BOSNA I HERCEGOVINA БОСНА И ХЕРЦЕГОВИНА

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Case Number: S1 1 K003417 12 Krž 12

Date: **Pronounced on:** **20 May 2013**

Written copy issued on: **16 August 2013**

Before the Appellate Panel composed of: Judge Mirko Božović, Presiding Judge

Judge Tihomir Lukes, member

Judge Redžib Begić, member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

DUŠKO JEVIĆ, MENDELJEV ĐURIĆ, GORAN MARKOVIĆ AND NEĐO IKONIĆ

SECOND-INSTANCE VERDICT

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

Ibro Bulić

Defense Counsel for the Accused Duško Jević:

Vera Lazić and Dragan Gotovac

Defense Counsel for the Accused Mendeljev Đurić:

Miodrag Stojanović and Dragoslav Perić

Defense Counsel for the Accused Neđo Ikonić:

Nenad Rubež and Dragiša Mihajlović

Defense Counsel for the Accused Goran Marković:

Veljko Ćivša

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel of the Appellate Division composed of Judge Mirko Božović, as the Presiding Judge, and Judge Tihomir Lukes and Judge Redžib Begić, as members of the Panel, with the participation of Legal Adviser Neira Kožo, as the record-taker, in the criminal case against the Accused Duško Jević, Mendeljev Đurić, Neđo Ikonić and Goran Marković, for the criminal offense of Genocide, in violation of Article 171(a) and (b) of the Criminal Code of Bosnia and Herzegovina (CC B-H), as read with Article 180(1) and Article 31 of the CC B-H, having decided on the respective Appeals by the Prosecutor's Office of Bosnia and Herzegovina No. T20 0 KTRZ 0004980 07 (KT-RZ-101/07) of 21 September 2012, Defense Counsel for the Accused Duško Jević, Attorney Vera Lazić, of 28 September 2012, and Defense Counsel for the Accused Mendeljev Đurić, Attorney Miodrag Lj. Stojanović, of 18 September 2012, from the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003417 10 Kri of 25 May 2012, following the session of the Panel held on 20 May 2013, in the presence of Ibro Bulić, Prosecutor of the Prosecutor's Office of B-H, the Accused Duško Jević and his Defense Counsel, Attorney Vera Lazić, and in the absence of the Co-Counsel, Attorney Dragan Gotovac, who had been duly summoned; in the presence of the Accused Mendeljev Đurić and his Defense Counsel, Attorney Miodrag Stojanović, and in the absence of the Co-Counsel, Attorney Dragoslav Perić, who had been duly summoned; and in the presence of the Accused Neđo Ikonić and his Defense Counsel, Attorneys Nenad Rubež and Dragiša Mihajlović, and the Accused Goran Marković and his Defense Counsel, Attorney Veljko Ćivša, pursuant to Article 310(1), as read with Article 314 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H), rendered the following

VERDICT

Refusing, as unfounded, the Appeal by the Prosecutor's Office of Bosnia and Herzegovina, and **partially granting** the Appeals by the Defense Counsel of **Duško Jević** and **Mendeljev Đurić**, and **revising** the first instance Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 003417 10 Kri of 25 May 2012, in the part of the decision on the sentence, thereby **sentencing the Accused Duško Jević to long-term**

imprisonment of 32 (thirty-two) years, for the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, of which he was found guilty, and **sentencing the Accused Mendeljev Đurić to long-term imprisonment of 28 (twenty-eight) years,** for the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, of which he was found guilty.

The remaining part of the first instance Verdict is hereby upheld.

REASONING

I. PROCEDURAL HISTORY

A. FIRST INSTANCE VERDICT

1. By the Verdict of the Court of B-H No. S1 1 K 003417 10 Krl (X-KR-09/823-1) of 25 May 2012, the Accused Duško Jević a.k.a. Staljin and Mendeljev Đurić a.k.a. Mane were found guilty of the criminal offense of Genocide, in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, so the Accused Duško Jević was sentenced to long-term imprisonment of 35 (thirty-five) years, and the Accused Mendeljev Đurić to long-term imprisonment of 30 (thirty) years. Pursuant to Article 56(1) of the CC B-H, the time the Accused had spent in custody starting from 28 October 2009 was credited towards the pronounced imprisonment sentence.

2. Pursuant to Article 284(1)(c) of the CPC B-H, the Accused Neđo Ikonić and Goran Marković were acquitted of the charges as follows: the Accused Neđo Ikonić that he committed the criminal offense of Genocide, in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) of the CC B-H, and the Accused Goran Marković that he committed the criminal offense of Genocide, in violation of Article 171(a) and (b) of the CC B-H, as read with Article 31 of the CC B-H.

3. By the Verdict, the Accused were relieved of the duty to reimburse the costs of the criminal proceedings, pursuant to Article 188(4) and Article 189(1) of the CPC B-H.

4. Pursuant to Article 198(2) and (3) of the CPC B-H, the injured parties and the

relatives of the victims were instructed to pursue their claims under property law in civil action.

B. APPEALS AND RESPONSES

5. The Prosecutor's Office of B-H filed an Appeal from the first instance Verdict on the grounds of essential violation of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC B-H, violation of the Criminal Code referred to in Article 298 of the CPC B-H, and the incorrectly or incompletely established facts referred to in Article 299(1) of the CPC B-H, moving the Panel of the Appellate Division (hereinafter: the Appellate Panel) to grant the Appeal, partially revoke the contested Verdict in the part relative to Goran Marković and Neđo Ikonić, and to schedule a trial, pursuant to Article 315(2) of the CPC B-H, with a view to re-presenting the evidence adduced in the first instance that caused the state of facts to be erroneously and incompletely established, whereupon the Panel should pronounce the Accused Neđo Ikonić and Goran Marković guilty of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, impose on them the sentence of long-term imprisonment pursuant to the statute, and uphold the remaining part of the Verdict.

6. Defense Counsel for the Accused Duško Jević, Attorney Vera Lazić, also filed an Appeal on the grounds of essential violation of the criminal procedure provisions, the incorrectly or incompletely established facts, violation of the Criminal Code, and the decision on the sentence, moving the Appellate Panel to grant the Appeal, revise the first instance Verdict and acquit the Accused Duško Jević of the charges, pursuant to Article 284(c), as read with Article 3(2) of the CPC B-H, and terminate his custody, or to grant the Appeal and, pursuant to Article 315(1)(a) and (b) of the CPC B-H, render a decision revoking the first instance Verdict and schedule a trial before the Appellate Panel and terminate the custody of Duško Jević.

7. Defense Counsel for the Accused Mendeljev Đurić, Attorney Miodrag Stojanović, also filed an Appeal from the first instance Verdict on the grounds of essential violation of the criminal procedure provisions, referred to in Article 297(1)(i) and (k) of the CPC B-H, violation of the Criminal Code, referred to in Article 298(1)(d) of the CPC B-H, the incorrectly or incompletely established facts, referred to in Article 299 of the CPC B-H, and the decision on the sentence, referred to in Article 300 of the CPC B-H, moving the

Appellate Panel to grant the Appeal, revoke the first instance Verdict and hold a trial, or to remand it to the first instance Panel for reconsideration, or, exceptionally, to revise the Verdict and impose a substantially more lenient sentence on the Accused Đurić.

8. Defense Counsel for the Accused Duško Jević, Attorney Vera Lazić, filed a Response to the Prosecution Appeal, moving the Appellate Panel to refuse as unfounded the Prosecution Appeal from the acquittal of the Accused Neđo Ikonić and Goran Marković, and to uphold the first instance Verdict, that is, the acquittal of the Accused Ikonić and Marković.

9. Defense Counsel for the Accused Neđo Ikonić, Attorney Nenad Rubež, filed a Response to the Prosecution Appeal, moving the Appellate Panel to refuse as unfounded the Prosecution Appeal relative to the Accused Neđo Ikonić and to uphold the first instance Verdict acquitting the Accused Ikonić of the charges.

10. Defense Counsel for the Accused Goran Marković, Attorney Veljko Ćivša, filed a Response to the Prosecution Appeal, moving the Appellate Panel to refuse the Appeal as unfounded and to uphold the first instance Verdict.

11. The Prosecution filed a Response to the Appeal by the Defense Counsel for the Accused Duško Jević, moving the Appellate Panel to refuse the Appeal as unfounded.

12. The Prosecution filed a Response to the Appeal by the Defense Counsel for the Accused Mendeljev Đurić, moving the Appellate Panel to refuse the Appeal as unfounded.

13. Pursuant to Article 304 of the CPC B-H, the Appellate Panel held a session on 20 May 2013. Paragraph (4) of the Article provides that the Panel shall not be precluded from holding a session due to the failure of the parties and defense counsel who were duly informed to appear before the Court. Consequently, the session was held notwithstanding the absence of the Co-Counsel for the accused Duško Jević and Mendeljev Đurić, who had been duly informed.

14. At the session, the Prosecution and Defense Counsel for the Accused Duško Jević and Mendeljev Đurić briefly presented their respective Appeals and Responses. The Defense Counsel for the Accused Neđo Ikonić and Goran Marković also presented their Responses to the Prosecution Appeal. The parties and Defense Counsel reiterated the arguments they had presented in writing.

15. The Accused Duško Jević agreed with the arguments of his Defense Counsel and expressed regret for all victims in the war, in particular the victims in Srebrenica. He also stressed that he had not supervised or personally committed any crime and that his conscience was clear in that respect.

16. The Accused Mendeljev Đurić also agreed with the arguments of his Defense Counsel. He voiced his regret for the victims of the civil war. In addition, he stated that justice was not served with the first instance Verdict and that he had not done anything in contravention of the Geneva Conventions.

17. The Accused Neđo Ikonić and Goran Marković fully agreed with the arguments of their respective Defense Counsel.

18. Having reviewed the contested Verdict within the scope of the arguments raised in the appeals, the Appellate Panel, pursuant to Article 306 of the CPC B-H, rendered the decision as stated in the enacting clause, for the reasons that follow.

II. GENERAL CONSIDERATIONS

19. Prior to addressing each ground for appeal, the Appellate Panel notes that an appeal, pursuant to Article 295(1)(b) and (c) of the CPC B-H, must include the grounds for contesting the verdict and the reasoning behind the appeal.

20. Given that the Appellate Panel shall review the verdict insofar as it is contested by the appeal, pursuant to Article 306 of the CPC B-H, an appellant is required to draft his appeal in such a way that it may serve as a basis for reviewing the verdict.

21. In that respect, the appellant must specify the grounds on the basis of which he contests the verdict, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

22. Referring to appeal grounds in general terms only and arguing the alleged irregularities in the first instance proceedings without specifying which appeal grounds the appellant refers to, do not constitute a valid basis for reviewing the first instance Verdict. For that reason, the Appellate Panel refused the uncorroborated and unclear appeal arguments as unfounded.

III. SENTENCING PART OF THE CONTESTED VERDICT

A. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC B-H: ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

1. Standards of review

23. A Verdict may, pursuant to Article 296 of the CPC B-H, be contested on the grounds of essential violations of the criminal procedure provisions. The essential violations of the criminal procedure are prescribed under Article 297 of the CPC B-H.

24. As to the gravity and significance of the procedure violations, the CPC B-H differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced verdict (absolutely essential violation), and such violations regarding which it us up to the Court to assess, in each specific case, whether they have or could have affected the validity of the verdict (relatively essential violation).

25. Absolute essential violations of the CPC B-H are listed in Article 297(1)(a) through (k) of the CPC B-H.

26. Should the Appellate Panel establish an essential violation of criminal procedure provisions, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC B-H, except in the cases referred to in Article 314(1) of the CPC B-H.

27. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a verdict the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

28. 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. Further, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC B-H was not violated.

2. Appeal by the Defense for the Accused Duško Jević and Mendeljev Đurić

(a) Sub-Ground One: Article 297(1)(d) of the CPC B-H – The Defense argues that the right to a defense was violated; and Article 297(1)(i) of the CPC B-H - The Defense argues that the Verdict is based on evidence that may not be used as the basis of a verdict under the CPC B-H

29. The Appellate Panel notes that the right to a Defense for the Accused Duško Jević has not been violated and also considers unfounded the appeal arguments of the respective Defense Counsel for the Accused Duško Jević and Mendeljev Đurić that the first instance Verdict is based on unlawful evidence, hence it has refused the appeal arguments of the Defense Counsel as unfounded.

(i) Appeal arguments of the Defense for the Accused Duško Jević

30. The Defense considers that, given that the Court could not provide for a cross-examination of the Prosecution witnesses Dragan Obrenović, Robert A. Franken, Leendert Cornelis van Duijn, Vicentius Egbers, Martijn Anne Mulder and witness PW-100, or at least witnesses who are citizens of Bosnia and Herzegovina, Ljubomir Borovčanin and Momir Nikolić, it should not have admitted the transcripts of these witnesses as evidence. The admitting of the anonymous witness' statement constitutes a particular violation. This conduct brought about a violation of the right of the Accused guaranteed by Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), namely a violation of the right referred to in Article 6(3) of the ECHR. Unconvincing is the argument that *"the Court did not base the Verdict on the referenced evidence to a decisive measure"*, given that an analysis of the Verdict shows that the Panel based the Verdict finding the Accused Duško Jević guilty of the criminal offense of

Genocide on the transcripts of the statements of witnesses Momir Nikolić (paragraphs 1019 and 1020) and Miroslav Deronjić (paragraphs 1025 and 1030).[1]

31. Witness Joseph Kingori (paragraphs 1021 and 1033) gave evidence on certain findings before the Trial Panel on 31 October 2011, whereby the Panel violated Article 281 of the CPC B-H when it admitted parts of the transcript of this witness' testimony given in other cases, without having him testify about those particular circumstances at the main trial in this case.[2]

32. Additional reason not to admit the statements from the transcripts of Momir Nikolić and Dragan Obrenović without prior cross-examination is the fact that they were convicted on the basis of a plea agreement. For that reason, a particular attention and caution should always be paid in evaluating their statements' authenticity (decision of the Constitutional Court of B-H No. AP-661/04 of 22 April 2005), all the more so because the Court of B-H has established a practice of examining witnesses who cannot attend via video link.[3]

33. By admitting the transcripts of examination in other cases of witnesses Miroslav Deronjić, Ćamila Omerović and Luka Marković, who had meanwhile died, the Trial Panel violated Article 273(2) of the CPC B-H because the statements of these witnesses had not been taken during the investigative proceedings against the Accused Duško Jević.[4]

34. Dean Manning was examined as a witness, and tendered into the case file were also the transcripts of his forensic analyses and corroborating evidence (DT-75, DT-75a, 75b, 75c, 75d, 78, 83, 85, 88, 89), which, by their character, correspond to an expert witness' finding and opinion. Given that the Defense was not given an opportunity to cross-examine the expert witnesses who had made reports, the Defense's right to cross-examine expert witnesses was violated, since Manning was examined as a witness, hence the admission of the referenced evidence into the case file is contrary to Article 98(3) and Article 270(5) of the CPC B-H.[5]

[1] Appeal by the Defense for the Accused Duško Jević, pp. 2-3.
[2] Appeal by the Defense for the Accused Duško Jević, pp. 3-4.
[3] Appeal by the Defense for the Accused Duško Jević, p. 4.
[4] Appeal by the Defense for the Accused Duško Jević, p. 5.
[5] Appeal by the Defense for the Accused Duško Jević, p. 5.

35. In that respect, the reports of specialized institutions on the materials that were subject of forensic analysis (attachments to exhibits DT-76, 77, 86, 87) were also not admitted into the file, pursuant to Article 270(5) and Article 271(1) of the CPC B-H, as authorized representatives of these institutions were not examined before the Court as expert witnesses.[6]

36. The Defense Counsel emphasized in the Appeal that, having in mind the argument of a violation of the right to a defense, he considered that the evidence such as the statements and the transcripts of the witnesses examined before the International Criminal Tribunal for the Former Yugoslavia (ICTY), with respect to which the Defense was not allowed to conduct cross-examination, as well as the reports of the institutions that conducted forensic analyses of materials and whose representatives were not examined as expert witnesses in these proceedings, constitute unlawful evidence as it was obtained through essential violations of the CPC B-H.[7]

37. The statements of Duško Jević and Mendeljev Đurić given as suspects to the ICTY investigators on 18 October 2000 (referred to on page 261 of the first instance Verdict), were obtained through violations of Article 78 of the CPC B-H, whereby an essential violation of the procedure referred to in Article 297(i) of the CPC B-H was committed. It was on this unlawful evidence that the Trial Panel established the decisive facts concerning the presence of the Accused Duško Jević in front of a hangar of the *Kravica* Farming Cooperative in the evening of 13 July and morning of 14 July 1995. In other words, the summons to these witnesses did not indicate the capacity in which they were summoned, the investigator did not notify them of the facts of the acts or of the criminal offense they were charged with. While questioned in the capacity as suspects, neither the Accused Duško Jević nor the Accused Mendeljev Đurić gave their statements in the presence of Defense Counsel, and the Trial Panel admitted the records of their questioning as evidence pursuant to Articles 1, 3 and 7 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of B-H and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in Bosnia and Herzegovina (the Law on Transfer), that is, pursuant to Rule 42 of the ICTY Rules of Procedure and Evidence. In the

[6] Appeal by the Defense for the Accused Duško Jević, p. 5.
[7] Appeal by the Defense for the Accused Duško Jević, p. 5.

case at hand, Article 78(2)(c) of the CPC B-H, which is a *lex specialis* in relation to the Law on Transfer, should have been applied in the first place.[8]

(ii) Appeal argument of the Defense for the Accused Mendeljev Đurić

38. Defense Counsel argues that in the contextual part of the enacting clause of the Verdict the statements of witnesses which were admitted into evidence pursuant to the Law on Transfer were used, namely the statements of Momir Nikolić, Dragan Obrenović, Cornelis van Duijn, and partially also the statements of witnesses Paul Groenwegen, Robert Franken, Vincentius Egbers and Martijn Anne Mulder. Despite the fact that on 10 May 2011 the Trial Panel granted the Defense motion to have these witnesses cross-examined, not one of them appeared in the courtroom or presented to the Court a valid reason why their cross-examination was not possible, although all of them had been cross-examined in other cases before the ICTY. The Trial Panel, therefore, acted contrary to Article 273(2) of the CPC B-H and based the Verdict on the evidence on which a verdict cannot be based. Given the fact that the Trial Panel's position was based exclusively on such evidence, the Panel committed an essential violation of the criminal procedure provisions referred to in Article 297(1)(i) of the CPC B-H.[9]

39. The Defense Counsel considers that the Trial Panel should not have admitted and based its Verdict on the statement of witness S-101. Considering the fact that the witness changed his statement from the investigation stage, which he justified by the fact that the investigator had exerted pressure on him, if the Trial Panel was of the opinion that his testimony should nevertheless be accepted, then the Panel should have decided which of the two was credible -- his statement from the investigation stage or his evidence at the main trial. In reality, the Trial Panel took as relevant a part of the statement given in the investigation stage and a part of the statement from the main trial, while it did not admit certain parts of the witness' statements at all.[10]

[8] Appeal by the Defense for the Accused Duško Jević, pp. 6-7.
[9] Appeal by the Defense for the Accused Mendeljev Đurić, p. 2.
[10] Appeal by the Defense for the Accused Mendeljev Đurić, p. 2.

a. Findings of the Appellate Panel

40. Article 297(1)(d) of the CPC B-H stipulates that essential violation of the provisions of criminal procedure shall be established if the Accused's right to a defense was violated. This implies that rules of the procedure were not applied or were misapplied to the detriment of the Accused whereby his right to a defense was denied.

41. Also, Article 297(1)(i) of the CPC B-H stipulates that an essential violation of the provisions of criminal procedure exists if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code.

42. First of all, the Appellate Panel notes that in this part of the Verdict it will explain its decisions regarding the appeal grievances of a violation of the right to a defense and unlawful evidence, given that the Defense Appeals are drafted in such a way that these grievances are mutually related and require a single analysis on the part of the Court.

43. The Appeals by the respective Defense Counsel for the Accused Duško Jević and Mendeljev Đurić contest the decision of the Trial Panel in the part related to the use of witnesses' statements which were admitted into evidence pursuant to the Law on Transfer, namely the statements of Momir Nikolić, Dragan Obrenović, Joseph Kingori, Paul Groenwegen, Robert A. Franken, Leendert Cornelis van Duijn, Vicentius Egbers, Martijn Anne Mulder, PW-100, Dean Manning, Rutten Johaness, as well as the statements of the deceased witnesses Miroslav Deronjić, Ćamila Omanović and Luka Marković, and in that respect this Panel concludes that the referenced grievances are unfounded.

44. The contested Verdict provides a clear and detailed explanation of the reasons why the Trial Panel admitted the transcripts of the referenced witnesses' statements, and this Panel also accepts these inferences as proper. In the case at hand, the Trial Panel properly applied the Law on Transfer, which, according to the contested Verdict, is a *lex specialis* in relation to the CPC B-H and which specifies the conditions and the manner of transfer of cases to the Prosecutor's Office of B-H by the ICTY and the use of evidence collected by the ICTY in the proceedings before the courts in Bosnia and Herzegovina.

45. It should also be noted that the Trial Panel used up all available possibilities to summon the referenced witnesses to give evidence before the Court of B-H and be cross-examined by the Defense, but it encountered many obstacles, due to the fact that some witnesses enjoyed diplomatic immunity (members of the Dutch Battalion), some were

serving their sentences and the ICTY did not approve of their giving evidence (Momir Nikolić, Dragan Obrenović, Ljubomir Borovčanin), the whereabouts of some witnesses were unknown, and the ICTY refused a motion for disclosure of the identity of witness PW-100. The fact that the Trial Panel did not manage to summon the witnesses to give evidence directly before this Court for objective reasons does not mean that the Panel violated the right to a defense and that the evidence obtained pursuant to the Law on Transfer is unlawful.

46. When evaluating these witnesses' statements given in other cases, the Trial Panel was mindful of Article 3(2) of the Law on Transfer stipulating that courts shall not base a conviction of a person solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at trial. The Trial Panel decided on the quality of the referenced statements based on the principle of free evaluation of evidence, by evaluating every piece of evidence individually and in its correspondence with the rest of the evidence.

47. Based on the foregoing, the Appellate Panel finds the referenced grievances unfounded and stresses that the charges against the Accused Duško Jević and Mendeljev Đurić were not based solely or to a decisive extent on the statements of these witnesses, but were also corroborated with other evidence that was directly adduced before this Court.

48. This conclusion of the Appellate Panel also concerns the statements of the deceased witnesses Miroslav Deronjić, Ćamila Omanović and Luka Marković. In that respect, this Panel finds that the Trial Panel admitted these witnesses' statements pursuant to Article 273(2) of the CPC B-H, which clearly stipulates an exemption to the direct presentation of evidence if the examined persons have died. Irrespective of the fact that the referenced statements were not taken in the investigation stage in the criminal proceedings at hand, but actually in other cases conducted before the ICTY, they were taken under the rules in effect before the authorized Prosecutor's Office and Court, and, as such, they are credible, authentic and admissible in the case at hand. Therefore, contrary to the grievances, the referenced evidence was admitted into the body of evidence in line with the Law on Transfer, as a *lex specialis*, and with the CPC B-H.

49. With respect to the testimony of Dean Manning and the reports that the witness made as an expert witness before the ICTY, the Appellate Panel does not find the

grievance of the Defense to be well-founded, because it is not contestable that Dean Manning was a witness in the criminal proceedings at hand and that the reports that he made constitute lawful evidence given that they were admitted into the case file pursuant to the Law on Transfer.

50. The contested Verdict properly notes that these pieces of documentary evidence were also admitted into the body of evidence pursuant to Article 3 of the Law on Transfer. Given the fact that they were obtained in accordance with the Statute and the Rules of Procedure and Evidence (RoPE) of the ICTY, pursuant to the referenced provision they may be used in the proceedings before courts in Bosnia and Herzegovina, but the final evaluation of their probative value will be rendered by the Panel in the context of the other presented evidence.

51. The Trial Panel acted with due diligence when it comes to this evidence, so it had in mind the fact that a conviction cannot be based solely or to a decisive extent on the prior statements of witnesses who did not give oral evidence at the main trial. Therefore, witness Dean Manning gave evidence via video-link so that the Defense could cross-examine the witness about the drafted reports, whereby the Trial Panel honored the right of the Accused to a defense.

52. This Panel, therefore, concludes that Dean Manning is a credible and reliable witness and that the reports he had made constitute lawful evidence despite the claims to the contrary by the Defense.

53. With respect to the statements that the Office of the Prosecutor (OTP) of the Hague Tribunal took from the Accused Duško Jević and Mendeljev Đurić, the Appellate Panel concludes that these statements had been taken in accordance with the ICTY Statute and RoPE, and are, therefore, lawful and admissible in these criminal proceedings as they were admitted pursuant to the Law on Transfer, which makes the grievances in that respect unfounded.

54. The Trial Panel properly established that the OTP of the Hague Tribunal instructed the Accused about all their rights during the questioning, whereby the procedural requirements referred to in Rule 42 (Rights of Suspects during Investigation) and Rule 43 (Recording Questioning of Suspects) of the RoPE were met, to which the Trial Panel justifiably referred in the contested Verdict.

55. When evaluating the legality of the referenced statements, the Trial Panel also applied Article 10 of the CPC B-H and reached a proper conclusion that the Defense had not submitted any piece of evidence about a prohibited treatment of the Accused during the questioning.

56. Witness Jean Gagnon, an ICTY investigator, also confirmed that there were no irregularities during the taking of the statements from the Accused Duško Jević and Mendeljev Đurić. He testified about the circumstances under which the investigative actions were conducted and information obtained in the investigation, and the Defense Counsel for the Accused had an opportunity to examine him. On that occasion the witness explained that the statements had been taken from the suspects in compliance with all rights guaranteed by the RoPE.

57. Nevertheless, the Trial Panel evaluated whether the statements acquired in a lawful manner could be used as evidence against the Accused if the Accused decides to remain silent at the trial, as was the case with the Accused Duško Jević and Mendeljev Đurić.

58. In that respect, the contested Verdict properly states that, when giving the referenced statements, the Accused waived their right to remain silent and that the waiver was documented and clarified, hence the admission of the referenced statements does not constitute a violation of the right of the Accused to remain silent.

59. It follows clearly from the foregoing that the Accused gave the referenced statements to the OTP willingly and knowingly and that these statements have been admitted in the criminal proceedings at hand as lawful evidence, in accordance with the Law on Transfer. Finally, the Trial Panel used the statements of the Accused very restrictively as the corroborating evidence only.

60. Based on the foregoing, when reviewing the grievances of the Defense Counsel for the Accused Duško Jević and Mendeljev Đurić regarding the justifiability of admitting the previous statements into the case file pursuant to the Law on Transfer, the Appellate Panel finds the grievances to be unfounded as the relevant ICTY rules were complied with.

61. On the other hand, the Appellate Panel concludes that the statements were lawfully obtained in those situations in the case at hand where the questioning procedures referred to in Article 78 of the CPC B-H were not applicable and in the situations where the Hague

investigators acted in compliance with the ICTY rules on the questioning of suspects.

62. Having reviewed the contested Verdict, the Appellate Panel has established that the Trial Panel evaluated the evidence with due diligence, both the individual pieces of evidence and their mutual correspondence, with a view to evaluating their probative value. Having in mind that the value of the referenced statements had previously been established, they cannot be disregarded, given the fact that their contents provide ample details on the events concerned that only the perpetrator can be familiar with. However, as stated earlier, the statements as such cannot constitute the sole evidence on which a conviction shall be based, and that is not the case here, anyway, contrary to the arguments in the Appeal.

63. An inspection of the case file shows that the Trial Panel had at its disposal a considerable quantity of evidence corroborating the statements of the Accused and that it considered them to be reliable.

64. Based on the foregoing, the Appellate Panel concludes that the Trial Panel evaluated the evidence that was not directly presented at the main trial in the light of the other evidence and proven facts, and that it did not base its decision on certain counts of the Indictment on that evidence alone.

65. The Appellate Panel also finds unfounded the grievance that the Trial Panel should not have admitted the statement of witness S-101 or based its Verdict on it, as Bajro Kulovac, investigator of the State Investigation and Protection Agency (SIPA), and Muris Brkić, investigator of the Prosecutor's Office of B-H, had allegedly exerted pressure on the witness.

66. Given that the Defense had presented this argument in the first instance proceedings as well, the Trial Panel organized a confrontation of witness S-101 with these investigators in order to eliminate all doubts with respect to the truthfulness and reliability of the statement of witness S-101.

67. The contested Verdict reads that the protected witness claimed that the investigators had contacted and visited him in his family house repeatedly, exerting various kinds of pressure on him so that he would confirm in his statement the presence of the Accused Duško Jević and Mendeljev Đurić at the time of the transportation of civilians in Potočari, in front of the *White House* (*Bijela kuća*) where Muslim men had been

detained, and during the executions.

68. In that respect, the Trial Panel concluded that at the main trial this witness did not depart from his statement given in the investigation stage, and that at the hearing at which he was confronted with investigator Bajro Kulovac he stated that he adhered to what he had said before the Court, as *"there is nothing disputable"* in it.

69. It should also be stressed that the Trial Panel established that this witness had ample relevant and first-hand information about the events that are the subject of this Indictment. However, it was also mindful of the unauthorized pressures by the prosecution authorities, confirmed by his wife who was examined as witness S-127, hence it rendered a proper decision that any conclusion by the Court on any relevant fact in the case at hand would not be based solely or to a decisive extent on this witness' statement.

70. Based on the foregoing, the Appellate Panel concludes that in the case at hand there were instances of certain inappropriate pressures exerted on witness S-101 by the investigators, but that the pressures did not exceed the limit set forth in Article 10 of the CPC B-H required to make this piece of evidence unlawful.

71. Therefore, when it comes to the inappropriate influence on witness S-101 in the investigation stage of these proceedings, argued in the Appeal, the contested Verdict provides clear and sufficient arguments, which the Appellate Panel also accepts as proper.

72. The Appellate Panel, therefore, concludes that the arguments by Defense Counsel for the Accused Duško Jević and Mendeljev Đurić related to the unlawfulness of evidence and violation of the right to a defense lack the necessary factual and logical grounds, and shall be refused as such in their entirety.

(b) Sub-Ground Two: Article 297(1)(j) of the CPC B-H – The Defense argues that the charge has been exceeded

73. The Appellate Panel concludes that the appeal arguments on the exceeding of the charges are unfounded.

(i) Appeal arguments of the Defense for the Accused Duško Jević

74. The Defense considers that the charge has been exceeded, as referred to in Article 297(1)(j) of the CPC B-H, given that the amended Indictment charged the Accused Duško Jević and Mendeljev Đurić with membership in a Joint Criminal Enterprise (JCE). The Trial Panel then unlawfully amended the enacting clause of the Indictment by convicting the Accused Duško Jević for aiding and abetting in the alleged JCE and finding that he had commanded and supervised members of the 1st Company in the undertaking of the actions they were found guilty of.[11]

75. By the acts described in paragraph 764 of the contested Verdict, the Accused Duško Jević committed the criminal offense referred to in Article 180(2) of the CC B-H and the Court accepted this legal definition, whereas the amended Indictment charges him with the perpetration of the acts referred to in Article 180(1) of the CC B-H, whereby the Court exceeded the charge and thus committed an essential violation of the criminal procedure provisions referred to in Article 297(1)(j) of the CPC B-H.[12]

a. Findings of the Appellate Panel

76. Having reviewed the grievance of the Defense Counsel for the Accused Duško Jević that the charge was exceeded with the contested Verdict, the Appellate Panel first points at Article 280(1) of the CPC B-H prescribing that the verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed. In that respect, the law requires the existence of the subjective and objective identity between the indictment and the verdict. The matter of the subjective identity of the verdict and the Indictment shall be resolved by checking the identity of the person against whom the criminal proceedings were conducted and the first instance verdict rendered. The objective identity of the offense is preserved if the offense in the verdict is identical or only slightly different from the one referred to in the indictment, but it must never be more stringent for the Accused than the one referred to in the indictment.

77. In that respect, if a comparison is made between the description of facts in the Indictment No. KT-RZ-101/07 of 15 January 2010, confirmed on 22 January 2010 and

[11] Appeal by the Defense for the Accused Duško Jević, pp. 9-10.
[12] Appeal by the Defense for the Accused Duško Jević, pp. 33-34.

amended on 6 March 2012, and the description of facts in the enacting clause of the contested Verdict, it is clear that the Trial Panel did not amend the description of facts of the relevant act of the criminal offense the Accused Duško Jević is charged with in the amended Indictment by way of charging him more severely.

78. In other words, the Appellate Panel does not consider as proper the Defense arguments that the charge was exceeded when the Trial Panel convicted the Accused Duško Jević of aiding and abetting Genocide, although the Indictment had charged him with membership in the JCE.

79. In that respect, this Panel notes that, pursuant to Article 280(2) of the CPC B-H, the Court is not bound by the legal definition of the criminal offense from the Indictment. A modification of the legal definition is permitted if the criminal offense is described in the description of facts in the Indictment and if it is not more stringent for the Accused. Consequently, this Panel does not consider logical and legally well-founded the Defense grievance that a modification of the legal definition of the criminal offense as such constitutes an exceeding of the charge.

80. Therefore, the Trial Panel properly argues in the contested Verdict that the evidence adduced at the main trial does not provide sufficient grounds for the Trial Panel to conclude that a plan or agreement for killing the detainees and their forcible transfer existed between the Accused Duško Jević and Mendeljev Đurić, and some members of the JCE of the murder of men, or that they shared with them the specific intent for destruction of the group, although they were aware of it. Therefore, the Trial Panel did not find that the Accused had acted as co-perpetrators within any JCE, but that their acts may be characterized as acts of aiding in the commission of the criminal offense of Genocide and that their responsibility may be established in that respect. The foregoing leads to the conclusion that the legal definition of the criminal offense was changed in favor of the Accused Duško Jević, given that he has been convicted of aiding and abetting in a JCE, which is undoubtedly more lenient than the (co-)perpetration in the JCE as charged in the Indictment.

81. The Trial Panel only made the description of the facts in the Indictment more precise after the completion of the evidentiary proceedings, which is also clear from the arguments in the first instance Verdict that the Indictment attempted to charge the Accused with all the killings referred to therein as members in the III Category JCE. The

Trial Panel did not find the grounds for it in the adduced evidence, hence it omitted the killings and the events that were not proven from the enacting clause of the Verdict, given that they did not constitute separate criminal offenses, but the underlying offenses of the crime of Genocide that the Accused were charged with.

82. Also, the Appellate Panel does not find well-founded the grievance that the contested Verdict charged the Accused Duško Jević with the legal definition referred to in Article 180(2) of the CC B-H, for the aforementioned does not follow either from the enacting clause or the reasoning of the contested Verdict. The fact that the Accused Duško Jević was Assistant Commander of the Special Police Brigade of the MUP RS and Commander of the Jahorina Training Center of the Special Police Brigade was not contested in any way, but that fact does not inherently constitute the command responsibility of the Accused in the case at hand.

83. Based on the foregoing, the appeal arguments and grievances of Defense Counsel for the Accused regarding the alleged exceeding of the charges are completely unfounded, therefore the Appellate Panel states that in the case at hand there was no violation of Article 297(1)(j) of the CPC B-H.

(c) Sub-Ground Three: Article 297(1)(k) of the CPC B-H – The Defense for the Accused argue that the wording of the Verdict is incomprehensible, internally contradictory or contradicts the grounds of the Verdict or it does not cite reasons concerning the decisive facts

84. The Appellate Panel does not consider the appeal grievances of Defense Counsel for the Accused Duško Jević and Mendeljev Đurić to be well-founded. Defense Counsel argue that the enacting clause of the first instance Verdict contradicts the grounds of the Verdict and that the Verdict does not cite the reasons concerning the decisive facts.

(i) Appeal arguments of the Defense for the Accused Duško Jević

85. According to the Defense, the Trial Panel committed a violation of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC B-H when it refused without explanation the motion of the Defense Counsel for the Accused Duško Jević to admit as established the facts adjudicated in the ICTY case of *Vujadin Popović et al.*, No.

IT-05-88-Tu, concerning the final and legally binding part of the Verdict, especially if taken into account that in the case against Radomir Vuković, the Appellate Panel of the Court of B-H admitted 43 established facts from the same ICTY Judgment.[13]

86. The Appeal notes that by the contested Verdict the Trial Panel acquitted the Accused Duško Jević of the charge for membership in the JCE of murder, and that he was acquitted for the so-called "*incidental killings"*. The Appeal argues that the Trial Panel committed an absolutely essential violation of the criminal procedure provisions and a violation of the right to a fair trial by charging the Accused Jević with the events he had not participated in and of which his knowledge was not proven.[14]

87. The Verdict is incomprehensible as its reasoning contradicts its enacting clause, and in that sense the Defense argues that this violation is manifested in the fact that the Accused Duško Jević was found guilty of killing the bedridden old man referred to in paragraph 1 of the enacting clause of the contested Verdict, while it is beyond doubt from the Verdict's reasoning that this event has remained absolutely unexplained, and that the Accused Jević did not commit the referenced offense, moreover he was not even aware of it (paragraphs 343-352, 348 and 349).[15]

(ii) Appeal arguments of the Defense for the Accused Mendeljev Đurić

88. The Appeal reads that in the reasoning of the Verdict the Trial Panel did not provide valid arguments to corroborate the parts of the enacting clause relative to:

- the Trial Panel's conclusion that the Accused Mendeljev Đurić held the duty of the Commander of the 1st Company of the Jahorina Training Center,

- the conclusion that the Accused Mendeljev Đurić acted with the intent of summarily executing 7,000-8,000 Bosniak men,

- and the conclusion that the Accused ordered members of the 1st Company to participate in the forcible transfer of the Bosniak civilian population from Potočari, the separation of the able-bodied men and their detention in the so-called *White House*, and

[13] Appeal by the Defense for the Accused Duško Jević, p. 12.
[14] Appeal by the Defense for the Accused Duško Jević, p. 14.
[15] Appeal by the Defense for the Accused Duško Jević, pp. 13-15.

the subsequent mass killing of the detained Bosniak men in the warehouse of the *Kravica* Farming Cooperative.[16]

89. The enacting clause of the Verdict is particularly conceptually incomprehensible as it introduces collective responsibility of the Accused Duško Jević and Mendeljev Đurić, since in every part of the enacting clause it is said that the two of them "*ordered and supervised*" or the phrase "*under their command and supervision*" is used, but their acts and, consequently, responsibilities are not individualized. Given that the Trial Panel determined that the form of responsibility applicable to the Accused was individual criminal responsibility pursuant to Article 180(1) of the CC B-H, it would have implied that the enacting clause of the Verdict contained a specific description of the acts ordered and supervised by the Accused Jević, and a description of the acts ordered and supervised by the Accused Đurić. As it is, it follows that both Accused ordered one and the same thing, which is impossible in the system of unity of command and subordination where an officer senior by rank and formation orders a junior officer, and the junior can only pass on the order. The Defense notes that it can be seen from the enacting clauses of the ICTY Judgments in the *Krstić* case and the *Blagojević and Jokić* case, which the Trial Panel often refers to in the legal description, that General Krstić and Colonel Blagojević had already been convicted of a part of the referenced acts that the Trial Panel convicted the Accused Jević and Đurić of as the order-issuing authorities.[17]

90. The Defense also considers that the Accused Duško Jević, as the Commander of the Jahorina Training Center, as he was referred to in the enacting clause of the Verdict, could issue a direct order to the Commander of the Platoon of the 1st Company "bypassing" the Accused Mendeljev Đurić.[18]

91. With respect to the part of the enacting clause of the Verdict reading that the Accused Duško Jević and Mendeljev Đurić are individually criminally liable for aiding and abetting in the "summary" executions of 7,000-8,000 Bosniak men, the Defense is of the opinion that the clause is essentially incorrect in that part.[19]

[16] Appeal by the Defense for the Accused Mendeljev Đurić, p. 3.
[17] Appeal by the Defense for the Accused Mendeljev Đurić, p. 3.
[18] Appeal by the Defense for the Accused Mendeljev Đurić, p. 4.
[19] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 6-8.

92. The Defense also considers as absolutely arbitrary and unfounded the Trial Panel's opinion presented in paragraphs 396 and 397 of the reasoning of the Verdict that the Accused Jević and Đurić took active part in the forcible transfer of the population and thus aided and abetted the commission of genocide, given that there is not a single testimony stating directly that the Accused Đurić personally, by way of individual responsibility, generated any humanitarian crisis, that he contributed in any way the rendering of the decision that the population should move in the direction of Potočari, that during the two days he was in Potočari he personally forced anyone to go toward the buses and Kladanj, or that he ordered any member of the Jahorina Training Center to do anything like that. For that reason the Trial Panel's evaluation of the Prosecution Exhibit T1 of 13 July 1995 provided in paragraph 395 of the reasoning of the Verdict, as well as its evaluation in paragraphs 394 and 395 of the reasoning of the Verdict, are absolutely biased and malicious.[20]

93. The key issue of responsibility of the Accused Mendeljev Đurić in Potočari is described in paragraph 2 of the enacting clause of the first instance Verdict, according to which the Accused Duško Jević and Mendeljev Đurić "ordered members [of the 1st Company of the Jahorina Training Center] to separate in Potočari several hundred Bosniak men [from their families]", aware that the men would be summarily executed. The Defense stresses that paragraphs 481-506 of the reasoning of the Verdict lack arguments which would corroborate such a conclusion of the Trial Panel. In other words, none of the witnesses on whose evidence the Court based such a conclusion has said that he had received any order from the Accused Đurić related to the separation of the able-bodied men from their families, which the Trial Panel also states in the reasoning of the Verdict.[21]

a. Findings of the Appellate Panel

94. An absolutely essential violation of the criminal procedure provisions pursuant to Article 297(1)(k) of the CPC B-H exists when either the enacting clause of the reasoning of the first instance Verdict, as a formal judicial act, contains certain defects of such nature so as to prevent an evaluation as to whether the Verdict is lawful and proper.

[20] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 9-11.
[21] Appeal by the Defense for the Accused Mendeljev Đurić, p. 11.

95. After a detailed and comprehensive analysis of the enacting clause of the contested Verdict, the Appellate Panel concludes that it was sufficiently clear and comprehensible and that the reasons in the reasoning were not contradictory. The Appellate Panel concludes that the form and the contents of the Verdict are in accordance with the provisions of the procedural law and that there was no violation of the law in that respect, either.

96. The contested Verdict also provides reasons on decisive facts relevant to adjudication in this criminal matter, with a detailed and comprehensive analysis of all pieces of evidence, individually and in terms of their mutual correspondence.

97. Contrary to the appeal grievances by the Defense, the Trial Panel did provide a detailed explanation for each paragraph of the enacting clause of the Verdict related to the Accused Duško Jević and Mendeljev Đurić, that is, the Panel presented its position about the reasons that made it render its decision. The fact that the conclusions of the Trial Panel are not in favor of the Defense for the Accused does not mean that they are not well-founded or not based on the body of evidence.

98. In the contested Verdict the Trial Panel reviewed and evaluated all presented evidence, but referred to those pieces of evidence that were relevant to the rendering of the decision, and in the reasoning the Panel presented the conclusions about the facts that were of decisive importance for the decision.

99. Therefore, this Panel refuses as unfounded the appeal argument that an evaluation of the evidence and facts in favor of the Accused is lacking. Nevertheless, this Panel will examine in more detail the referenced appeal argument in the part of the Verdict related to the erroneously and incompletely established state of facts.

100. With respect to the Defense motion at the main trial for the admission of facts from the case of *Vujadin Popović et al.* as established facts, the Appellate Panel concludes that the Trial Panel, after a careful review of the arguments and a detailed review of the applicable law related to the admission of adjudicated facts, decided to refuse the Defense motion, and this Panel also accepts that conclusion as a proper one.

101. The Trial Panel states in the contested Verdict that it concluded that the facts proposed in the Motion by the Defense for the Accused Duško Jević do not meet all required criteria, given that they originate from the ICTY Judgment in the case of *Vujadin*

Popović et al., which at the moment of the rendering of the decision was not final and binding, whereby one of the criteria of admissibility of established facts was not complied with.

102. The contested Verdict also reads that it is not clear under which criterion Defense Counsel singled out from that same Judgment the parts that were final and binding regarding one Accused only, Ljubomir Borovčanin, and thus declared the Judgment partially final and binding, without any relevant decision of the ICTY second instance chamber. In that respect, the Trial Panel also considered the fact that at that time the referenced Judgment had not yet been available in an official translation to the Bosnian/Croatian/Serbian language, so the unofficial translation of the paragraph from the submitted Motion could not be accepted as authentic anyway, so it was not suitable in the context of evaluating the admissibility of the proposed facts.

103. Therefore, the Appellate Panel concludes that the factual description of the criminal offense that the Accused Duško Jević and Mendeljev Đurić were charged with, as contained in the enacting clause of the contested Verdict, is clear, decisive and complete, and that it contains the facts and circumstances that constitute essential elements of the criminal offense of Genocide, prescribed in Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, of which the Accused were found guilty in the first instance proceedings, and the precise description of individual criminal acts referred to in all paragraphs of the enacting clause.

104. The appeal arguments that the factual description in the enacting clause should have referred to the individual acts of the Accused Duško Jević and Mendeljev Đurić are unfounded given that, through their command roles, the Accused committed the criminal acts together, either by issuing or by transmitting orders. Also, the Accused cannot be exculpated by the fact that their superiors were tried before the ICTY for the crimes committed in Srebrenica.

105. Therefore, the Defense Counsel pointed unjustifiably in their Appeals that the Trial Panel provided a cumulative factual description and reasoning for the Accused Duško Jević and Mendeljev Đurić without the required individualization, whereby the Accused would have been held responsible under the principle of "collective responsibility".

106. Paragraph 729 of the contested Verdict corroborates it: *"The Accused controlled all members of the 1st Company who participated in the executions. Therefore, it*

is not at all important if the soldiers received the order directly, or agreed to participate in the killings, because all members of the 1st Company were under the direct control of the Accused."

107. Also, with respect to the killing of the bedridden old Bosniak man by members of the 1st Company of the Jahorina Training Center, referred to in paragraph 1 of the enacting clause of the contested Verdict, the Appellate Panel concludes that it was an incident that the Accused Duško Jević was not charged with, although it is referred to in the description of the event concerned, because the charge related to the forcible transfer of the population, not to the killings.

108. The foregoing follows from the reasoning of the contested Verdict, in which the Trial Panel states that a terrain search is a military term and a legitimate military action, but it does not mean that in the course of its execution unlawful actions may be undertaken with impunity, such as the killings committed by the 1st Company members. In that respect, it should be stressed that the Trial Panel concluded that there was no evidence that the Accused Jević and Đurić, who took the main road, learned about the referenced killing at any moment, thereby they could not be expected to prevent or punish such conduct, which clearly indicates the absence of the element of "knowledge".

109. Based on the foregoing, the Appellate Panel does not think that there was an essential violation claimed by the Appeal, hence it notes that the referenced charge pertains solely to the forcible transfer of civilian population given that all criminal acts were perpetrated with a view to executing the forcible transfer. This is clear from the reasoning of the contested Verdict, which states that the description of facts refers to the killing of the bedridden old man as an incident, which does not lead to incomprehensibleness and contradiction between the enacting clause and the reasoning of the Verdict.

110. The Defense for the Accused Mendeljev Đurić contested that the Accused held the duty of Commander of the 1st Company of the Jahorina Training Center, claiming that it was not proven in any way in the contested Verdict, just as it was not proven that the Accused participated in the killing and forcible transfer of the Bosniak civilians.

111. In that respect, the Appellate Panel concludes that everything that was stated in the enacting clause of the contested Verdict was indeed proven, that is, that the reasoning of the Verdict does not lack the reasons confirming the factual description of the charges in

the enacting clause.

112. Contrary to the arguments of the Defense, the contested Verdict contains reasons regarding the duty carried out by the Accused Mendeljev Đurić, since the formational structure of the military and police forces in the territory of Srebrenica, to which the Accused belonged, is explained in detail.

113. It follows from the reasoning of the contested Verdict that the President of Republika Srpska determines the organization of the police force and issues orders for their engagement in times of war, and that the police may be subordinated to military command under the Minister's orders.

114. Radovan Sladoje testified in that respect. He explained that the two Companies had three platoons each, hence the 1st (First) Company, commanded by the Accused Mendeljev Đurić, comprised the 1st (First) Platoon, commanded by the Accused Goran Marković, the 2nd (Second) Platoon, commanded by Tomo Krstović, and the 3rd (Third) Platoon, commanded by Jevto Doder. The Accused Neđo Ikonić commanded the 2nd Company and Platoons' Commanders were witness Radovan Sladoje, Duško Kusmuk and Dejan Radojković.

115. In this context, the Trial Panel was also mindful of the fact that on 24 February 1994, the Accused Mendeljev Đurić was temporarily assigned the duties and tasks of a mines and explosive ordnance instructor in the Special Police Brigade, which position he held during the period concerned[22], and pursuant to the Decision dated 17 March 1996, he was appointed Assistant Commander for Operations and Training in the Special Police Brigade[23].

116. The contested Verdict gives a clear answer that, although at that time the Accused were not issued with official decisions on their appointments, which they received only later, in the opinion of the Trial Panel they *de facto* carried out the tasks of instructors in the Jahorina Training Center in their respective special fields in the period concerned and prior to it. In the course of the proceedings it was established beyond any reasonable doubt that the instructors acted as Platoon Commanders while on field missions.

[22] T-120 (Decision assigning Mendeljev Đurić to compulsory work service No. 08/1-120-3794 of 13 November 1995).

117. Having reviewed the referenced appeal argument, the Appellate Panel concluded that the Trial Panel provided adequate and sufficient arguments in the contested Verdict, completely confirming the facts from the enacting clause of the Verdict, whereby the Defense appeal argument is unfounded.

118. Based on the foregoing, the Appellate Panel concludes that the Appeals did not reasonably argue that the contested Verdict was improper and unlawful, hence this Panel concludes that the Trial Panel did not commit a violation referred to in Article 297(1)(k) of the CPC B-H.

(d) Sub-Ground Four: Article 297(2) of the CPC B-H – The Defense argues that the Court did not apply or incorrectly applied provisions of the CPC B-H, which affected the rendering of a lawful and proper verdict

119. The Appellate Panel concludes that the Trial Panel properly applied the provisions of the CPC B-H and that it did not commit an essential violation of the criminal procedure provisions stipulated in Article 297(2) of the CPC B-H.

(i) Appeal arguments of the Defense for the Accused Duško Jević

120. The Appeal argues that by admitting additional evidence in the closing stage of the trial, the Trial Panel committed a violation referred to in Article 297(2) of the CPC B-H, as read with Article 261(2)(c) and Article 276 of the CPC B-H, because the Prosecutor did not state which particular arguments of the Defense he would refute with which of the proposed additional evidence, while he corroborated the previously presented Prosecution evidence with it, and also because the Prosecutor was familiar with it during the presentation of the Prosecution evidence. Nevertheless, the Prosecution introduced it only in the closing stage of the proceedings for no justified reason and thus brought the Accused into a procedural position more difficult than the one he was in before this evidence was introduced.[24]

[23] Decision appointing Mendeljev Đurić the Assistant Commander for Operations and Training in the Special Police Brigade Command No. 09/3-120-1130 of 17 March 1996.
[24] Appeal by the Defense for the Accused Duško Jević, pp. 10-11.

121. The Appeal also argues that a particularly prominent defect of the contested Verdict is the absence of evaluation of credibility of the contradictory pieces of evidence, which constitutes a violation of Article 281(2) and Article 290(7) of the CPC B-H. Another defect of the contested Verdict is that it was drafted so as to quote or paraphrase only the parts of the Prosecution witnesses' statements in favor of conviction. It also used the parts of the witnesses' statements not given at the main trial, taking from them only the parts incriminating the Accused, while leaving out and not evaluating the parts in favor of the Accused.[25]

122. With respect to the essential violations of the criminal procedure referred to in Article 297(2) of the CPC B-H, the Defense argues that there is not one piece of direct or solid evidence that Duško Jević had the knowledge that the separated men in Potočari would be killed. Of the contradictory respective bodies of evidence of the Prosecution and the Defense regarding the Accused's knowledge, the Panel accepted the Prosecution evidence but did not provide any explanation for so doing or the reasons why it did not accept the relevant Defense evidence.[26]

a. Findings of the Appellate Panel

123. An essential violation of criminal procedure provisions under Article 297(2) of the CPC B-H, that is, a relatively essential violation, exists if the Court has not applied or has improperly applied some provisions of the CPC B-H before or during the main trial or in rendering the verdict, and this affected or might have affected the rendering of a lawful and proper verdict.

124. With respect to a relatively essential violation of the criminal procedure provisions, an appeal should not only point at the acts and omissions that reflect a non-application or misapplication of a certain provision of the procedural law, but also how and why that affected or might have affected the rendering of a lawful and proper verdict, or else a review of whether a relatively essential violation of the criminal procedure provisions was committed would turn into an *ex officio* review.

[25] Appeal by the Defense for the Accused Duško Jević, p. 37.
[26] Appeal by the Defense for the Accused Duško Jević, pp. 39-43.

125. In that respect, this Panel finds that the Appeal by the Defense Counsel for the Accused Duško Jević has not successfully proved that, due to the defects the Appeal points at, the Trial Panel rendered an unlawful and improper verdict, due to which the referenced appeal arguments are hereby refused as unfounded.

126. Therefore, mindful of the foregoing, the Appellate Panel notes that the Court is entitled to decide which evidence is relevant for the criminal proceedings at hand, that is, which evidence would facilitate the establishing of the truth in the specific case, and to accept it, as well as not to adduce all proposed pieces of evidence if they are not significant for the case or are unnecessary.

127. This Panel concludes that the Trial Panel did not commit an essential violation of the criminal procedure provisions when it accepted the Prosecution additional evidence, and that by doing so it did not bring the Accused Duško Jević in a less favorable procedural position, given that in his Appeal the Defense Counsel did not corroborate his argument with facts except for expressing his subjective belief that the additional evidence of the Prosecution influenced the decision of the Court. Also, the Defense could have refuted the contested evidence in the first instance proceedings, given the fact that the Defense, that is, the Accused is always given the last word.

128. Also, having reviewed the appeal argument concerning a violation of Article 14 of the CPC B-H, the Appellate Panel has reached the conclusion that when establishing and reviewing decisive facts in the contested Verdict the Trial Panel did not violate the methodological approach stipulated in the referenced provision and related to the standard of equality of treatment, since the Trial Panel reviewed all facts with equal attention, not disregarding a single one that was important for the adjudication. Therefore, the Defense appeal argument that an evaluation of facts in favor of the Accused Duško Jević is lacking is generalized and unfounded, in the opinion of this Panel.

129. The Appellate Panel also considers that the Trial Panel is in the best position to evaluate the credibility of a witness, which the Trial Panel indeed did and offered adequate reasons in that respect. The fact that the Trial Panel did not evaluate the evidence in a manner that would have suited the Defense, does not make the first instance Verdict defective and incomplete, but clear and focused on the essential elements of the criminal offense that the Accused is tried for. Also, if the Trial Panel has found as established facts to the detriment of the Accused, that is, facts which lead to the conclusion that the charges

have been proven, this does not inherently constitute the ground for a conclusion on a different treatment of the parties to the proceedings.

130. The Appellate Panel concludes that in the course of the criminal proceedings that preceded the rendering of the Verdict, the Trial Panel complied with its statutory obligation by having reviewed and established the facts related to the essential elements of the criminal offense, culpability of the Accused, establishing the requisite facts for the pronouncing of the appropriate criminal sanction, as well as the other facts on which the application of the relevant statutory provisions depends.

131. During the main trial the Trial Panel did not commit a violation of the law that would have the character of an essential violation of the criminal procedure provisions referred to in Article 297(2) of the CPC B-H, nor did the contested Verdict contain the defects of such character, which all leads to the conclusion that the relevant appeal grievances are unfounded.

B. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC B-H: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

1. Standards of Review

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

133. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond any 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.

134. 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.

135. 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."

136. Article 299 of the CPC B-H stipulates when a verdict may be contested because of erroneously or incompletely established state of facts. Decisive facts are established directly by evidence or indirectly from other facts (indications or control facts). Only the facts being established by a verdict may be regarded as existent, and irrespective of the existence of decisive facts conclusions about their existence must always be made, or else there is no the established factual status (incompletely established factual status). In case a certain decisive fact has not been established in the manner it existed in the reality of a certain event, then there exists an incorrectly established factual status.

137. The Constitutional Court of Bosnia and Herzegovina, 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.[27] 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.

2. Appeal by the Defense for the Accused Duško Jević and Mendeljev Đurić

138. The Appellate Panel concludes that the facts in the contested Verdict were correctly and completely established.

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

(a) Appeal arguments of the Defense for the Accused Duško Jević

139. According to the Defense, the Verdict abounds with ill-founded factual conclusions regarding the commission of the criminal offense of genocide, namely its paragraphs 922, 923 and 924, as there is no evidence indicating that all essential elements of this criminal offense have been satisfied.

140. The Defense comments on the part of the Verdict referring to the acts of the Accused Duško Jević and Mendeljev Đurić when deploying members of the 1st Company along the road on 12 and 13 July 1995 (paragraph 521), and stresses that the fact that the Accused Duško Jević was not present in front of the *Kravica* Farming Cooperative in the night of 13 July and the morning of 14 July has been proven beyond reasonable doubt, and refers to paragraphs 607, 460, 521, 527, 528, 1451, 1453 and 1458 in that respect. The Defense also stresses that witnesses S-101, S-118, Tomislav Krstović and S-104 did not see the Accused Jević in front of the hangar on the night of 13 July, and that witnesses S-101, S-118 and S-126 did not see the Accused in front of the hangar of the *Kravica* Farming Cooperative in the morning, either. Likewise, he was not seen by witness Siniša Renovica, who was passing by the hangar together with the Accused Neđo Ikonić in a vehicle. Having seen the loading of the dead bodies and not having found the Accused Jević in front of the warehouse, they left for Bratunac and reported what they had seen to Borovčanin (paragraph 703).[28]

141. The Defense refers to the testimony of witness S-101 and the pressure exerted by SIPA investigator Bajro Kulovac when this witness was giving a statement concerning the establishing of the decisive fact of the (non-)presence of the Accused Duško Jević in front of the hangar of the *Kravica* Farming Cooperative in the morning of 14 July 1995.[29]

142. The Defense also touches on the testimonies of witnesses S-119 and S-102, who testified about Jević's presence in front of the *Kravica* Farming Cooperative hangar in the early morning of 14 July, and argues that such a conclusion cannot be made beyond a reasonable doubt, as these assertions were not corroborated by any other piece of evidence. Therefore, pursuant to Article 23 of the Law on the Protection of Witnesses Under Threat and Vulnerable Witnesses, the Court shall not base a conviction either solely

[28] Appeal by the Defense for the Accused Duško Jević, pp. 16-21.
[29] Appeal by the Defense for the Accused Duško Jević, pp. 22-32.

or to a decisive extent on the evidence provided according to Article II-22 of the Law. These testimonies are completely contrary to the statements of witnesses Siniša Renovica, S-126 and Tomislav Krstović.[30]

143. The Defense contests the killings allegedly committed by Siniša Renovica, Commander of the 2nd Company Platoon (paragraphs 762, 763 and 764 of the contested Verdict), as the statements of witnesses S-123, S-124 and S-121 do not provide sufficient grounds for such a decision of the Trial Panel.

144. The Appeal contests the facts related to the terrain search of 17 and 18 July 1995, and emphasizes as a particular defect in the Verdict the absence of evaluation of credibility of contradictory evidence, which constitutes a violation of Article 281(2) and Article 290(7) of the CPC B-H. The Defense notes that the Verdict quotes or paraphrases only the parts of witnesses' statements that are in favor of a conviction, and that it uses parts of witnesses' statements not given at the main trial (witness Velomir Gajić), while leaving out the evaluation of those parts of witnesses' statements that are in favor of the Accused.[31]

145. The Defense gains an impression that the Trial Panel decided in advance not to trust the statements of Defense witnesses, such as, for example, the testimony of Nenad Andrić (Defense Exhibit I). However, the Trial Panel has a habit of trusting the Prosecution witnesses irrespective of their credibility and the fact that they were participants/co-perpetrators in the referenced events, namely witnesses S-100, S-105, S-102, S-110, S-119 and S-126.[32]

146. The Defense also comments on paragraph 117 of the contested Verdict related to the JCE and states that the state of the facts was incorrectly established and substantive law misapplied in that respect, since the existence of any JCE was not proven, hence the Accused Duško Jević should not have been found guilty as an aider and abettor of a JCE. The Defense also argues that it is impossible to find a person guilty of aiding and abetting a JCE whose members have not been precisely identified, since the opposite would mean

[30] Appeal by the Defense for the Accused Duško Jević, pp. 32-33.
[31] Appeal by the Defense for the Accused Duško Jević, pp. 34-38.
[32] Appeal by the Defense for the Accused Duško Jević, pp. 37-38.

depriving the Accused Jević of the right to be informed about the charges against him in detail, in accordance with the ICTY jurisprudence.[33]

147. Also, the Defense states that there is not one piece of direct or solid evidence of the Accused Duško Jević's knowledge that the men separated in Potočari would be killed. Of the contradictory respective bodies of evidence of the Prosecution and the Defense regarding the Accused's knowledge, the Trial Panel accepted the Prosecution evidence but did not provide any explanation for so doing, or the reasons why it did not accept the relevant Defense evidence.[34]

148. The Defense denies the presence, participation or existence of any knowledge on the part of the Accused Duško Jević concerning the acts as charged related to the hangar of the *Kravica* Farming Cooperative, the Sandići meadow and the Konjević Polje-Bratunac road, and the other incriminations, and states that all acts that the Accused Duško Jević undertook in the course of the search were lawful, permissible, and undertaken with a belief that they targeted members of the 28th Division, and the measures he undertook against these captives were measures against prisoners of war in accordance with statutory provisions.[35]

149. The Defense raises the question just how the Accused Duško Jević could have the awareness and knowledge that the Bosniak population from Srebrenica would be destroyed on the national, ethnic, religious and cultural grounds, if his superior Ljubiša Borovčanin, from whom he received all orders, has not been convicted of either genocide or aiding and abetting, but of crimes against humanity. Therefore, the Defense concludes that the Court of B-H takes over the facts and adduced evidence from the ICTY only if they suit the intentions of the Court.[36]

(b) Appeal arguments of the Defense for the Accused Mendeljev Đurić

150. The Trial Panel states in the enacting clause of the Verdict that the Accused Mendeljev Đurić was the Commander of the 1st Company of the Jahorina Training Center in the relevant period, and expounds on this conclusion in paragraphs 320-325 of the

[33] Appeal by the Defense for the Accused Duško Jević, pp. 38-39.
[34] Appeal by the Defense for the Accused Duško Jević, pp. 39-43.
[35] Appeal by the Defense for the Accused Duško Jević, pp. 41-42.

contested Verdict. The Defense considers that the Trial Panel did not establish beyond a reasonable doubt that the Accused Đurić *de facto* held the duty of the 1st Company Commander, but, as the Trial Panel admits in paragraph 176 of the Verdict reasoning, he carried out the task of an instructor in the Center, which indicates that he did not have a possibility, either *de facto* or *de iure*, to issue orders to any other instructor or "deserter".

151. The Accused never received any official or unofficial document on his appointment as Commander of the 1st Company of the Jahorina Training Center. The majority of the witnesses, including the majority of the "deserters", state that the Accused Đurić was one of the instructors in the Center, which was also confirmed by Prosecution witness Tomislav Krstović. Nevertheless, given the different testimonies about this issue, the Defense requested an opinion of expert witness, Professor Dr. Mile Matijević, who drew a conclusion that the Accused Đurić had been engaged in the Jahorina Training Center as an instructor.[37]

152. The Appeal also argues that the Trial Panel's conclusion that the Accused Mendeljev Đurić and Duško Jević ordered the disarming of the Dutch Battalion members, together with other members of the Army of Republika Srpska (VRS) and the Ministry of the Interior (MUP), referred to in paragraph 1 of the enacting clause of the Verdict, is absolutely unfounded. In the reasoning of this position, in paragraphs 320-325, the Trial Panel referred to the statements of witnesses Tomislav Krstović and Ljubodrag Gajić. The Defense notes that neither of the two witnesses confirmed that he had received any order to disarm members of the Dutch Battalion from the Accused Đurić, that is, that there does not exist a single clear argument on the basis of which the Trial Panel could establish beyond a reasonable doubt that the Accused Đurić issued an order to any member of the Jahorina Training Center to disarm UN members.[38]

153. The Defense Counsel also considers that the Trial Panel incorrectly established that the Accused Mendeljev Đurić had issued an order for the search of Bosniak houses and that the population should be dispatched to the collection center in Potočari for the purpose of their displacement, which is a conclusion the Trial Panel expounds on in paragraph 340 of the contested Verdict. That is to say, there is no evidence about any

[36] Appeal by the Defense for the Accused Duško Jević, pp. 43-44.
[37] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 13-14.
[38] Appeal by the Defense for the Accused Mendeljev Đurić, p. 14.

order by the Accused Đurić or that anyone of the local population was found in their homes and dispatched to Potočari, or that the Accused Đurić physically supervised such activity. If the Accused Duško Jević was also at that area in the same time, then such a position of the Accused Đurić could not exist in the system of subordination and unity of command.

154. On 21 October 2010, witness S-126 gave a statement on the record about these circumstances and confirmed that the Accused Đurić had ordered him to participate in the terrain search and to deliver to the Accused Đurić anyone they might find during the search. The Appeal argues that this witness' statement cannot serve as a basis for the averment in the enacting clause of the Verdict that the order read that the persons who would be found at their homes were to be sent to the collection center in Potočari, because this witness says that the order was that such persons should be handed over to the Accused Đurić, which is contrary to the wording of the enacting clause.[39]

155. In paragraph 1 of the enacting clause of the contested Verdict, the Trial Panel established that the Accused Đurić ordered and executed the deployment of members of the 1st Company on the Bratunac-Konjević Polje road, with a view to secure an unhindered passage so that the women and children on board buses and trucks could be transported forcibly to the territory of the Army of B-H. In paragraphs 521-537 of the reasoning, the Trial Panel presented the testimonies and arguments corroborating this part of the enacting clause. Defense Counsel considers that the Trial Panel did not make proper conclusions while evaluating the following documentary evidence -- the Combat Report by General Krstić dated 13 July 1995 and the Report sent on the same day by Ljubomir Borovčanin -- and while evaluating the witness statements, as it did not refer to a single testimony or a piece of documentary evidence that would indicate that any member of the Jahorina Training Center had received an order from Đurić or that he had been deployed to the road by the Accused to that purpose. On the contrary, the Trial Panel mistook him for the Accused Duško Jević, which is obvious in paragraph 527 of the contested Verdict where the Trial Panel refers to the testimony of Radovan Sladoje, member of the 2nd Company of the Jahorina Training Center, who said that he had received an order for securing the road from the Accused Duško Jević.[40]

[39] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 14-15.
[40] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 15-16.

156. The Trial Panel again incorrectly identifies the Accused Mendeljev Đurić with the Accused Duško Jević when it argues and draws the conclusion presented in paragraph 2 of the enacting clause of the contested Verdict that they ordered some members of the Center to deploy along the road with a view to capturing the men who intended to flee Srebrenica, aware that they would all be killed. The Trial Panel does so although there is not a single piece of evidence that the Accused Đurić issued such an order to any member of the Center.[41]

157. The Defense claims that the activity of systematic separation of the able-bodied men from their families in Potočari, referred to in paragraph 2 of the enacting clause and paragraphs 474-506 of the reasoning of the contested Verdict, was conducted by the VRS through its security organs, not by the Accused Đurić, which is confirmed in the *Krstić* Judgment and the *Blagojević* Judgment. The separation was carried out by members of the Military Police of the Bratunac Brigade and the Drina Corps, and there is no evidence that the orders were issued by the Accused Đurić, which is confirmed by the statements of witnesses Mile Janjić, S-119, S-101, S-126, S-104, Neđo Jovičić and S-118.[42]

158. The Defense also thinks that the Trial Panel should not have based its decision on whether the Accused Đurić knew that all men separated on 12 and 13 July 1995 would be killed on van Duijn's statement, given the fact that van Duijn did not agree to be cross-examined or to give evidence before the Trial Panel. However, even if the reason for the exemption of direct presentation of evidence by examining van Duijn were accepted, such a statement could still not serve as a basis for any verdict if regarded within the context of the other evidence, namely Matijević's expertise and the statement of witness Ljubodrag Gajić.[43]

159. Paragraph 3 of the enacting clause of the Verdict concerns the position, role and conduct of the Accused Đurić in the events surrounding the *Kravica* Farming Cooperative as a person responsible for issuing the orders whose objective was the execution of more than 1,000 captives in the evening hours on 13 and 14 July 1995. The evaluation of evidence on which the Trial Panel based that part of the decision is contained in paragraphs 654-724 of the Reasoning. Defense Counsel claims that there is no evidence

[41] Appeal by the Defense for the Accused Mendeljev Đurić, p. 16.
[42] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 17-18.
[43] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 17-18.

that could corroborate beyond a reasonable doubt the Court's conclusion that the Accused Đurić ordered anyone to take part in the killing of the captives and that he supervised this activity of the Jahorina Training Center. Defense Counsel corroborates these arguments with the statements of witnesses S-104, S-126, S-118, Tomislav Krstović, S-119 and S-102.[44]

160. The Defense also considers the Verdict to be unfounded in the part related to the events of the morning of 14 July 1995, when, according to the enacting clause, several dozen captives were summarily executed in front of the Kravica hangar. The Defense considers unfounded the conclusions in paragraph 706 that the Accused Đurić was present in front of the warehouse during the night of 13 July and that "*upon Mendeljev Đurić's and Duško Jević's order, [they] were brought by buses to the Kravica site in the evening hours of 13 July*", and the conclusion in paragraph 724 that the Accused Đurić was present in front of the Kravica warehouse on 14 July. In that respect, the Defense notes that the fact that Đurić was on board a bus on 13 July, or the fact that the Jahorina Training Center members were brought to the road and given a legitimate combat task of securing the road or guarding the captives, can in no way be related to the conclusion that Đurić ordered the killings on 14 July.[45]

161. With respect to paragraph 4 of the enacting clause of the Verdict in which the Trial Panel established that the Accused Đurić commanded the 1st Company of the Jahorina Training Center and that he knew then that all captives would be killed, whereby with such orders and supervision he aided and abetted the realization of genocide, and with respect to paragraphs 854-878 of the contested Verdict, Defense Counsel claims that none of the witnesses referred to in these paragraphs mentions the Accused Đurić as a person from which they received any order regarding the terrain search task. Defense Counsel refers to the statements of witnesses Slavko Bojanić, S-119 and Jevto Doder, who, admittedly, mention Đurić's presence on the road between Lolić and Konjević Polje those days, but stresses that neither these nor any other statements could suffice for the Trial Panel to conclude that the Accused Đurić participated in the search with an active and command

[44] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 19-20.
[45] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 20-21.

role, given that nobody said anything like it and that there is no documentary evidence in that respect, either.[46]

162. Defense Counsel states that the Trial Panel has established that members of both Companies of the Jahorina Training Center participated in the terrain search, but has acquitted the 2nd Company Commander, the Accused Neđo Ikonić, of any criminal liability, but convicted the Accused Đurić of the same thing, being of the opinion that Đurić knew what would happen to the captives, whereas Ikonić did not. Defense Counsel adds that it is beyond doubt that Mićo Gavrić had the role of coordinator of activities between the VRS and the MUP, but he has not been held responsible, so the Counsel wonders whether the Accused Đurić is responsible for everything that happened in the territory of Bratunac and Srebrenica in that period.[47]

(i) Findings of the Appellate Panel

163. After the Appellate Panel reviewed the Defense appeal arguments that the state of facts in the contested Verdict was incorrectly and incompletely established, analyzed in detail the contents of the Verdict, and reviewed the case file, it has concluded that the referenced grievances were unfounded. The Panel has concluded that the state of the facts was correctly and completely established and that the contested Verdict contained valid and acceptable reasons on all decisive facts on the basis of which the Accused Duško Jević and Mendeljev Đurić were convicted.

164. This Panel concludes that the Trial Panel in this case evaluated the evidence in accordance with the CPC B-H, having primarily applied the principle of presumption of innocence referred to in Article 3 of the CPC B-H, which embodies the general principle of law according to which the burden of proof lies with the prosecution, which must establish the guilt of the accused person beyond any reasonable doubt.

165. It is necessary to stress that the Trial Panel was not obligated to deal with each piece of evidence, as the Defense groundlessly claims, but, pursuant to Articles 15 and 281 of the CPC B-H, it evaluated the evidence freely, dealing primarily with the evidence necessary for achieving the purpose of this Verdict, as it considered that it was not

[46] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 21-22.
[47] Appeal by the Defense for the Accused Mendeljev Đurić, p. 22.

necessary to deliberate on absolutely each piece of evidence.[48] For that reason this Panel concludes that the contested Verdict properly focused on a review and evaluation of the evidence which is the basis for the conclusion that the criminal offense that the Accused are charged with was committed and that the Accused are guilty. The state of the facts was thereby not incorrectly and incompletely established, and the Accused were not brought into a less favorable procedural position.

166. Also, it would be unreasonable to expect that all minor details may be established in such massive crimes, in a multitude of events and systematic executions that happened over a rather short period of time. It can equally not be expected from witnesses to remember all details of the events concerned, given the chaotic events at the relevant time and the distance in time. The Panel is aware that it happens rarely that two witnesses who testify about same circumstances regard or describe one event identically.

167. The Appellate Panel also emphasizes, as stated previously, that the evidence the Trial Panel accepted and admitted into the body of evidence pursuant to the Law on Transfer constitutes lawful evidence, on which the Verdict could be based, but not exclusively or decisively or without the support of the other evidence that would confirm such evidence.

168. This Panel also notes that the Defense groundlessly pointed at the statements of witnesses who were direct participants in the event concerned, namely witnesses S-100, S-105, S-102, S-110, S-119 and S-126, given that the Trial Panel properly and carefully evaluated their probative value in the contested Verdict and provided valid and sufficient arguments, which this Panel also accepts as proper.

169. The Appellate Panel considers that, irrespective of the fact that some witnesses were unreliable in certain parts of their statements for fear of self-incrimination, these witnesses nevertheless accurately perceived, committed to memory and reproduced some other facts.

170. The Trial Panel, therefore, rendered a proper decision when it did not dismiss complete statements of those witnesses whose statements were partially unreliable, as it

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

would neither be in the interest of justice or in accordance with the obligation of free evaluation of evidence and establishment of truth. The Trial Panel was nevertheless mindful of the unreliability of parts of the witnesses' statements when evaluating the accuracy of the remaining part of such statements, and it also evaluated the correspondence of these pieces of evidence and the rest of the evidence.

171. It arises from the contents of the contested Verdict that the Trial Panel reviewed every document in this case in order to decide about its reliability and probative value, and it concluded that the Prosecution proved their credibility beyond any reasonable doubt. It also transpires that the Trial Panel did not treat every exhibit in the case file equally, which is a discretion of the court, but clarified only those conclusions concerning the facts that were important for establishing the guilt of the Accused. In order to evaluate the credibility of the documents, the Trial Panel also evaluated their correspondence with the rest of the evidence.

172. Having in mind the foregoing, the Appellate Panel concludes that it was properly established in the contested Verdict that members of the Jahorina Training Center operated in the Bratunac Brigade's zone of responsibility, and that, although at that time they did not have official decisions on their appointment, which they were issued subsequently, according to the finding of the Trial Panel, at the relevant time and prior to it, the Accused *de facto* carried out the tasks of instructors in the Jahorina Training Center in their respective specialist branches. It was established beyond any reasonable doubt in the course of the proceedings that, while the instructors were in the field, they acted as platoon commanders.

173. The contested Verdict also provided valid arguments that the Accused Duško Jević held the duty of Assistant Commander of the Special Police Brigade of the MUP RS and Commander of the Jahorina Training Center of the Special Police Brigade, while it was proven that the Accused Mendeljev Đurić held the duty of Commander of the 1st Company of the Jahorina Training Center.

174. Many witnesses testified about the duties that the Accused Duško Jević and Mendeljev Đurić carried out. The witnesses' testimonies are consistent in the important parts. For example, witness Ljuban Popržen stated that Mendeljev Đurić was Commander

of the 1st Company and that the Accused Duško Jević was a superior to the 1st and the 2nd Companies, which was also confirmed by witness Jevto Doder, and that they were not appointed to these duties by some formal document, but divided the duties in the field between themselves. Witness Tomislav Krstović also confirms that Mendeljev Đurić was the Company Commander and that the Accused Duško Jević was a superior officer to the commanders of the companies and platoons and the instructors. The finding of the Trial Panel that the platoons were organized into two companies each, that the Accused Mendeljev Đurić was the Commander of the 1st Company and that the Accused Duško Jević was superior to these Companies, was also confirmed by witness Radovan Sladoje.

175. Therefore, although there was not a single document officially and formally appointing the Accused Duško Jević the superior officer to the 1st and the 2nd Companies and the Accused Mendeljev Đurić the Commander of the 1st Company, which is understandable given that it was a time of war activities and that omissions of such nature were possible in the given circumstances, the Accused were perceived as such by the other members of the unit because of their conduct, and that was indeed their true role in the field.

176. Therefore, this Panel does not consider as well-founded the grievances that the Accused did not have either *de facto* or *de iure* authorities to issue and convey orders in the field, and it has been proven that they undertook all actions with a view to achieving the ultimate goal of forcible transfer of the Bosniak civilian population and summary execution of the Bosniak men.

177. During the respective first instance and appellate proceedings, the Defense for the Accused Duško Jević contested the presence of the Accused Jević and Mendeljev Đurić at the relevant locations. However, the Trial Panel established with certainty that, having disarmed UN troops at a checkpoint, a number of members of the 1st Company of the Jahorina Training Center, led by the Accused Jević and Đurić and platoon commanders, carried out a search of the Muslim houses to the left and right sides of the Bratunac-Srebrenica road.

178. The Trial Panel properly concluded that the Accused commanded and supervised members of the 1st Company who participated in the terrain search, aware that its objective was a round-up of the whole civilian population in Potočari, starting as of 12 July, which was confirmed by witness S-126 and a video-footage. A considerable number of

people had earlier fled from heavy shelling to Potočari, seeking protection in the UN base.

179. With respect to the *mens rea* of the Accused Jević and Đurić, the Trial Panel did not find that, when actively participating in the forcible transfer, the Accused acted with genocidal intent or that they were members of that or any other JCE, but they were aware of the genocidal intent of the principal perpetrators, so by commanding and supervising the members of the 1st Company who participated in the forcible transfer of the civilians they aided and abetted the criminal offense of Genocide.

180. Contrary to the appellate grievances, the Appellate Panel considers as proper the conclusion in the contested Verdict that the presence of the Accused Duško Jević and Mendeljev Đurić in Potočari at the time and in the proximity of the location of the separation of the men and their detention in the White House was proven in the course of the proceedings beyond any reasonable doubt.

181. In addition, the Trial Panel established on the basis of all adduced evidence that, starting from the late afternoon of 12 July, the Accused deployed the subordinate members of the 1st Company along the Bratunac-Konjević Polje road with a view to capturing the Bosniak men from the column, and with the awareness that both the captured persons and the men separated in Potočari would be executed.

182. Although the referenced Appeals tried to reduce the significance of the criminal acts of the Accused Jević and Đurić, the Trial Panel established with certainty that with their acts the Accused gave a considerable contribution to the perpetration of this criminal offense, due to which they were found guilty of aiding and abetting Genocide.

183. In that respect, the Trial Panel established beyond any reasonable doubt that members of the 1st Company of the Jahorina Training Center, under the command and supervision of the Accused Duško Jević and Mendeljev Đurić, participated in the executions of the men in the warehouse of the Kravica Farming Cooperative starting from the evening hours of 13 July.

184. Also in favor of the foregoing is the established fact that, in the evening, a part of the 1st Company of the Jahorina Training Center, led by the Accused Duško Jević and Mendeljev Đurić, arrived in front of the Kravica Farming Cooperative hangar, where they took turns with members of the 2nd Detachment of the Šekovići Police. One part of the 1st Company deployed along the road, a little farther away from the hangar, which was

confirmed by witnesses S-126 and S-104, who were brought by bus in the evening, together with their fellow Platoon members, some 200 meters away from the warehouse in front of which they saw killed people.

185. In the course of the first and second instance proceedings, the Defense for the Accused Duško Jević contested the presence of the Accused Jević in front of the hangar on 13 July, claiming that in the evening hours of that day he went with a driver in the direction of Zvornik, wherefrom he went to Bijeljina. The Defense summoned and examined witness Velomir Gajić about it.

186. In that respect the Appellate Panel supports the opinion of the Trial Panel that the alibi of the Accused Duško Jević was not proven. When evaluating the credibility of the alibi, the Trial Panel was mindful of the cumulative effect of all relevant evidence, of the Prosecution and the Defense alike.

187. The question of alibi was also raised by the Defense for the Accused Mendeljev Đurić, and Smilja Vidović testified about that circumstance. As the Appellate Panel concludes, the Defense failed to prove that the Accused Đurić was not present in the relevant place at the relevant time.

188. Based on the foregoing, this Panel considers the following Trial Panel's conclusion to be proper and founded on the evidence: the Trial Panel concluded that members of the 1st Company continued the executions in the Kravica warehouse from the evening hours of 13 July, under the orders and supervision of the Accused Duško Jević and Mendeljev Đurić, and that the executions of the groups of captives brought in the course of 14 July were commanded by Platoon Commander Neđo Milidragović and were carried out by members of the 1st Company of the Jahorina Training Center, who arrived in front of and around the warehouse following the order of the Accused Duško Jević.

189. The Trial Panel established properly that the Accused Duško Jević and Mendeljev Đurić were present at the locality of the Kravica warehouse beyond a doubt, that is, having arrived there in the evening hours of 13 July they did not move away from the locality at all, so all the executions starting from the night of 13 July to the burial of the dead bodies on 14 July were carried out under their supervision and control, although the Defense claims to the contrary in the Appeal.

190. The Appellate Panel concludes that it follows clearly from the adduced evidence

that the Accused Duško Jević and Mendeljev Đurić supervised all members of the 1st Company who participated in the executions, so it does not matter whether they directly ordered them to commit the killings or they agreed with their participation in the killings, as all members of the 1st Company were under the direct authority of the Accused.

191. Contrary to the grievances, the Trial Panel properly established that at the time of the killing of the captives, the Accused Duško Jević and Mendeljev Đurić were in front of the hangar where they supervised the killing, so they could not be unaware of it. In addition, also proper is the conclusion in the contested Verdict that the Accused knew that their actions would result in forcible deaths of the men from Srebrenica against whom members of the 1st Company opened fire. While carrying out their activities the Accused did not refrain from the issued order for one moment, thus showing the will for perpetration, whereby they significantly contributed to the realization of the genocidal plan by acting as aiders and abettors.

192. The Appellate Panel also considers that the Trial Panel properly found that during the terrain search members of the 1st and the 2nd Companies were directly commanded by the Accused Duško Jević and members of the 1st Company also by the Accused Mendeljev Đurić. The contested Verdict also reads that, after the order and supervision of the mass executions of the captured men in the hangar of the Kravica Farming Cooperative, the Accused were fully aware that the ultimate goal of this search was the finding of the remaining groups of Srebrenica men who had been in the column but did not manage to reach the territory under the control of the Army of B-H, in order to detain them in the temporary detention facilities and then execute them *en masse*, following the well-established pattern.

193. The presence of the Accused Duško Jević and Mendeljev Đurić in the terrain search and on the meadow in Pervani where the rounded-up men were frisked and where they lay face down to the earth and with their hands tied, wherefrom they were transported in the direction of Konjević Polje, was confirmed by the other participants in the terrain search, namely witness Jevto Doder, Platoon Commander, and witness S-119, member of the Platoon commanded by Neđo Milidragović.

194. Contrary to the Defense arguments, by ordering and supervising the execution of the Srebrenica men and participating in the terrain search with a view to capturing men who would also be executed, the Accused clearly demonstrated knowledge of the

existence of the genocidal intent on the part of the principal members of the JCE, and thus gave their ultimate contribution to the realization of the genocidal plan, agreeing that members of the 1st Company execute the captives during the search with impunity.

195. Defense Counsel for the Accused Duško Jević and Mendeljev Đurić contested in the Appeals both the *actus reus* and the *mens rea* of the Accused for all the criminal acts they were charged with. In that respect, it was established in the contested Verdict that what qualifies the *actus reus* in this case as genocide is the intent with which the offense was committed, and for certain acts to qualify as genocide they must contain the intent for the destruction of a protected group.

196. The contested Verdict reads properly that it has been established beyond a doubt that the captives in the Kravica warehouse suffered grave bodily and mental injuries, owing both to the conditions of their detention and the acts undertaken against them with a view to killing them. It is also properly stated that the forcible separation of the men from women, mothers from their minor children, and the forcible transfer of civilians from Potočari, also constitute a mental harm for the injured parties.

197. The grievances also contested the number of the killed persons, as one of the important elements of the criminal offense of Genocide, and the Trial Panel, too, provided a response to the grievances in the contested Verdict. In that respect, the Panel states that it is in the spirit of this statutory provision that when it comes to the intent to destroy a group "in part", the part must be "a substantial part of that group"[49]. Also, an analysis of the notion of "substantial" part of a group incorporates a number of elements including the numeric size, relative majority of the part relative to the total of the group as a whole, prominence within the group, if a specific part of the group is emblematic of the overall group, or is essential to its survival.

198. Upon the completion of the evidentiary proceedings, the Trial Panel established that after the takeover of Srebrenica in July 1995, the Bosnian Serb forces executed

[49] Appeals Judgment in *Krstić*, para. 8; the International Law Commission (ILC) Report of 1996, p. 45. ("However, the crime of genocide by its nature requires the intent to destroy at least a substantial part of a specific group."). See Trial Judgment in *Jelisić*, para. 82; *Prosecutor v. Sikirica*, IT-95-8-T, Judgment on the Defense Motion to Acquit the Accused, 3 September 2001, para. 65; *Kayishema and Ruzindana*, Judgment, para. 97; *Prosecutor v. Bagilishema*, ICTR-95-1A-T, Judgment, 7 June 2001, (*Bagilishema Trial Judgment*) para. 64; Trial Judgment in *Semanza*, para. 316. See also, Benjamin Whitaker, *Revised and Updated Report on the Prevention and Punishment of the Crime of Genocide*, U.N. Doc. E/CN.4/Sub.2/1985/6, para. 29. ("'In

several thousand Bosnian Muslim men, and that "the total number of executed people most probably ranges from 7,000 to 8,000 men".

199. In that respect, it was established that Bosnian Muslims undeniably represent a national, ethnic and religious group, and, as such, they belong to the protected group category in terms of Article 171 of the CC B-H.

200. Based on the foregoing, the appellate grievances contesting the number of the victims in order to prove that not all elements of the criminal offense of Genocide were satisfied in the case at hand are unfounded.

201. When it comes to the knowledge of the Accused Duško Jević and Mendeljev Đurić of the mass killings committed at the relevant time in the area of Srebrenica, it alone cannot support an inference of genocidal intent,[50] so the Trial Panel inferred from the evidence that the Accused were only aware of the existence of genocidal intent on the part of the principal perpetrators of the criminal offense of Genocide, and that by their actions they significantly contributed to the commission of Genocide, due to which the Trial Panel found them guilty of aiding and abetting this criminal offense.

202. As stated previously, the Trial Panel did not find it proven that the Accused Jević and Đurić participated in the planning of the committed crimes or that they were members of the JCE of genocide, as they did not share the genocidal intent with its members. Accordingly, the Trial Panel did not find them responsible for co-perpetration in genocide, as they were charged in the Indictment, but only for aiding and abetting its commission.

203. After a detailed and careful evaluation of evidence, the Trial Panel began establishing criminal liability of each Accused individually, taking into consideration his actions, objective and intent. The Panel was not satisfied beyond any reasonable doubt that the Accused Jević and Đurić shared the genocidal intent with the principal perpetrators, but it found that it was incontestably proven that they were aware of it and

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part' would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.").

[50] The Appeals Chamber holds that all that the evidence can establish is that Mr. Krstić was aware of the intent to commit genocide on the part of some members of the Main Staff, but this knowledge on his part alone cannot support an inference of genocidal intent. Genocide is one of the worst crimes known to humankind, and its gravity is reflected in the stringent requirement of specific intent. Convictions for genocide can be entered only where that intent has been unequivocally established. There was a demonstrable failure by the Trial Chamber to supply adequate proof that Radislav Krstić possessed the genocidal intent. Mr. Krstić, therefore, is not guilty of genocide as a principal perpetrator.

that they intentionally took actions by which they gave a substantial contribution to the implementation of the genocidal plan, so the Panel found them guilty as aiders and abettors in genocide.

204. The contested Verdict properly and reliably established that the Accused held certain positions in the chain-of-command in the armed force of Republika Srpska at the relevant period and that in these capacities they were aware of the intentions of their superiors, although they deny it, or they could not be unaware of them after receiving an order to commit mass killings of Bosniak men.

205. The conclusion that the Accused showed the volition for the commission of the referenced criminal offense is supported by the fact that not for a single moment during the executions in the Kravica warehouse did they show any surprise or disagreement with the manner in which the captured men were treated, which corroborates the Trial Panel's conclusion that they were aware of the plan of treatment of the captured men.

206. Moreover, aware of their contribution to the commission of genocide in Srebrenica, when the Accused Duško Jević and Mendeljev Đurić returned to Jahorina they even prohibited talking about the activities in the area of Srebrenica, thus hiding the scope and magnitude of the committed crimes. The Trial Panel based this conclusion on the credible statements of witnesses S-117 and S-119.

207. It follows beyond a doubt from the foregoing that members of the 1st Company of the Jahorina Training Center, under the command and supervision of the Accused Duško Jević and Mendeljev Đurić, participated in the killing of Srebrenica men incarcerated in the Kravica Farming Cooperative warehouse, which resulted in the death of around 1,000 people. This constituted a substantial contribution to the implementation of the genocidal plan in the field, whereby the acts of the Accused Jević and Đurić satisfied the elements of the criminal offense of aiding and abetting of Genocide.

208. Finally, it should be noted that the Defense for the Accused Jević argued that the Trial Panel did not identify the JCE members, but that the Appellate Panel does not consider this grievance to be well-founded, either. Although it is necessary to establish the

plurality of persons belonging to a JCE, each JCE member need not be identified by name.[51]

209. Based on the foregoing, the Appellate Panel concludes that in the case at hand the conviction is based on lawful and reliable pieces of evidence, which, when evaluated individually and in terms of their correspondence with the rest of the evidence, lead to the only logical and proper conclusion that the Accused Duško Jević and Mendeljev Đurić committed the criminal offense as established in the contested Verdict.

210. Therefore, having reviewed the grievances of the Defense of all the Accused on the incorrectly or incompletely established state of facts, the Appellate Panel has concluded that the Trial Panel reliably established all decisive facts based on the evidence adduced, and, on the basis of those facts, concluded that the actions of the Accused Jević and Đurić, described in detail in the enacting clause of the contested Verdict, satisfied all legal elements of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H, which was not contested by the grievances of Defense Counsel.

C. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC B-H: VIOLATIONS OF THE CRIMINAL CODE

1. Standards of Review

211. 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.

212. 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 a legal error, but also applies the correct legal standard to the correctly and completely established factual finding.

[51] *Ratko Bundalo et al.,* Appellate Panel Verdict, para. 268; *Trbić*, Trial Panel Verdict, para. 216, citation from the Appeals Chamber Judgment in *Brđanin*, para. 430.

213. 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(1) and 308 of the CPC B-H.

2. Appeal by Defense Counsel for the Accused Duško Jević and Mendeljev Đurić

214. The Appellate Panel finds that the Defense appeal arguments relating to the misapplication of the CC B-H are unfounded.

(a) Appeal arguments of the Defense for the Accused Duško Jević

215. The Defense considers that when the number of the killed in the column, 2,000 – 4,000 (including the deaths from mines, ambush, mutual clashes, suicides and accidental deaths), is deducted from 7,000, which is the total number of the killed, the Court's conclusion that the killed men constituted approximately one fifth of the whole Srebrenica community (paragraph 88) cannot be confirmed. Thereby the objective to destroy a national, ethnic or religious group in a substantial part, as one of the important requirements for the existence of the elements of the criminal offense of Genocide with the Accused, was not satisfied. In that respect, without any reason the Trial Panel refuses to believe the credibility and accuracy of the documents compiled by expert witness Stefan Karganović, and also fails to acknowledge the number of victims established in the final Judgment of the ICTY in *Ljubomir Borovčanin* and in the *Perić-Pelemiš* Verdict of 19 April 2010.[52]

216. Also, the Appeal reads that it was not proven in the proceedings that the Accused Duško Jević knew of the intent of the JCE members, or that he had the knowledge and the will to assist the JCE members in the commission of the criminal offense of Genocide, or that, as the commander of the Jahorina Training Center, he participated in the Srebrenica operation, independently from his superior commander, commanding or ordering those units to execute any act of aiding, with the awareness that all the captured would be killed in the realization of the ultimate goal. For that reason the actions of the Accused Duško

[52] Appeal by the Defense for the Accused Duško Jević, pp. 43-44.

Jević do not satisfy the elements of the criminal offense that he is charged with, which constitutes a violation of the Criminal Code referred to in Article 298(a) of the CC B-H.[53]

217. With respect to the foregoing, the Defense further states that the Accused Duško Jević indeed was the Assistant Commander, but for training, and by his position in the chain-of-command he was an assistant, not an officer, that is, he was not in the chain-of-command between the Companies' commanders and Deputy Commander Ljubomir Borovčanin. Jević could have an assisting role, in terms of assisting the execution of orders, but he was not allowed to issue orders or modify the orders issued by Deputy Commander Borovčanin. Given that it was not proven during the proceedings that the Accused Jević issued orders and commanded the 1st and the 2nd Company of the Jahorina Training Center in the area of Srebrenica and Bratunac in the period 11-17 July 1995 independently from his superior officer, and given that these units were resubordinated to the VRS Command, all that indicates that the Accused Jević did not have the original command authorities in that period but only the executive ones. Therefore, the actions of the Accused Duško Jević do not satisfy the elements of a criminal offense, which constitutes a violation of the Criminal Code referred to in Article 298(a) of the CC B-H.[54]

218. The Defense considers the adopted Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) (with the abolished death penalty) to be more lenient to the Accused Jević and the other co-Accused persons, since the envisaged minimum sentence is imprisonment for a term of five years, which is less than the minimum stipulated by the CC B-H -- imprisonment for a term of 10 years, hence the legal definition in the Indictment is unacceptable under the CC SFRY. It also notes that the death penalty was never laid down alone as the sole principal punishment, but alternatively with the punishment of imprisonment, and it can be substituted only with the prison sentence with which it would have been substituted at the time of the relevant criminal offense. With its abolition before the passing of the CC B-H, only the prison sentence has remained that cannot be substituted with long-term imprisonment. Such an application of the Criminal Code constitutes a violation of the Criminal Code referred to in Article 298(d) of the CPC B-H.[55]

[53] Appeal by the Defense for the Accused Duško Jević, p. 45.
[54] Appeal by the Defense for the Accused Duško Jević, pp. 45-46.
[55] Appeal by the Defense for the Accused Duško Jević, pp. 46-48.

219. The Defense also notes that it opposes the application of the aforementioned concept of a JCE as a mode of participation in the perpetration of criminal offense, since it was not laid down by the CC SFRY and it did not exist as a part of customary international law either, given that Bosnia and Herzegovina's statute contains clear prohibitions in this respect if the principle of legality is taken into account. The Defense nevertheless states that, should the Appellate Panel conclude that the JCE concept may be applied before the Court of B-H, it is necessary to apply it in the manner specified in the jurisprudence of the international courts by which it was created.[56]

220. The Defense considers that there was a violation of the principle of individualization of guilt in the contested Verdict, since criminal liability in terms of a JCE in war crimes cases can and must be attributed solely to individuals, but in no case to organs or groups as collectivities, and refers to the ICTY Appeals Chamber Judgment in *Krajišnik* (paragraph 157), stating that the Trial Chamber erred when it failed to specify whether all or only some of the local politicians, militaries, police commanders and paramilitary leaders were rank and file JCE members.[57]

221. The Defense points in the Appeal that it is clear that in the contested Verdict the Accused has been found guilty of a mode of participation in the perpetration of the criminal offense ("supervision") hitherto unknown in customary law and not laid down in a single applicable Criminal Code, which constitutes a violation referred to in Article 298(d) of the CPC B-H, given that the law which was not prescribed at all has been applied.[58]

(b) Appeal arguments of the Defense for the Accused Mendeljev Đurić

222. Defense Counsel considers that the CC SFRY, as the law in effect at that time in Bosnia and Herzegovina, should be regarded as "a more lenient law" concerning the Accused Mendeljev Đurić, and that the Court erroneously applied the CC B-H.[59]

(i) Findings of the Appellate Panel

[56] Appeal by the Defense for the Accused Duško Jević, pp. 48-50.
[57] Appeal by the Defense for the Accused Duško Jević, pp. 50-51.
[58] Appeal by the Defense for the Accused Duško Jević, p. 8.
[59] Appeal by the Defense for the Accused Mendeljev Đurić, pp. 12-13.

223. A violation of the criminal code referred to in Article 298(a) of the CPC B-H exists when the act for which the accused is being prosecuted constitutes a criminal offense, and can be manifested in three ways, namely: 1) as an erroneous assessment of whether or not the act that the accused is charged with constitutes a criminal offense, 2) as an erroneous assessment of the existence or non-existence of the essential elements of a criminal offense, and 3) an erroneous assessment of the existence or non-existence of unlawfulness. Also, a violation referred to in Article 298(d) of the CPC B-H exists when the court subsumes a properly established state of facts under an incorrect statutory provision by applying a law that could not be applied or by misapplying a proper law. Both cases result in an erroneous legal definition of the criminal offense, which means that the Accused was found guilty and his acts were qualified as a criminal offense, but the Criminal Code was misapplied in these cases.

224. It follows from the contents of the appeal arguments that the Defense Counsel for the Accused Duško Jević has raised those arguments because he considers that all statutory elements of the criminal offense of which the Accused Duško Jević was found guilty were not proven in the first instance proceedings.

225. Article 171 of the CC B-H defines the criminal offense of Genocide as follows:

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

226. In that respect, the Appellate Panel finds that the confirmed Indictment charged the Accused Duško Jević with the criminal offense of Genocide in violation of Article 171(a)

and (b) of the CC B-H, as read with Article 29 and Article 180(1) of the CC B-H, while the contested Verdict convicted him of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H.

227. As indicated earlier, the Court is not bound by the legal definition of the criminal offense in the Indictment, so after the completion of the evidentiary proceedings the Trial Panel properly defined the relevant acts of the Accused, contrary to the appeal grievances by the Defense.

228. The contested Verdict properly states that the Accused Duško Jević held the office of Assistant Commander of the Special Police Brigade of the MUP RS and Commander of the Jahorina Training Center of the Special Police Brigade, and it was proven in the proceedings that the Accused issued and conveyed orders which resulted in the forcible transfer of civilian population and mass killings.

229. In that respect, it should be noted that, according to the ICTY case law, "'ordering' means a person in a position of authority using that authority to instruct another to commit an offense".[60] Therefore, the *actus reus* of "ordering" means that a person in a position of authority instructs another person to commit an offense.[61] The person issuing orders may be either the *de iure* or the *de facto* commander to the person who committed an offense.[62] The order does not need to be given in writing or in any particular form[63]. It can be explicit or implicit.[64] The existence of the order may be proven through circumstantial evidence.[65] A causal link between the act of ordering and the physical perpetration of a crime needs to be demonstrated.[66]

230. As for the requisite *mens rea*, it is necessary to prove that a person who orders an act or omission must do so with either the direct intent or the awareness of the substantial likelihood that a crime will be committed in the execution of that order.[67]

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[60] *Prosecutor v. Galić*, Trial Judgement, para. 168; see also *Prosecutor v. Limaj et al.*, Trial Judgement, para. 515; *Prosecutor v. Stakić*, Trial Judgement, para. 445.
[61] *Prosecutor v. Kordić and Čerkez*, Appeals Judgement, para. 28.
[62] *Prosecutor v. Limaj et al.*, Trial Judgement, para. 515.
[63] *Prosecutor v. Brđanin*, Trial Judgement, para. 270.
[64] *Prosecutor v. Blaškić*, Trial Judgement, para. 281.
[65] *Prosecutor v. Limaj et al.*, Trial Judgement, para. 515.
[66] *Prosecutor v. Strugar*, Trial Judgement, para. 332.
[67] See *Prosecutor v. Kordić and Čerkez*, Appeals Judgement, para. 30; see also *Prosecutor v. Blaškić*, Appeals Judgement, paras. 41-42.

231. Therefore, with respect to the essential elements of the referenced criminal offense the Accused Duško Jević has been convicted of under the contested Verdict, this Panel concludes that it follows beyond a doubt from the adduced evidence that the Accused commanded and supervised members of the 1st and the 2nd Companies of the Jahorina Training Center who took part in the forcible transfer of the Bosniak women, children and elderly to the territory outside of Republika Srpska, killing and inflicting of grave bodily and mental harm on a group of Bosniaks, whereby he assisted its partial destruction as a national, religious and ethnic group.

232. The Appeal argues that the CC B-H does not refer to “supervision”, so this Panel notes in that respect that the Accused was originally charged with “ordering”, set forth in Article 180(1) of the CC B-H, and that ‘ordering’ includes supervision as one of the modes of participation in the commission of a criminal offense. It is important to emphasize that ‘ordering’ is a graver mode, so the Accused was not brought into a less favorable position.

233. In other words, the Accused Duško Jević conveyed orders to his subordinated units to which those orders pertained, and supervised the execution thereof. The Accused had control of the events and personally supervised mass executions of the captured Bosniak men. For that reason the relevant appeal grievances are refused as unfounded.

234. Also, the Defense Counsel for the Accused Duško Jević contested the number of the victims of genocide in Srebrenica, thus arguing that one of the important elements of the criminal offense was not satisfied. In that respect, the Appellate Panel finds that, although a simultaneous commission of several different forms of the referenced acts with a view to destroying a group is more probable, even the commission of only one of the referenced acts against one member of the group suffices for the existence of this criminal offense. Consequently, this appeal argument is also unfounded.

235. On the basis of such properly established states of facts, the Trial Panel properly defined the acts of the Accused as the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H. In this way the charge was not exceeded, given that this definition is more favorable for the Accused than the definition in the Indictment. The Appellate Panel, therefore, concluded that the grievances of Defense Counsel for the Accused Duško Jević regarding a violation of the Criminal Code referred to in Article 298(a) of the CPC B-H were unfounded, and refused them as such.

236. The question as to which Criminal Code is more favorable for the Accused was raised in the Appeals by the respective Defense Counsel for the Accused Duško Jević and Mendeljev Đurić. In the contested Verdict, the Trial Panel analyzed properly and in detail all circumstances of the case at hand, as well as the relevant regulations, and, accordingly, reached a conclusion that the 2003 CC B-H was more favorable than the 1976 CC SFRY as the law in effect at the time of the commission.

237. First of all, it is important to underline that in considering the issue of selecting the more lenient law (*lex mitior*), the basic starting point is that it is not resolved *in abstracto*, but *in concreto*, that is, not by a general comparison between the old and new law(s), but by their comparison against the specific case, because the same law can be more favorable to one of the accused but more severe to the other, depending on the offense charged against them, the manner in which the elements of the criminal offense are defined in the law and the provisions that govern the guilt or punishment for the offense.

238. Contrary to the referenced grievances, the Appellate Panel concludes that the Trial Panel properly adhered to the statutory obligation of application of the more lenient law on the perpetrator, as set forth in Article 4 of the CC B-H[68], and the relevant international standards, being mindful of the time of the commission and the provisions of the substantive law that was in effect at that time (CC SFRY), and the provisions of the subsequent CC B-H, and concluded justly that in the case at hand the current CC B-H was, nevertheless, more lenient given that the sentence that the CC B-H prescribes is obviously more lenient than the death penalty that was in effect at the time of the commission and that was pronounced only for the gravest kinds of war crimes, as is the case here.

239. The contested Verdict primarily established that Article 171 of the CC B-H, which sets forth the criminal offense of Genocide of which the Accused have been found guilty, is for the most part identical to Article 141 of the CC SFRY, that is, that the criminal acts that are defined as Genocide under the law in effect (CC B-H) were also defined as criminal in the Criminal Code that was in effect at the time of the commission.

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[68] *(1) The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense.*
(2) If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied.

240. The Appellate Panel concludes that, given that the criminal offense of Genocide is laid down in both Codes, and that under Article 141 of the CC SFRY the referenced offense carried the sentence of imprisonment of not less than five years or death penalty, while under the Criminal Code in effect the same offense carries the sentence of imprisonment of not less than 10 years or long-term imprisonment, when evaluating which law is more lenient on the perpetrator in the case at hand the court must take into account the principle of alternativity, according to which the range of the sentencing dictates the selection of law, not the other way around.

241. Therefore, a comparison of the prescribed punishments undoubtedly leads to the conclusion reached in the contested Verdict that, in the case at hand, the sentence envisioned in the Code in effect (CC B-H) is in any case more lenient than the one prescribed in the former Code, irrespective of the fact that the former Code set the sentence minimum to five years of imprisonment, bearing in mind the fact that the sentence that was imposed on the Accused Duško Jević (long-term imprisonment of 35 years) and the Accused Mendeljev Đurić (long-term imprisonment of 30 years) was not leaning toward the general statutory minimum for the referenced offense.

242. To corroborate the foregoing, the Appellate Panel emphasizes the fact that, under customary international law, the death penalty is in any case a more stringent sentence than the sentence of long-term imprisonment, and that it is an absolute right of a suspect not to be executed, so the state must guarantee that right, which was done by the adoption of a new Criminal Code in 2003.

243. Based on the foregoing, and mindful of the *ratio legis* in Paragraph (2) of Article 4 of the CC B-H requiring the application of the law more lenient to the perpetrator and not the law more lenient in general, and mindful of the range of the sentencing, the Trial Panel found that the CC B-H envisaged a criminal sanction more lenient than the sanction envisaged by the law that was in effect at the time of the commission.

244. Having determined that the CC B-H is applicable in the case at hand, the Trial Panel properly concluded that the acts of the Accused Duško Jević, as described in detail in the enacting clause of the contested Verdict, satisfied all essential elements of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC B-H, as read with Article 180(1) and Article 31 of the CC B-H.

245. In view of the foregoing, the Appellate Panel finds that the respective

Defense and Prosecution appeal arguments raised in relation to the application of the criminal code are unfounded and generalized, and confirms that the Trial Panel properly applied the CC B-H to the correctly and completely established state of facts in the contested Verdict.

D. DECISION ON CRIMINAL SANCTION

1. Standards of Review under Article 300 of the CPC B-H

246. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC B-H.

247. 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. 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.

248. 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.

249. 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.

250. 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.

2. Appeal by the Defense for the Accused Duško Jević and Mendeljev Đurić

251. The Appellate Panel concludes that the criminal sanction was not properly determined and that the Defense appeal arguments are, therefore, well-founded.

(a) Appeal arguments of the Defense for the Accused Duško Jević

252. In the Appeal, the Defense moves the Court to acquit the Accused Duško Jević, since he did not commit a single act as charged. Nevertheless, the Defense states as an extenuating circumstance that during the terrain search conducted on 17 July 1995, the Accused helped a wounded Bosniak to receive first aid (S-119), and that the acts referred to in the Verdict are incompatible with his personality as a professional, member of the MUP, family man, colleague, and an athlete, who had stayed with his family in Sarajevo until the beginning of the war not believing there would be a war. He got the nickname "Stalin" from the late Adnan Karović, who heard that Jević always had a disciplined approach and strictly honored the law in the exercise of his duties. The Defense argues that the facts to the detriment of the Accused Duško Jević were not proven beyond doubt in the first instance proceedings.[69]

(b) Appeal arguments of the Defense for the Accused Mendeljev Đurić

253. Defense Counsel considers that the Court imposed an incomprehensibly strict punishment on the Accused Mendeljev Đurić, especially given the fact that it was not established under the Indictment, the Verdict or the adduced evidence that the Accused

[69] Appeal by the Defense for the Accused Duško Jević, pp. 51-52.

Đurić killed anyone, that he ever ordered anyone's killing, either directly or indirectly, or that he was present when these crimes were committed.

254. The Accused Mendeljev Đurić was a low-level police officer, without any professional or personal fault. He is a good father and family man, but, according to the reasoning of the Verdict, the Trial Panel did not find a single extenuating circumstance for him.

255. The Defense considers that such a Verdict is contrary to the jurisprudence of other courts, specifically the ICTY. In other words, General Krstić was sentenced to imprisonment for a term of 34 years for the same charges, while Colonel Blagojević was sentenced to imprisonment of 15 years for the same offense, despite the fact that a comparison between their position and participation in these events and the participation of the Accused Đurić is incomprehensible and inappropriate.

256. The jurisprudence of the Court of B-H also differs from such a drastic judicial ruling, as this sentence compares only to the verdicts imposed on direct perpetrators, something the Accused Mendeljev Đurić certainly is not.[70]

(i) Findings of the Appellate Panel

257. Considering the decision on sentence within the arguments raised in the appeal, the Appellate Panel concludes that the Trial Panel did not properly assess all circumstances of the case at hand, that is, both the extenuating and the aggravating ones, bearing in mind all subjective and objective considerations underlying the criminal offense and its perpetrator, as required by Article 48 of the CC B-H.

258. The Trial Panel considered the degree of criminal liability of the Accused, the motives for the perpetration of the criminal offense, the degree of danger or violation to the protected value, the circumstances under which the criminal offense was perpetrated, the previous life of the perpetrator, his personal situation and conduct after the offense, as well as other circumstances pertaining to the perpetrator's personality.

[70] Appeal by the Defense for the Accused Mendeljev Đurić, p. 23.

259. In that respect, the Appellate Panel notes that the Trial Panel did not establish in the contested Verdict the extenuating factors for the Accused Duško Jević and Mendeljev Đurić, given the fact that the Accused were employees of the MUP (Ministry of the Interior), so the factor of no prior conviction was irrelevant for the Trial Panel as an extenuating circumstance, as was the fact that they had families, since they were convicted of the killing of, *inter alia*, underage children.

260. In other words, the Trial Panel took into account the responsibility of the Accused and the gravity of the criminal offense of which they have been found guilty. The contested Verdict particularly emphasized that the Accused were longtime MUP employees, but instead of protecting the life and limb of all people and preserving public peace and order, they consciously and willingly took actions aimed at the implementation of a genocidal plan, whereby they breached their human and official duty.

261. It was also stated that the Accused were particularly persistent in pursuing actions of which they were found guilty by issuing orders to their subordinates during the killing of the men in the night of 13 July and the day of 14 July, all of which clearly shows that they were fully aware of the genocidal intent of the principal members of the JCE – not to leave a single Bosniak man from Srebrenica alive, which included those who were brought and imprisoned in the Kravica warehouse.

262. However, having reviewed the case file, the Appellate Panel has concluded that the Trial Panel did not appreciate the importance of the extenuating factors for the Accused Duško Jević and Mendeljev Đurić, which the Defense properly argues in the Appeals. This Panel, therefore, considers the imposed sentences of long-term imprisonment to be too stringent, hence it was necessary to partially grant the Appeals by Defense Counsel for the Accused Jević and Đurić.

263. The reasoning in the contested Verdict that the Trial Panel did not find any extenuating factors for the Accused Jević and Đurić is unacceptable, so the Appellate Panel has taken into account the fact that they had families and that they had no prior conviction. In accordance with the statute, the referenced circumstances must be taken into account despite the fact that the case at hand concerns the most serious criminal offense and the values that are also protected by international law.

264. The Appellate Panel completely accepts the arguments of the Trial Panel about the aggravating circumstances. In that respect, this Panel also wants to emphasize that the

Accused Jević and Đurić, as members of the MUP, professionals, were aware of the laws of warfare and the Geneva Conventions. They must have also known that the protection of civilians was one of the basic responsibilities of persons entrusted with command duties, irrespective of the warring party they belong to.

265. Given that the Accused behaved with proper decorum during the trial and in accordance with the procedural rules, their conduct does not constitute either an extenuating or an aggravating factor.

266. Therefore, with respect to the Accused Duško Jević, the Appellate Panel considers that the purpose of punishment, envisaged in Article 39 of the CC B-H, may be achieved with the sentence of long-term imprisonment of 32 (thirty-two) years, and with respect to the Accused Mendeljev Đurić with the sentence of long-term imprisonment of 28 (twenty-eight) years. The Appellate Panel considers such punishment to be commensurate with all circumstances of the case at hand which affected the range of the imposed sentence, that is, to be adequate, appropriate and just. Only on the basis of such punishment will both the general and the special purpose of punishing be achieved.

267. Based on the foregoing, the Appellate Panel established that the criminal sanction imposed by the Trial Panel was fashioned too strictly, that is, that the Trial Panel gave weight only to the aggravating circumstances, disregarding the extenuating factors for the Accused Duško Jević and Mendeljev Đurić, for which reason this Panel has revised the contested Verdict in that part.

268. Finally, it should be stressed that the protected value of these criminal offenses are universal human values, the values that are the requirements and basis for common and human existence, a violation of which constitutes grave breaches of norms of international humanitarian law. The fact that these offenses are not barred by the statute of limitation speaks of their severity and gravity.

269. The Appellate Panel concludes that, when meting out the punishment, the Trial Panel was mindful of the fact that a decision on the sentence must always express an individualized statutory community condemnation for a specific criminal offense, so the appeal arguments involving a comparison of the circumstances surrounding the Accused Mendeljev Đurić and the circumstances in the cases tried before the ICTY are not appropriate and founded on law.

270. Trials and sanctioning of these crimes must demonstrate zero tolerance for the crimes committed at the time of war, but also show that criminal procedure is an appropriate way to unmask the crimes and end the circle of personal retaliation. The Court or its judgment cannot order or mandate reconciliation. However, a sanction that fully amounts to the gravity of the offense may contribute to reconciliation by offering a legal and non-violent response, and promote the commitment to serve justice instead of a drive for a personal or community retaliation. Specifically, the sufferings directly inflicted on these victims caused additional suffering to their families and communities which sufferings have continued to the present day. Those are the parents, brothers, sisters, other relatives and friends of the killed who cannot come to terms with the loss of their nearest kin and who are the indirect victims of this crime. As stated before, there is nothing the Court can do to adequately address the loss suffered by both individuals and the larger community. The Court can do what it is designed to do which is to find guilt or innocence and apply the law to the result. In this case the Court hopes the sentence illustrates that even the most severe crimes can be adjudicated fairly.

271. Punishing genocide is a matter of international interest and genocide is a crime under international law condemned by the civilized world, whose principal perpetrators and their co-perpetrators need to be punished, irrespective of who they are and whether the crime was committed for religious, racial, political or any other reasons.

IV. ACQUITTING PART OF THE CONTESTED VERDICT

A. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF B-H: ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

1. Appeal by the Prosecutor's Office of Bosnia and Herzegovina

(a) Sub-Ground One: Article 297(1)(k) of the CPC B-H – The Prosecution argues that the wording of the Verdict is incomprehensible, internally contradictory or contradicts the grounds of the Verdict or it does not cite reasons concerning the decisive facts

272. The Appellate Panel regards as unfounded the Prosecution appeal grievances that the enacting clause of the first instance Verdict contradicts the grounds of the Verdict and

that the Verdict does not cite the reasons concerning the decisive facts.

(i) Appeal arguments of the Prosecutor's Office of Bosnia and Herzegovina

273. The essential violation of the criminal procedure provisions, that is, contradictions between the wording and the reasons of the Verdict, and contradictions between the decisive reasons of the Verdict are, according to the Prosecution, inseparable from the established state of facts, hence the Prosecution explained these appeal arguments together.[71]

a. Findings of the Appellate Panel

274. The Appellate Panel first of all wishes to emphasize that the Prosecution Appeal, in the part related to the essential violations of the criminal procedure provisions, only generally states that the contested Verdict is incomprehensible and that it lacks reasons on decisive facts, but it does not provide any additional explanation, corroborating arguments or evidence in support of these averments. The parties and Defense Counsel are obliged to present their arguments in the proceedings in a clear, logical and exhaustive manner, so that the Appellate Panel can perform its duty properly.

275. Given that the Prosecution Appeal lacked the reasoning justifying the raised argument, this Panel has refused the referenced appeal argument as unfounded.

B. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC B-H: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

1. Appeal by the Prosecutor's Office of Bosnia and Herzegovina

276. The Appellate Panel concludes that the state of the facts in the contested Verdict was properly and completely established.

[71] Appeal by the Prosecutor's Office of B-H, p. 3.

(a) Appeal arguments of the Prosecutor's Office of Bosnia and Herzegovina

(i) The Accused Neđo Ikonić

277. The Prosecution states in the Appeal that the Trial Panel erroneously and incompletely established the state of facts, which resulted in an unjust outcome of the court proceedings – the acquittal of Neđo Ikonić. The Appeal notes that, if the proven facts are regarded in the light of other factual findings and the evidence adduced at the main trial, it must be concluded that the acts undertaken by the Accused Neđo Ikonić satisfy the elements of the criminal offense of Genocide, that is, that he acted with the same knowledge and intent as the Accused Duško Jević and Mendeljev Đurić. As Company Commander, the Accused Neđo Ikonić had the same scope of information as Mendeljev Đurić, Commander of the 1st Company.[72]

278. The Prosecution maintains that fact number one is that the 2nd Company, upon the order and under control of the Accused Neđo Ikonić, participated in the forcible removal of the Bosniak civilian population by securing an unhindered passage of the buses, as indicated in paragraph 399 of the Verdict, whereby the state of facts was erroneously established.[73] [sentence as rendered in the original text; translator's note]

279. The Prosecution considers that the Trial Panel erred when it completely excluded the Accused Neđo Ikonić from the chain-of-command without any explanation, especially given that it was previously established that the 2nd Company was commanded by the Accused Ikonić, that he deployed his subordinates in the field, that the chain-of-command was clearly established despite the lack of ranks and official decisions on appointments, and given that members of the 1st and the 2nd Companies had the same task on the road, each at the respective part of the terrain they covered, and given that there is no evidence or reference by the Trial Panel that the Accused Đurić assumed command over the 2nd Company. It follows clearly from this that the 2nd Company participated in the forcible transfer of the population from Potočari upon the order and under the supervision of the Accused Neđo Ikonić.[74]

[72] Appeal by the Prosecutor's Office of B-H, pp. 3-4.
[73] Appeal by the Prosecutor's Office of B-H, pp. 5-8.
[74] Appeal by the Prosecutor's Office of B-H, pp. 5-7.

280. The Appeal also reads that the Trial Panel completely disregarded the evidence that it referred to in the Verdict and made a wrong conclusion that there was no responsibility on the part of the Accused Neđo Ikonić for the forcible transfer of population, whereby the Trial Panel made an error of law, given that these unlawful acts satisfy the elements of the criminal offense of Crimes against Humanity under Article 172(1)(d) of the CC B-H.[75]

281. In that respect, the Appeal refers to paragraphs 520, 525, 526, 527, 528, 1055, 521, 234-237, and 769 of the contested Verdict.

282. The Prosecution considers that fact number two is that members of the 2nd Company captured the Bosniak men who tried to cross to the territory of the Army of B-H, which is a fact that was established erroneously and incompletely.[76]

283. This position of the Prosecution was corroborated by the facts and circumstances from the dispatches of 13 July 1995 by Dragomir Vasić, the Order to the subordinated units of 13 July 1992 issued by the Command of the Drina Corps, the Instruction to the 2nd Company Commanders, and the statements of witnesses Željka Šehovac, Siniša Renovica (T-207), Jelenko Kljajić, paragraph 894, the statement of the Accused Mendeljev Đurić, the statements of witness S-112, witness Momir Nikolić, and witness Živorad Lakić, and paragraphs 606, 747-753, 533, and 729.[77]

284. The Prosecution states that even if the Accused Neđo Ikonić was not aware in the beginning what was happening to the captives, as the Trial Panel erroneously concluded, in front of the hangar in Kravica he did have an opportunity to see for himself the manner in which the captives were treated, following the pattern of incarceration in temporary detention facilities, where they were either killed or from which they were later taken to the execution site. Nobody would confuse the shooting or the scene in front of the hangar for combat, especially not an experienced police officer such as the Accused Neđo Ikonić. If ordinary members of the Jahorina Training Center understood what the captives' fate would be, if Jević, Đurić, Borovčanin, with whom Ikonić had direct contact, as well as all the Platoon Commanders of the 2nd Company, were aware of individual killings, the capturing of men and their subsequent taking to execution sites (which follows from the

[75] Appeal by the Prosecutor's Office of B-H, pp. 7-8.
[76] Appeal by the Prosecutor's Office of B-H, pp. 9-16.
[77] Appeal by the Prosecutor's Office of B-H, pp. 9-15.

Verdict), then Neđo Ikonić could not have been unaware of it either. The statement of the Accused Mendeljev Đurić given to the ICTY investigators and the evidence given by witness S-112 speak in favor of such a position.

285. The Trial Panel completely disregards the fact that the 1st and the 2nd Companies were component parts of one and the same unit that had one and the same task, although it did not necessarily include the commission of the same acts.

286. It is also stated that the crimes took place along the whole road, whose one part was covered by the 2nd Company, such as the killings in Cerska, with respect to which the forensic evidence was tendered, and that there were individual killings as well, like, for example, the killings of two captives that Neđo Ikonić is responsible for although he did not order them.

287. The Prosecution considers that fact number three is that the "Death Squad" was made up of members of the 2nd Company who participated in the killing of the incarcerated Bosniaks in the Kravica hangar, referring to the statements of witness S-124, that is, paragraphs 717, 774, 776, 777, 778, and 769 of the contested Verdict.[78]

288. The referenced paragraphs would have sufficed to reach the conclusion that the "Death Squad" beyond a doubt participated in the killing of the captives, however, the Trial Panel did not reach such a conclusion only because witness S-119 did not remember seeing "Cigo" in front of the hangar. The Prosecution, therefore, thinks that the Trial Panel reached a wrong conclusion on the basis of the properly established state of facts, and that it erroneously evaluated the evidence by calling into question the witnesses' statements in the referenced paragraphs of the contested Verdict, only because witness S-119 stated that he did not remember "Cigo", which does not imply that "Cigo" was not there.

289. The Prosecution considers that fact number four is that during the terrain search the Accused commanded and supervised members of the 2nd Company when they captured the Bosniaks. In order to corroborate this argument the Prosecution refers to

[78] Appeal by the Prosecutor's Office of B-H, pp. 16-19.

paragraphs 772, 773, 765, 849, 850, 856, 861, 862, 864, 865, and 871 of the contested Verdict.[79]

290. The Trial Panel erroneously established the state of the facts when it concluded that during the terrain search the Accused Neđo Ikonić did not act with the same knowledge and awareness as the Accused Jević and Đurić. The Prosecution did not claim that the execution of the people captured during the search had been carried out by members of the 2nd Company, but that it happened after they had handed the captives over to another unit. The Accused Jević and Đurić were found guilty because they captured and delivered the Bosniaks who were subsequently killed, whilst the Accused Neđo Ikonić was not found guilty of it although it was the very members of the 2nd Company who escorted the captives to Konjević Polje.

291. The Trial Panel concluded erroneously that the 2nd Company was not under the command and supervision of the Accused Neđo Ikonić during the search, given the fact that there is not a single piece of evidence in favor of it. It, therefore, remains unclear on what basis the Trial Panel concluded that the Accused Neđo Ikonić did not lead the 2nd Company, if it concluded that the Accused Duško Jević commanded the search, although the 1st Company was directly commanded by the Accused Mendeljev Đurić. The Accused Ikonić may not have ordered the execution in the hangar, but he was aware of the treatment of the captives and the overall plan for the Srebrenica population, and it was with that awareness that he commanded the 2nd Company in the terrain search.

292. The Prosecution considers that the Appeal has clearly showed that the Trial Panel erred when it acquitted the Accused Neđo Ikonić and that his guilt is the same as the guilt of the Accused Duško Jević and Mendeljev Đurić.

(ii) <u>The Accused Goran Marković</u>

293. The Prosecution considers that the Trial Panel erroneously concluded that the Prosecution did not prove during the proceedings that the Accused Goran Marković acted in the terrain search with the knowledge that the civilians would be forcibly transferred from Potočari and that they were being rounded up for that very purpose. The Prosecution also deems that the Trial Panel erroneously concluded that the acts undertaken by the Accused

[79] Appeal by the Prosecutor's Office of B-H, pp. 19-23.

Marković as such did not constitute the criminal offense of Genocide, and continued with the conclusion in paragraph 648 of the contested Verdict. The Court also erroneously concluded that the Accused Marković, given the presence of his superior Company Commander, the Accused Mendeljev Đurić, and also the Accused Duško Jević, could not have significant responsibilities regarding the further course of action, as, anyway, the Accused Marković was not charged with participation in these activities in the amended Indictment.[80]

294. The Prosecution is of the opinion that from the evidence adduced at the main trial, primarily the testimonies of the witnesses whose superior at the relevant time was the Accused Goran Marković, there stems the conclusion that the task of the 2nd Platoon and the other members of the 1st Company was to begin the search of the inhabited villages in the direction of Potočari in the early morning hours, with a view to rounding up and taking the Bosniak population to the "collection center" in Potočari, wherefrom they would be expelled against their will. The fact that the 2nd Platoon, composed of 30 deserters and commanded by the Accused Goran Marković, which was a component of the 1st Company, was also operational on the relevant occasion constitutes one of the most important grounds for the conclusion about his guilt. This conclusion stems from paragraphs 409, 410, 429, and 440 of the contested Verdict and the statements of witnesses Tomislav Krstović, S-100, Ljubodrag Gajić, Nenad Milovanović, S-118, Dragan Bešić, Velomir Gajić, S-126, S-104, S-102, S-119, PW-100, Mile Janjić, Jevto Doder and Momir Nikolić.[81]

295. The Prosecution also considers that if the Trial Panel concluded that the Accused Jević and Đurić were fully aware of the genocidal plan of the principal members of the JCE, that is, principal perpetrators of genocide, it is absolutely logical that the Commander of the 30-strong Platoon, which was a part of a unit, himself acted with almost the same knowledge and awareness, as in the relevant period the Accused also had the same amount of information about the general plan and policy of forcible transfer of the population and killing of the men.[82]

[80] Appeal by the Prosecutor's Office of B-H, pp. 23-26.
[81] Appeal by the Prosecutor's Office of B-H, pp. 26-31.
[82] Appeal by the Prosecutor's Office of B-H, pp. 32.

296. The Appeal argues that the Accused Marković, as Platoon Commander, issued the most specific orders and instructions to his subordinates, so it is reasonable to conclude that in that position he was aware of the intentions of his superiors or that he could not be unaware of them after he had received an order to commit numerous unlawful acts against the Bosniak civilians. As a long-standing professional employee of the MUP, the Accused was fully aware of the unlawful acts that he undertook and that were obviously aimed at a complete destruction of victims chosen only because they were members of a particular group, hence he cannot avoid responsibility by claiming that he was not informed of all details of the all-encompassing genocidal plan or policy.[83]

297. The Prosecution also states that the Accused Marković could not have remained unaware of the genocidal intent at the moment of the separation of the men in Potočari, that is, at the moment of their detention in and around the White House, in front of which they were forced to leave behind their personal belongings which they could not carry on them while being transported toward Bratunac, or during the burning of their belongings, including identification documents. Supporting this argument is paragraph 1045 of the contested Verdict, in which the Trial Panel properly concludes that even members of the Training Center of a lower rank than the Accused, who were in Potočari at that time and eye-witnessed the separation of the men and their detention in the White House, could conclude that the men would not be exchanged, since all their personal belongings and documents were being burned as they would no longer need them.[84]

298. The Prosecution also argues that if members of the 1st Company, including members of the 2nd Platoon, were aware of the true objectives of the search and the round-up of the Bosniak population for the purpose of their expelling and of the tragic future that lay in store for the separated men, then the Accused who had the command role and who, by the nature of his duty, carried out the orders of his superiors – Duško Jević and Mendeljev Đurić – and saw to their execution, must have been aware of it, too.[85]

299. The Appeal also states that the fact that the soldiers, police officers, as well as their commanders and senior officers had the knowledge that the killing of the Bosniak men was being planned, stems from the setting of controlled lawlessness that reigned in

[83] Appeal by the Prosecutor's Office of B-H, p. 32.
[84] Appeal by the Prosecutor's Office of B-H, pp. 32-34.
[85] Appeal by the Prosecutor's Office of B-H, p. 34.

Potočari. In other words, on 12 and 13 July, in Potočari, the soldiers, police officers, deserters and junior officers were allowed to verbally insult, physically abuse and kill the Bosniak men with impunity, while the superiors ignored it all, so in that context the Prosecution referred to the testimonies of Momir Nikolić and Major Franken.[86]

300. Contrary to the assertion that a certain degree of criminal behavior in Potočari was a natural consequence of the state of chaos, given the soldiers' emotions and a huge number of refugees, the Prosecution notes that the operation that the Bosnian Serb soldiers and MUP members carried out in the course of two days was absolutely contrary to chaotic. Actually, this operation represented an efficient completion of their task of transportation of several dozen thousand women, children and elderly and separation and detention of almost all men, and also launching a propaganda campaign with which they were to appease their own people and the international community. This indicates that the approach to that task was exceptionally well-planned and disciplined, and that the death of those people was a part of the plan. The Prosecution refers to the statements of witnesses Robert Franken, A-1 and Abida Huremović.[87]

301. It is also noted that the Bosniak men who survived Potočari were transferred to other temporary locations on 13 July, where they were subsequently either detained or executed by fire, and where, as planned, they were joined by other captured men from the column, captured in the zones of responsibility of the two Companies of the Jahorina Training Center. Those who were in the column and those who surrendered were treated absolutely identically as those who were separated in Potočari; they were forced to leave behind all their belongings, including personal documents, they were being convinced that they would be either exchanged or transferred to Kladanj to reunite with their families, and they were exposed to the same "controlled lawlessness".[88]

302. Equally wrong is the conclusion of the Trial Panel that it has not been proven that the Accused Marković spent the whole day of 12 July in Potočari, that is, that he commanded the members of his Platoon in any way, but that, according to the adduced evidence, he mostly carried out logistic tasks in the Srebrenica field, such as bringing food to the unit members. The Trial Panel was right in not trusting the statement of witness

[86] Appeal by the Prosecutor's Office of B-H, pp. 34-35.
[87] Appeal by the Prosecutor's Office of B-H, pp. 35-36.
[88] Appeal by the Prosecutor's Office of B-H, pp. 36-37.

Slavko Bojanić, while the Panel's conclusion that the Accused Marković carried out logistic tasks is based solely on the statement that the Accused gave on the record before the Prosecutor's Office, which was his conscious attempt to evade guilt.[89]

303. The Accused Marković also committed the acts referred to in Counts II/3, 4 and 5, according to the Prosecution, which follows from the evidence adduced at the main trial, primarily from the statements of those witnesses whose immediate superior the Accused Marković was.[90]

304. The Prosecution is of the opinion that the Trial Panel has reached wrong conclusions in paragraph 660 of the contested Verdict regarding the absence of the Accused Marković in front of the Kravica Farming Cooperative warehouse or on the Bratunac-Konjević Polje road; in paragraph 669, regarding the insignificant competences he had in the further course of the operation; in paragraphs 681, 682 and 683 that it has not been proven that he requested volunteers. To corroborate its assertions, the Prosecution refers to the statements of witnesses Dragan Bešić, Milorad Sarić, S-117, Ljubodrag Gajić, Tomislav Krstović, S-102, S-104, Velomir Gajić and Jevto Doder.[91]

a. Findings of the Appellate Panel

305. First of all, the Appellate Panel notes that the Prosecution superficially points at certain evidence in its Appeal, stating that it is incomprehensible that the Trial Panel evaluated that evidence in the referenced manner, that is, that it did not reach the conclusion that the Prosecution suggests.

306. The Prosecution did not point at the relevant evidence and did not offer sufficient reasons to establish that the Trial Panel's conclusion on the participation of the Accused Neđo Ikonić and Goran Marković in the incriminated event was obviously unjustifiable. In addition, there is nothing in the evidentiary material that would render the Trial Panel's conclusion unreasonable. Accordingly, this Panel concludes that the Trial Panel's decision to acquit the Accused Ikonić and Marković of the charges, namely, the Accused Ikonić of the charges for the criminal offense of Genocide in violation of Article 171(1)(a) and (b) of the CC B-H, as read with Article 180(1) of the CC B-H, and the Accused Marković for the

[89] Appeal by the Prosecutor's Office of B-H, p. 37.
[90] Appeal by the Prosecutor's Office of B-H, pp. 37-38.

criminal offense of Genocide in violation of Article 171(1)(a) and (b) of the CC B-H, as read with Article 31 of the CC B-H, is obviously justified.

307. In other words, the Trial Panel properly found that the Prosecution did not successfully prove in the course of the proceedings that during the terrain search the Accused Goran Marković acted with the knowledge that the civilians would be forcibly transferred from Potočari and that they were being rounded-up for that reason, or that these men would be summarily executed, which leads to the conclusion that the acts undertaken by the Accused as such do not constitute the criminal offense of Genocide.

308. According to the adduced evidence, as properly stated in the contested Verdict, the Accused Goran Marković mainly carried out logistic tasks in the Srebrenica field, that is, prepared food for the unit members. In his own words, on 12 July he was turned back to the base by the Accused Mendeljev Đurić to bring food to the members of the 1st Company who were busy with the transportation of civilians in Potočari, which was also confirmed by witness Slavko Bojanić.

309. Given the offered evidence, the Trial Panel could not reach any other conclusion but that the Accused was briefly present in Potočari, and that the Prosecution did not prove the participation of the Accused in the forcible transfer of the civilians from Potočari or that he ordered or supervised members of his Platoon to take part in the separation of men.

310. Contrary to the grievances in the Prosecution Appeal, the Trial Panel could not establish with certainty on the basis of the statements of witnesses S-100 and S-105, which were not sufficiently consistent and precise, that the Accused Goran Marković at any moment ordered members of his Platoon to confiscate money and valuables from the separated men.

311. The Trial Panel also could not establish beyond any reasonable doubt that the Accused Goran Marković was in front of the hangar at the time of the execution of the prisoners, that is, that he was present in front of the hangar in the night of 13 July, although some witnesses imprecisely and unreliably stated that at that time the Accused

[91] Appeal by the Prosecutor's Office of B-H, pp. 38-41.

"*circulated somewhere around*" the hangar (for example, witness S-102), but did not indicate the specific acts that the Accused undertook on that occasion.

312. The Trial Panel did not find it contestable that the Accused Goran Marković's Platoon participated in the terrain search, but the Trial Panel could not establish beyond any reasonable doubt that the Accused participated in the terrain search with the intention of capturing men, aware that they would be summarily executed following the same pattern as the captives in the Kravica warehouse, in whose executions he did not participate anyway.

313. The Prosecution Appeal also failed to successfully contest the factual finding in the contested Verdict that, although the Accused Goran Marković participated in the terrain search on 17 and 18 July, when several wounded column members were killed after they had lagged behind the column moving in the direction of Tuzla, he actually ordered some of those killings. [sentence as rendered in the original text; translator's note]

314. Therefore, the Appellate Panel concludes that the Prosecution did not offer a single corroborated and serious reason relative to the acquittal of Goran Marković for which this Panel should not trust the factual finding in the contested Verdict.

315. Also, the Appellate Panel concludes that the Trial Panel properly established the facts and found on the basis of the adduced evidence that the Accused Neđo Ikonić did deploy members of the 2nd Company along the road in the manner indicated in the description of facts, but that this had nothing to do with the capturing of men in Sandići, their detention and execution in the Kravica Farming Cooperative warehouse.

316. Contrary to the Prosecution Appeal grievances, this Panel considers proper the Trial Panel's conclusion that it has not been proven that Siniša Renovica, as Commander of one Platoon in the 2nd Company, participated in the execution of the captives, or that the Accused Neđo Ikonić was informed about it, and notes that quite reasonably the Accused should not have been charged with it. The Trial Panel was also of the opinion that the Accused should not have been charged with individual killings, given the fact that it was not possible to establish the identity of the perpetrator(s) on the basis of the offered evidence.

317. As the contested Verdict properly establishes, given the fact that the Accused Ikonić came to the execution site after the execution had been carried out, he could not

voice disagreement with the killing of the captives, and the referenced location was not in the zone of responsibility of the 2nd Company that he commanded, either.

318. Therefore, this Panel accepts as proper the conclusion of the Trial Panel that during the proceedings the Prosecution did not prove beyond any reasonable doubt the presence of the Accused Neđo Ikonić in front of the Kravica warehouse at the time of the killing of the captives, and it did not prove any participation of his Company's members in those executions, either.

319. The Trial Panel did not find contestable the participation of the 2nd Company commanded by the Accused Neđo Ikonić in the terrain search on 17 and 18 July. However, it did find contestable the fact that the Prosecution did not prove during the proceedings that during the terrain search this Accused, unlike the Accused Jević and Đurić, had the knowledge and awareness that the men found and captured during the search would be summarily executed, and it did not prove that on that occasion members of his (2nd) Company carried out individual killings of the wounded. Consequently, for him the terrain search, the act in which his participation was proven, and which, according to the adduced evidence, was a completely legitimate military action, was carried out in line with military rules. On that occasion all captured persons were delivered to members of the Military Police, but the Prosecution did not prove beyond a doubt to which unit the persons who subsequently participated in the executions belonged, with the examined witnesses categorically claiming that members of the 2nd Company did not participate in it.

320. Based on the foregoing, the Appellate Panel accepts as proper the Trial Panel's conclusion that it has not been proven that the Accused Neđo Ikonić participated in the terrain search with the same motives (that is, the same intent) as Duško Jević and Mendeljev Đurić, that is, that it has not been proven that he was aware that the captured men would be executed, given that he did not participate in the executions of the captives in the Kravica Farming Cooperative warehouse or consent with this crime, as he immediately informed his superiors in the Bratunac SJB [Public Security Station] about it.

321. Therefore, with respect to the Accused Neđo Ikonić, the Prosecution did not contest in its Appeal the facts established in the contested Verdict, but only voiced a different reading of the facts in the appeal grievances, which renders them unfounded.

C. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC B-H: VIOLATIONS OF THE CRIMINAL CODE

1. Appeal by the Prosecutor's Office of Bosnia and Herzegovina

322. The Appellate Panel concludes that the appeal arguments of the Prosecutor's Office concerning the misapplication of the CC B-H are unfounded.

(a) Appeal arguments of the Prosecutor's Office of Bosnia and Herzegovina

323. The Prosecution explained in its Appeal which decisive facts the Trial Panel failed to establish and which decisive facts it erroneously established, which led to the erroneous conclusion about the existence of decisive facts and misapplication of the law.

(i) Findings of the Appellate Panel

324. Having considered the Prosecution appeal argument that the Trial Panel erroneously established the decisive facts and misapplied the substantive law, the Appellate Panel concludes that the contested Verdict contains sufficient reasons on decisive facts and takes into account all relevant evidence that constituted the basis for the contested decision, and that the Trial Panel properly applied substantive law to such a properly established state of facts.

325. This Panel, therefore, concludes that the Prosecution did not prove the Trial Panel's conclusions in that respect to be contestable, whereby the appeal arguments are rendered unfounded.

326. Based on the foregoing, and pursuant to Article 314 of the CPC B-H, the decision has been rendered as stated in the enacting clause of the Verdict.

Record-taker **PRESIDING JUDGE**

Legal Adviser

Neira Kožo Mirko Božović

LEGAL REMEDY: No appeal lies from this Verdict.