect for the principle of *in dubio pro reo*, which among other things convinced the Panel not to give full credence to the testimony of witness Z-1. The Appellate Panel upholds the Trial Panel's finding that it has not been proven in the present case that witness Z-1 opposed the order for the execution of Bosniaks. Evidence presented in this case points to the conclusion that during his stay at the Branjevo farm witness Z-1 did nothing that would suggest his opposition to the order and the claims that during the execution he was even telling the Accused Zoran Goronja that he had to "work faster and bloody his hands". Another important fact for the credibility of witness Z-1 is that he failed to mention in his testimony his presence in front of the hangar in Kravica together with Pelemiš and the Accused Kos. All of this points to the conclusion that, in his testimony, witness Z-1 is attempting to present his role and participation in the incident in such a way so as to diminish his role and responsibility.

107. The Appellate Panel is satisfied that the Trial Panel properly evaluated the testimony of protected witness Z-1 deciding not to give it full credence, especially in the part in which witness Z-1 claimed that they had received the order for execution before their departure for Branjevo. With this evidence, the Prosecution is essentially trying to prove the existence of genocidal intent on the part of the Accused, or that they were at least aiders and abettors in the criminal offense of Genocide. In this regard, the Appellate Panel notes that witness Z-1, following the signing of the plea agreement with the Prosecution, was found guilty for his participation in the incident, that is, he was found guilty of the criminal offense of Crimes against Humanity and sentenced to imprisonment for the term of ten years. Under the relevant provisions of the CPC of BiH, the Prosecution has the possibility to negotiate and potentially sign plea agreements on the admission of guilt. It should be noted, however, that in the process of negotiating plea agreements the Prosecution can make concessions when it comes to criminal sanction, but not when it comes to facts and legal qualification of the offense, particularly not those that constitute essential elements of the criminal offense. Still, the Prosecution described and qualified the acts of witness Z-1, which are clearly acts of co-perpetration with other Accused, as Crimes against Humanity. The interests of justice and fairness, along with the application of the *in dubio pro reo* principle, do not allow that the existence of genocidal intent on the

part of the Accused be proven solely by the testimony of such witness. The only way in which witness Z-1 is trying to justify his actions and participation, after they allegedly received the order prior to their departure for Branjevo, which would at the same time put the Accused in this case in a more difficult position, is his alleged opposition to the order in Major Pelemiš's office, which was not proven by any other evidence in this case. Even circumstantial evidence does not point in this direction.

108. Therefore, this Panel concludes that arguments of the Prosecution's Appeal are entirely unfounded. Arguments of the Defense Appeals concerning the evaluation of testimony of witness Z-1 are also unfounded since the Defense, in principle, point to the very same segments of his testimony which the Trial Panel considered relevant when it decided not to accept his testimony as entirely accurate and reliable.

f. <u>The number of killed men at the Branjevo farm</u>

109. The Appellate Panel holds that arguments of both the Prosecution and Defense Appeals with respect to the number of those killed at the Branjevo farm are unfounded. The Appellate Panel is satisfied that the Trial Panel properly found that around 800 men were killed at the Branjevo farm. This conclusion is based on cross-checking various pieces of evidence in the case: witness accounts, findings and opinions of expert witnesses, documentary evidence, and making the necessary link between the evidence that serves to shed more light on the incident itself and the process of burial, as well as later exhumation and identification of bodies.

110. Only such a comprehensive analysis can give a reliable estimate of the number of those killed, and the Trial Panel did exactly that. In their appeals both the Prosecution and Defense point only to some of the evidence considered by the Trial Panel, in such a way focusing only on the evidence in favor of their cases. Given the overall context, it would be wrong to accept the number of identified persons as the only criterion for evaluation, which is the view taken by the Prosecution, but an even less adequate method of analysis for determining the number of those killed would be for the Panel to give full faith to witnesses and base its assessment on their personal estimate of the number of buses and number of men that could fit on each of those buses, especially bearing in mind the extraordinary circumstances in which this was taking place.

111. The Accused were found guilty of having participated, as co-perpetrators, in the execution of men and, given the number of those killed, the manner of their execution and personal participation of the Accused in the execution of captives, the arguments of the Defense Appeals attempting to gauge the number of men killed by each individual Accused are considered as unfounded.

V. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC OF BIH: VIOLATIONS OF THE CRIMINAL CODE

A. STANDARDS OF APPELLATE REVIEW

112. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of his claim, and explain how the error affects the decision resulting in its unlawfulness.

113. Where an error of law arises from the application in the Verdict of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects the legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

114. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

B. APPEALS BY THE DEFENSE FOR THE ACCUSED FRANC KOS, STANKO KOJIĆ, VLASTIMIR GOLIJAN AND ZORAN GORONJA

1. First sub-ground: Application of the Criminal Code of BIH

115. Violation of the criminal code under Article 298(d) of the CPC BIH occurred if the court applied properly established state of facts under the wrong legal provision, or if it applied the law that could not have been applied or the law that should have been applied, but in a wrong manner.

(a) The Appellate Panel finds that the Defense arguments concerning the applicability of the CC of BiH are unfounded and as such are dismissed.

(i) Arguments of the Defense for the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja

116. The Defense argue in their Appeals that the Trial Panel erred in applying the 2003 CC of BiH since the criminal offense of Crimes against Humanity was not codified as a criminal offense at the time of perpetration.

117. According to the Defense, the Trial Panel violated the principle of legality guaranteed under Article 7(1) of the ECHR by applying the 2003 CC of BiH. The Defense argues that the CC of SFRY should have been applied as the law that was in force at the time the offense was allegedly committed and as the more lenient law for the perpetrators.

118. Furthermore, the Defense argue that the criminal offense charged against the Accused should have been qualified as War Crimes against Civilians under Article 142 of the CC of SFRY, or alternatively as War Crimes against Prisoners of War under Article 144 of the CC of SFRY.

a. Findings of the Appellate Panel

119. With respect to the Defense arguments alleging a wrong legal qualification, the Appellate Panel is satisfied that, having properly established the state of facts, the Trial Panel applied a correct legal provision, that is, it correctly qualified the offense as Crimes against Humanity – Persecution under Article 172(1)(h), committed by murder from paragraph (a) of the same Article of the CC of BiH. The legal qualification of the offense suggested by the Defense inevitably implies that the state of facts would have to be changed beforehand, which cannot be subsumed as violation of the criminal code within the meaning of Article 298, subparagraph (d) of the CPC of BiH, given that in their arguments the Defense did not challenge the state of facts as established by the Trial Panel in the contested Verdict. The facts contained in the factual description of the Indictment and in the operative part of the first instance Verdict must be evaluated and subsumed collectively, rather than individually, under a legal norm. In the same manner, the facts that constitute essential elements of the criminal offense cannot be left out of the process of applying a legal standard to the established facts, which is what the Defense is doing in their Appeals. The Defense did not challenge legal definitions of specific elements of the criminal offense of Crimes against Humanity – Persecution, as the Trial Panel outlined them having accepted the ICTY case law in that regard.

120. In their Appeals the Defense point to the Court of BiH case law concerning the application and acceptance as relevant of legal positions contained in the ICTY judgments. However, it is entirely clear that the court cannot, in one single case, apply the ICTY case law on all legal issues addressed by the ICTY in their jurisprudence, but only on those issues of relevance to the present case, which the Trial Panel properly did in the disputed Verdict. The Defense's invocation of various examples from the ICTY case law concerning the definition of essential elements of the criminal offenses of War Crimes against Civilians and War Crimes against Prisoners of War is irrelevant because the facts of the present case do not contain elements of those criminal offenses.

121. Furthermore, contrary to the arguments of the Appeals, the Appellate Panel is satisfied that Article 7(1) of the ECHR was not violated by applying the CC of BiH in the present case.

122. In the contested Verdict the Trial Panel gave a detailed analysis of provisions of Articles 3, 4 and 4a. of the CC of BiH, as well as Article 7(1) and (2) of the ECHR, which is

entirely upheld by the Appellate Panel.

123. The principle of legality is an imperative norm prescribed under Article 7(1) of the ECHR which has priority over all other law of Bosnia and Herzegovina (Article 2(2) of the Constitution of BiH). Article 7(1) of the ECHR prescribes as the general principle that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed.[14]

124. However, paragraph (2) of Article 7 of the ECHR contains an important exception with regard to paragraph (1) of the same Article, and it provides that "[t]his article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations."

125. Article 15(1) and (2) of the UN International Covenant on Civil and Political Rights contains similar international law provisions that have to be considered as *lex superioris* with regard to "... 'the general principles of law recognized by the community of nations.'"[15]

126. The customary status of responsibility and culpability relevant to Crimes against Humanity and individual criminal responsibility for the perpetration thereof in the course of 1992 was confirmed on 3 May 1993 by the UN Secretary General in his Report to the Security Council regarding Resolution 808, by the International Law Commission (1996) and the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") case law.

127. Crimes against Humanity constitutes an imperative norm of international law and there is no doubt that it was part of customary international law in 1992.

128. The CC of BiH was applied to this specific criminal offense pursuant to Article 4a) of the CC of BiH: "Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law." As it is properly concluded in the disputed Verdict, this provision makes an exemption from the general principles laid down in Articles 3 and 4 of the CC of BiH in the sense that they shall not prejudice the trial and punishment of any person for any act or omission which amounts to the criminal offense of

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[14] (1) "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed."

[15] International Covenant on Civil and Political Rights, adopted by the General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976; in accordance with Article 49 Article 15: "1. No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

Crimes against Humanity which was not codified as such under the criminal law that was in force at the time when the offense was committed.

129. Crimes against Humanity is recognized as a crime under international law and its prosecution falls under universal jurisdiction. Therefore, Article 7 of the ECHR is not violated if the individual is convicted of such offenses pursuant to the law that subsequently prescribed and defined this act as a criminal offense and foresaw a criminal sanction thereto. This position is taken in the case No. 51 891/99, *Naletilić v. Croatia*, regarding the same objections raised by the Appellant in that case as are raised by the Defense in this case, but in that case in relation to the ICTY.

130. The Appellate Panel recalls the legality of the application of the 2003 Criminal Code in proceedings before the Court of BiH has been exhaustively considered and addressed by the Constitutional Court in its *Maktouf* decision.[16] The Constitutional Court of BiH addressed this issue in their Decision No. AP 1785/06 of 30 March 2007 (*Maktouf)* and in the Decision No. AP 408/07 of 11 February 2010 (*Dragoje Paunović*).[17] In these decisions, the Constitutional Court of BiH referred to the applicable provisions of Article 4a) of the CC of BiH and Article 7(2) of the ECHR and concluded that the application of the CC of BiH before the Court of BiH is not in violation of Article 7 of the ECHR. This conclusion is substantiated by the ECtHR case law, specifically the cases under which the general interpretation of Article 7 of the ECHR was established.[18]

131. The reasoning of the disputed Verdict contains valid arguments which undeniably prove that Crimes against Humanity constituted a criminal offense under the general principles of international law, and this conclusion is upheld by this Panel. Therefore, the Trial Panel was entirely justified in applying the provisions of the CC of BiH to the properly and completely established state of facts.

132. The Defense also erroneously argues that the adopted Criminal Code of SFRY foresaw more lenient sanctions for the perpetrators. The Trial Panel properly concluded that the applicability of the CC of BiH was additionally justified by the fact that the sanction foreseen in the CC of BiH is in any event more lenient than the capital punishment which was in force at the time of perpetration of the criminal offense. The Appellate Panel entirely upholds the decision made by the Trial Panel with regard to the principle of time

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[16] Constitutional Court, Decision on Admissibility and Merits No. AP1785/06 of 30 March 2007, Official Gazette of Bosnia and Herzegovina No. 57/07 (*Maktouf* Decision), para. 60-79; The Appellate Verdicts of the Court of BiH that have addressed this issue are: X-KRŽ-05/70 Radovan Stanković, X-KRŽ-05/51 Dragan Damjanović, X-KRŽ-05/154 Radisav Ljubinac, X-KRŽ-05/161 Gojko Janković, X-KR-05/165 Nenad Tanasković, X-KRŽ-06/275 Mitar Rašević et al., X-KRŽ-07/382 Mirko Todorović et al., X-KRŽ-06/202 Željko Lelek, X-KRŽ-06/200 Željko Mejakić et al., X-KRŽ-07/478 Momir Savić, X-KRŽ-08/500 Miodrag Nikačević, X-KRŽ-07/442 Predrag Kujundžić, X-KRŽ-05/16 Dragoje Paunović, X-KRŽ-05/40 Nikola Kovačević, X-KRŽ-06/234 Zoran Janković, X-KRŽ-06/290 Jadranko Palija, X-KRŽ-07/405 Ranko Vuković et al. and X-KRŽ-06/236 Božić et al.

[17] See *Maktouf* Decision, Official Gazette of Bosnia and Herzegovina No. 57/07; Decision on Admissibility and Merits No. AP 408/07 of 11 February 2010 (*Paunović* Decision), para. 50-52.

[18] See ECtHR, *Kononov v. Latvia* [GC] Judgment of 24 July 2008, Application No. 36376/04 and *Kolk and Kislyiy v. Estonia,* Judgment of 17 January 2006, Application Nos. 23052/04 and 24018.

application of the criminal code and the law more lenient to the perpetrator, although in this specific case the CC of BiH was not applied on that basis only.

133. The Defense incorrectly submits that the capital punishment was abolished in the meantime. When two or more laws are examined in order to assess which one of them is more lenient, a sanction may not be separated from the totality of goals sought to be achieved by the criminal policy at the time of the application of the law. This position is taken by the Constitutional Court of BiH in their Decision No. AP 1785/06 *Maktouf.*[19]

134. In support of their arguments, the Defense invokes cases before the Court of BiH in which the CC of SFRY was applied. The Appellate Panel feels compelled to note that the referenced cases do not bear important similarities with the present case, either from the factual or legal point of view. The cases erroneously invoked by the Defense concern the criminal offenses of War Crimes against Civilians and War Crimes against Prisoners of War, which are identically prescribed under both codes, the adopted CC of SFRY and the CC of BiH, and in which cases the latter was not considered as more lenient to the accused, unlike the present case in which the criminal offense, of which the Accused have been found guilty and which has been qualified as Crimes against Humanity – Persecution under Article 172(1)(h), in conjunction with subparagraph (a) of the same Article of the CC of BiH, is contained only in the CC of BiH.

b. Conclusion

135. Therefore, the arguments of the Defense concerning the applicability of the CC of BiH are dismissed as unfounded.

VI. GROUNDS OF APPEAL UNDER ARTICLE 300 OF THE CPC OF BIH: DECISION ON CRIMINAL SANCTION

A. STANDARDS OF APPELLATE REVIEW

136. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

137. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

138. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the

Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

139. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

140. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

141. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

(a) Prosecution arguments

142. The Prosecution submits that the Trial Panel did not properly evaluate the aggravating circumstances and, accordingly, the Prosecution moves for the maximum sentence of imprisonment prescribed for the criminal offense charged.

(b) Arguments of the Defense for the Accused Franc Kos, Stanko Kojić, Vlastimir Golijan and Zoran Goronja

143. The Defense, as well as the Accused Kos and Kojić in person, submit in their Appeals and Responses to the Prosecution's Appeal that the sentences imposed are too harsh and, in that regard, point to the Court of BiH and ICTY hitherto case law, making a special note of the length of prison sentences received by Dražen Erdemović and witness Z-1, imprisonment for the term of 6 and 10 years respectively. The Defense moves for sanctions of substantially shorter duration.

[19] See Constitutional Court, Decision on Admissibility and Merits No. AP1785/06 of 30 March 2007, Official Gazette of Bosnia and Herzegovina No. 57/07, paras. 68-69.

(c) Findings of the Appellate Panel

144. The Appellate Panel holds that the Trial Panel properly established the state of facts and circumstances on the part of the Accused influencing the length of sentence. However, in evaluating these circumstances the Trial Panel misapplied the rules on sentencing, as correctly argued by the Defense. In other words, the Trial Panel failed to give due importance to the established mitigating circumstances and, as a direct result of this finding, the Appellate Panel dismisses the Prosecution's Appeal arguments as entirely unfounded.

145. Direct victims of the crime of which the Accused have been found guilty are hundreds of men (around 800 of them) who were killed during the execution at the Branjevo farm in the course of 16 July 1995, which caused irreparable damage to their wives, children and other relatives. No punishment can adequately reflect the gravity of killing hundreds of people, the mental suffering caused to their families, especially such taking of one's life on a discriminatory basis. In the present case, the Accused carried out a mass execution of around 800 men in the most brutal and cold-blooded way, and all the while they essentially did not show any signs of opposition or hesitation in what they were doing.

146. The fact that some persons who were superiors of the Accused and who issued orders for the execution of captives at the Branjevo farm have not been tried yet, as many of them are still unavailable to the prosecution authorities, cannot be considered as a mitigating circumstance for the Accused in this case.

147. However, as for the Accused Franc Kos, the Trial Panel properly established as relevant the fact that in his testimony the Accused Kos presented his defense and revealed a number of facts that were not known beforehand. On this occasion, he expressed remorse for what he had done, but also that he led the group that went on a killing spree at the Branjevo farm, with him actively participating in the execution of captives by firing squad and finishing off those wounded. Although the Accused Kos was not formally in charge of the Detachment members during this incident, his prior role of commander is undeniably important in this incident too, which the Accused Kos himself admitted in his testimony when he said that he regretted putting the name of the second listed Accused Kojić on the list of those to carry out this assignment, as the Accused Kojić was not routinely deployed in missions with other members of the Detachment. This fact, among other things, leads this Panel to impose a shorter sentence of imprisonment on the Accused Kojić than the sentence imposed on the Accused Kos under this Verdict.

148. Further, contrary to the Prosecution's arguments in the Appeal, this Panel holds that finishing off the wounded captives done by the Accused Kos and Kojić does not constitute a substantially aggravating circumstance or additional suffering for victims, that is, it cannot be considered as additional torture, but it rather demonstrates persistence and determination on the part of the Accused in carrying out the assignment.

149. In deciding on the sentence to be imposed on the Accused Kojić, apart from the above, the Panel also factored in the Report of the team of medical experts in which it is

stated that his capacity was diminished at the time of the commission of the criminal offense, but not considerably.

150. With respect to the Accused Vlastimir Golijan, the Trial Panel properly established as relevant facts, apart from the gravity of the criminal offense, that the Accused Golijan in his statement of facts confirmed allegations from the Indictment and that he had not been 21 at the time of the commission of the offense. The Defense correctly submits that the Accused Golijan confessed before the Preliminary Hearing Judge to the facts of the offense of which he was convicted by the first instance Verdict, that he did not change this statement of facts during the proceedings and that his conduct was fair, all the while expressing remorse for what he had done. This is reflected, among other things, in the decision of the Accused Golijan not to subject witnesses and aggrieved persons to cross-examination by his Defense, the circumstance to which, in the view of this Panel, the Trial Panel failed to give appropriate weight.

151. As for the Accused Zoran Goronja, the Trial Panel properly established that although it follows from the witness accounts that the Accused Goronja is a quiet and unassuming person, these traits do not diminish his responsibility for the participation in the incident, but the Trial Panel should have attached more importance to the fact that by his conduct during the commission of the offense, that is, by leaving the execution site, the Accused Goronja showed, at least in some form, his opposition to the crime, and by his conduct during the proceedings he showed sincere remorse too.

(d) <u>Conclusion</u>

152. Therefore, the Appellate Panel holds that long-term imprisonment sentences, to the Accused Franc Kos for the term of thirty-five (35) years, the Accused Stanko Kojić for the term of thirty-two (32) years, the Accused Zoran Goronja for the term of thirty (30) years and the sentence of imprisonment for the term of fifteen (15) years to the Accused Vlastimir Golijan are fully adequate and proportionate both to the gravity of the offense, given the circumstances, consequences, the manner of perpetration and concrete acts of the Accused, and the personality of the Accused as perpetrators of this crime, and that such sentences would fully meet the purpose of punishment prescribed by law.

153. Based on all the aforementioned and pursuant to Article 314(1) of the CPC of BiH, the Appellate Panel decided as stated in the operative part of this Verdict.

Record-keeper: **PRESIDING JUDGE**

Melika Murtezić **Redžib Begić**

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