SUD BOSNE I HERCEGOVINE **СУД БОСНЕ И ХЕРЦЕГОВИНЕ**

COURT OF BOSNIA AND HERZEGOVINA

Number: **S1 1 K 014263 13 Krž**

Date: **23 January 2014**

Appellate Panel: **Judge Tihomir Lukes, Presiding Judge**

Judge Azra Miletić, Reporting Judge

Judge Mirko Božović, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan

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SECOND INSTANCE VERDICT

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

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

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

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

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

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

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Sarajevo, 23 January 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, the Appellate Division Panel of Section I for War Crimes, comprising Judge Tihomir Lukes, as the Presiding Judge, and judges Azra Miletić and Mirko Božović, as the Panel members, with the participation of legal advisor Belma Čano-Sejfović, as the record-taker, in the criminal case of the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan, charged with the criminal offense of Genocide under Article 171(a), as read with Articles 29 and 180(1) of the Criminal Code of Bosnia and Herzegovina, deciding on the appeals filed by attorney Rade Golić, Defense Counsel for the Accused Milenko Trifunović; attorney Suzana Tomanović, Defense Counsel for the Accused Brano Džinić; attorney Dragan Gotovac, Defense Counsel for the Accused Aleksandar Radovanović; attorney Boško Čegar, Defense Counsel for the Accused Slobodan Jakovljević; the appeal filed by the Accused Branislav Medan and the appeal filed by his Defense Counsel, attorney Borislav Jamina, from the Verdict of the Court of Bosnia and Herzegovina No: X-KR-05/24 dated 29 July 2008, with regard to the decision issued by the Constitutional Court of Bosnia and Herzegovina, No. AP-4065/09 dated 22 October 2013, at the session held on 23 January 2014, in the presence of the prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Ibro Bulić, the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan and their Defense Counsel, delivered the verdict as follows.

V E R D I C T

The Appeals filed by the Defense Counsel for the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan, and the Accused Branislav Medan personally, **are hereby partly upheld,** and the Verdict No: X-KR-05/24 of 29 July 2008, delivered by the Court of Bosnia and Herzegovina, **is hereby revised** with regard to these Accused, as follows:

THE ACCUSED:

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

2. Brano Džinić a.k.a. *Čupo*, son of Ratomir and Dragica, nee Erkić, born on 28 June 1974 in the village of Jelačići, Kladanj Municipality, residing in …, … by ethnicity, citizen of …, police officer by profession, single, no children, no previous convictions, no other criminal proceedings are being conducted against him,

3. Aleksandar Radovanović a.k.a. *Aca*, son of Ljubiša and Jela, nee Dragišević, born on 20 June 1973 in Bujakovići-Skelani, Srebrenica Municipality, permanent residence at …, … by ethnicity, citizen of …, police officer by profession, completed secondary school, married, father of one child, no previous convictions, no other criminal proceedings are being conducted against him

4. Slobodan Jakovljević a.k.a. *Boban*, son of Dobrislav and Kosa, born on 9 January 1964 in the village of Kušići, Srebrenica Municipality, residing in …, … by ethnicity, citizen of …, unemployed, married, father of three children, indigent, no previous convictions, no other criminal proceedings are being conducted against him

5. Branislav Medan a.k.a. *Bane*, son of Risto and Marta, nee Milić, born on 24 March 1965 in Dubrovnik, permanent residence in …, … by ethnicity, citizen of …, laborer, completed primary school, unemployed, widower, no children, indigent, served the Army, no previous convictions, no other criminal proceedings are being conducted against him,

A R E G U I L T Y

in as much as:

Milenko Trifunović, as Commander of the 3rd Skelani Platoon within the 2nd Šekovići Special Police Detachment, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, and Brano Džinić as a special

police officer in the 2nd Šekovići Special Police Detachment, together with other members of the Army of Republika Srpska (VRS) and the Ministry of the Interior of Republika Srpska, having participated in capturing a large number of Bosniak men who, after the fall of the Safe Area of Srebrenica and its complete occupation by the forces of the Army of Republika Srpska, attempted to leave the protected zone of Srebrenica, on which occasion Trifunović previously encouraged and invited them to surrender, which many of them did as they were promised they would be interrogated and exchanged, yet their personal papers and other personal belongings were seized from them, they were left without food, water and medical aid although many of them were seriously wounded, at the same time witnessing that the remaining Bosniak civilian population, about 25,000 of them, mainly women and children, were transported by trucks outside the Safe Zone of Srebrenica, on 13 July 1995 escorted a column of the captured Bosniak men to the Kravica Farming Cooperative warehouse and, together with the other captured Bosniak men who had been bused to the warehouse, more than one thousand of them, imprisoned them in the warehouse of the farming cooperative and killed them in the early evening hours, in the way that Milenko Trifunović and Aleksandar Radovanović fired their automatic rifles at the captives, Brano Džinić threw hand grenades at them, and Slobodan Jakovljević and Branislav Medan took positions in the rear of the warehouse, standing guard and preventing any escape of the captives through the windows,

therefore, by killing members of a group of Bosniaks, they aided and abetted their partial extermination as a national, ethnic and religious group,

whereby they committed the criminal offense of – Genocide in violation of Article 141 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted under the Law on Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia, as read with Article 24 of the Criminal Code of the Socialist Federal Republic of Yugoslavia[1]**,**

[1] Decree Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia adopted as the law of the Republic at the time of imminent threat of war or state of war (Official Gazette of RBiH No. 6/92) and the Law Enacting Decree Laws (Official Gazette of RBiH No. 13/94); Hereinafter: the adopted CC of SFRY.

so that, based on the above stated legal provisions and Articles 38 and 41 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, the Court

S E N T E N C E S

THE ACCUSED MILENKO TRIFUNOVIĆ TO A PRISON TERM OF 20 (twenty) YEARS

THE ACCUSED ALEKSANDAR RADOVANOVIĆ TO A PRISON TERM OF 20 (twenty) YEARS

THE ACCUSED BRANO DŽINIĆ TO A PRISON TERM OF 20 (twenty) YEARS

THE ACCUSED SLOBODAN JAKOVLJEVIĆ TO A PRISON TERM OF 20 (twenty) YEARS

THE ACCUSED BRANISLAV MEDAN TO A PRISON TERM OF 20 (twenty) YEARS.

Pursuant to Article 50 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, the time the Accused spent in custody under the Decisions of this Court shall be credited towards the imposed sentence, as well as the sentence served under the Verdict No. X-KRŽ-05/24 rendered by the Court of Bosnia and Herzegovina on 9 September 2009, namely the Accused Milenko Trifunović from 22 June 2005 to his referral to serve the sentence, and the sentence served from 28 October 2009 to 18 November 2013; Aleksandar Radovanović from 22 June 2005 to his referral to serve the sentence, and the sentence served from 28 October 2009 to 18 November 2013; Brano Džinić from 22 June 2005 to his referral to serve the sentence, and the sentence served from 28 October 2009 to 18 November 2013; Slobodan Jakovljević from 21 June 2005 to his referral to serve the sentence, and the sentence served from 28 October 2009 to 18 November 2013; Branislav Medan from 23 August 2005 to his referral to serve the sentence, and the sentence served from 28 October 2009 to 18 November 2013.

R E A S O N I N G

I. PROCEDURAL HISTORY

A. VERDICTS OF THE COURT OF BIH AND DECISION OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

1. Under the Verdict No. X-KR-05/24 of 29 July 2008 rendered by the Court of Bosnia and Herzegovina, the Accused Miloš Stupar, Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan were found guilty of the criminal offenses committed as described in Sections 1 and 2 of the Operative Part of the Verdict, namely the Accused Milenko Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević and Branislav Medan as co-perpetrators of the criminal offense of Genocide in violation of Article 171(a), as read with Articles 29 and 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), while the Accused Miloš Stupar was found guilty of the criminal offense of Genocide in violation of Article 171(a), as read with Article 180(2) of the CC of BiH. Under the same Verdict, Milovan Matić, Velibor Maksimović and Dragiša Živanović were acquitted of charges that they committed the criminal offense of Genocide in violation of Article 171 of the CC of BiH, as read with Articles 29 and 180(1) of the CC of BiH.

2. For the above stated criminal offenses, the Court imposed on the Accused long-term imprisonment sentences as follows: the Accused Miloš Stupar to long-term imprisonment of 40 (forty) years, the Accused Milenko Trifunović, Brano Džinić and Aleksandar Radovanović to 42 (forty two) years each, and the Accused Slobodan Jakovljević and Branislav Medan to 40 (forty) years each. Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody under the Decisions of this Court until their referral to serve their prison sentences was credited towards the imposed sanction: Miloš Stupar from 22 June 2005; Milenko Trifunović from 22 June 2005; Aleksandar Radovanović from 22 June 2005; Brano Džinić from 22 June 2005; Slobodan Jakovljević form 21 June 2005 and Branislav Medan from 23 August 2005.

3. Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH),[2] the Accused were relieved of their duty to reimburse the costs

[2] Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

of the criminal proceedings, which would be covered from the budget appropriations of the Court of BiH.

4. Pursuant to Article 198(2) of the CPC of BiH, the aggrieved parties S1 and S2, as well as the Association of Mothers from the Srebrenica and Žepa Enclaves, were referred to pursue their property law claims by taking civil action before the relevant court.

5. The Prosecutor's Office of Bosnia and Herzegovina (the BiH Prosecutor's Office) appealed the Verdict concerning the part in which the Accused Milovan Matić was acquitted of the charges on the grounds of erroneously and incompletely established facts and essential violation of the criminal procedure, and moved the Appellate Panel to uphold the Appeal as well-founded, partly revoke the appealed Verdict in the part relevant to Milovan Matić, order his retrial in order to present the evidence anew and, after that, find the Accused guilty of the criminal offense charged and sentence him to long-term imprisonment.

6. The Trial Verdict was appealed by attorneys Ozrenka Jakšić and Radivoje Lazarević, Defense Counsel for the Accused Miloš Stupar. Attorney Ozrenka Jakšić appealed the Verdict on the grounds of essential violations of the criminal procedure, violations of the criminal code, erroneously and incompletely established facts and the sentencing decision, moving the Appellate Panel to uphold the Appeal, revise the appealed Verdict and acquit the Accused Stupar, or to revoke the appealed Verdict and order a retrial before the Appellate Panel. Attorney Lazarević appealed the Verdict on the same grounds and with the same proposal to the Court.

7. Attorney Rade Golić, Defense Counsel for the Accused Milenko Trifunović, appealed the Verdict on the grounds of essential violations of the criminal procedure, violations of the criminal code, erroneously and incompletely established facts, moving the Appellate Panel to revise the appealed Verdict pursuant to Article 314(1) of the CPC of BiH and acquit the Accused, or to revoke the appealed Verdict and order a retrial.

8. Attorney Suzana Tomanović, Defense Counsel for the Accused Brano Džinić, appealed the Verdict on the grounds of essential violations of the criminal procedure, violations of the criminal code, erroneously and incompletely established facts, moving the Appellate Panel to order that all transcripts of the main trial and evidence presented in this proceeding be translated into English, so that the members of the Panel who do not speak the official languages of BiH should be able to discuss this appeal at the Panel session on

an equal footing, or, alternatively, that the Appellate Panel order the translation of all transcripts and evidence to which this appeal refers, and that the appealed Verdict be completely revoked, and that the Appellate Panel schedule and conduct a retrial where all evidence would be presented again, together with the new evidence proposed in the Appeal.

9. Attorney Dragan Gotovac, Defense Counsel for the Accused Aleksandar Radovanović, appealed the Verdict on the grounds of essential violations of the criminal procedure, violations of the criminal code, erroneously and incompletely established facts and the sentencing decision, moving the Appellate Panel to revoke the appealed Verdict, or to revise it and, having correctly applied the law, upon the presentation of new evidence and repeated presentation of the evidence already presented, acquit the Accused Radovanović under a new Verdict.

10. Attorney Boško Čegar, Defense Counsel for the Accused Slobodan Jakovljević, appealed the Verdict on the grounds of essential violations of the criminal procedure, violations of the criminal code, erroneously and incompletely established facts, moving the Appellate Panel to revise the Trial Verdict pursuant to Article 314(1) of the CPC of BiH and acquit Slobodan Jakovljević of the criminal offense of Genocide or any other criminal offense.

11. Both the Accused Branislav Medan himself and his Defense Counsel, lawyer Borislav Jamina, appealed the Trial Verdict on the grounds of essential violations of the provisions of criminal procedure, violations of the Criminal Code, erroneously and incompletely established state of facts and the sentencing decision, and moved the Appellate Panel to uphold the appeal, revoke the appealed Verdict and schedule a trial.

12. The BiH Prosecutor's Office responded to all Appeals, proposing that the court dismiss them as ill-founded and uphold the Trial Verdict.

13. Attorney Miloš Perić, Defense Counsel for the Accused Milovan Matić, responded to the Prosecution Appeal, moving the court to dismiss it as unfounded and to uphold the part of the Trial Verdict relevant to the Accused Milovan Matić.

14. Deciding on the Appeals filed by the Prosecution and the Defense, the Appellate Panel held a public session on 8 September 2009 and 9 September 2009 pursuant to Article 304 of the CPC of BiH and rendered the second instance Verdict No. X-KRŽ –

05/24 on 9 September 2009, dismissing the Appeal of the BiH Prosecutor's Office and upholding the Trial Verdict in relation to Milovan Matić. The Appeal filed by the Defense for Miloš Stupar was upheld, the Verdict was revoked in that part, and a trial was ordered before the Appellate Panel. The Appeals filed by the Defense teams for Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan were partially upheld and the appealed Verdict was revised in terms of the legal qualification of the criminal offense, so as to define the acts of the Accused as the criminal offense of Genocide in violation of Article 171 of the CC of BiH, as read with Article 31 of the CC of BiH (Accessory). The Trial Verdict was accordingly revised in its sentencing part, so that Milenko Trifunović was sentenced to a long-term imprisonment of 33 (thirty three) years, Brano Džinić and Aleksandar Radovanović to a long-term imprisonment of 32 (thirty two) years each, while Slobodan Jakovljević and Branislav Medan were sentenced to a long-term imprisonment of 28 (twenty eight) years each. The Trial Verdict remained unchanged in the remaining part.

15. Through their Defense Counsel, the Accused Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan filed appeals with the Constitutional Court of Bosnia and Herzegovina (the BiH Constitutional Court), arguing that the second-instance Verdict violated their rights guaranteed under the European Convention on Human Rights and Fundamental Freedoms (ECHR) and under the Constitution of Bosnia and Herzegovina (Article IV of the General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement).

16. At a session held on 22 October 2013, the BiH Constitutional Court granted the Appeals filed by Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan, and rendered the Decisions No. AP – 4100/09 (for Milenko Trifunović) and AP - 4065/09 (for Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan). Having found the violation of Article 7(1) of the ECHR, the Constitutional Court revoked the Verdict No. X-KRŽ – 05/24 of 9 September 2009 rendered by this Court. It is important to note that in its Decision AP - 4065/09 the Constitutional Court failed to note that, in addition to the Appellants, the Verdict pertained to two more individuals: Miloš Stupar and Milovan Matić, whose criminal proceedings were completed by a final verdict under which they were acquitted of the charges pursuant to Article 284(c) of the CPC of BiH. Nevertheless, although these individuals did not file appeals, nor did they contest the second instance verdict in any way whatsoever, the

Constitutional Court failed to include that fact in their Decision and limit it only on the Appellants, but instead revoked the entire Verdict.

17. However, this Panel sees this as an omission which should not have any consequences for Miloš Stupar and Milovan Matić since the allegations of the Appeals filed by Trifunović, Jakovljević, Džinić, Radovanović and Medan do not affect the validity of the acquitting Verdict, nor can the effects of the Constitutional Court Decisions be broadened so as to include these individuals. Thus, the Panel concludes that this omission in the Constitutional Court's Decision does not have a legal effect in respect of Sections I and II of the Operative Part of the second instance Verdict No. X-KRŽ-05/24 rendered by the Court of BiH on 9 September 2009.

18. In that regard, following the revocation of the second instance Verdict, the proceedings in this criminal matter have been returned to the stage which preceded the issuance of the disputed decision, that is, to the stage of deciding on the appeals, but **only for the Accused who filed the Appeals with the Constitutional Court and only in regard to the established violation in terms of Article 7(1) of the ECHR,** which corresponds to the allegations of the Appeals as to the erroneous application of criminal law and the imposed criminal sanctions.

B. PROCEEDINGS BEFORE THE APPELLATE PANEL

19. The Parties were informed that the Panel session was scheduled for the purpose of implementing the Constitutional Court's Decision that revoked the earlier second instance decision, and returned the case to the stage before the decision was issued – the appellate proceeding phase. For that reason, the allegations of the Appeals relevant to the Constitutional Court's Decision will be re-examined, since the Constitutional Court did not address, nor did it find, the other violations submitted in the Appeals. The Defense Counsel were given the possibility to present their appeals again. The Panel, however, noted that the violation was established in terms of Article 7(1) of the ECHR, so that the counsel, when presenting their appeals, should focus on that issue, on the applicable law and the decision on the criminal sanction, which the counsel eventually heeded.

20. It clearly follows from the Reasoning of the Constitutional Court's Decision that only the violation of Article 7(1) of the ECHR was established, so that the second instance Verdict rendered under the appellate proceeding before the Appellate Panel was revoked.

21. The Panel further notes that the Appellants alleged other violations of the ECHR in their Appeals, but in paragraph 60 of the Decision No. AP - 4065/09, the Constitutional Court said that *„...it is not necessary to specifically consider the part of the Appeal which alleges the violation of the right to liberty and security of person, stipulated in Article II/3.d) of the Constitution of Bosnia and Herzegovina and Article 5 of the ECHR (Appellant Jakovljević), the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6 of the ECHR, punishment only under the law as foreseen in Article 7 of the ECHR, effective remedy as set forth under Article 13 of the ECHR, non-discrimination stipulated in Article II/4 of the Constitution of Bosnia and Herzegovina and Article 14 of the ECHR, and general prohibition of discrimination stipulated in Article 1 of Protocol 12 to the ECHR, and Articles 2 and 4 of the International Covenant on Civil and Political Rights (Appellant Džinić)."* In addition, paragraph 50 of the Decision No. AP - 4100/09 states: „*In view of the conclusion about the violation of Article 7 of the ECHR and the order that a new decision be rendered by a regular court in a retrial, the Constitutional Court holds it is not necessary to specifically examine the allegations of the Appeal relevant to the violation set forth under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Articles 6 and 13 of the ECHR, as well as the rights guaranteed under Article 1 of Protocol 12 to the ECHR.*"

22. In the opinion of this Court, the Constitutional Court should have issued a decision with regard to the alleged violations of Articles 5, 6, 13 and 14 of the ECHR; violations of Article II/4 of the Constitution of Bosnia and Herzegovina; Article 14 of the ECHR; Article 1 of Protocol 12 to the ECHR and Articles 2 and 4 of the International Covenant on Civil and Political Rights, given that remedy to violations of Article 7 of the ECHR has no effect whatsoever on the potential violation of other ECHR provisions, which were not decided upon by the Constitutional Court.

23. The Court does not have the authority to reconsider its own final decisions – specifically the parts thereof which are not disputed by decisions of the Constitutional Court. The culpability of the Accused/Appellants and the established facts were not disputed by the Constitutional Court decisions; furthermore, the Constitutional Court did not issue any order in that respect, so that the Court cannot examine the allegations of the Appeals in that part, nor can the Court reconsider that part of its earlier decision. To that end, the Court only notes that the Accused can again appeal the new Verdict with the Constitutional Court or lodge an application directly with the European Court of Human Rights.

24. Besides, the proceeding resulting from the Decision of the Constitutional Court does not fall under the category of extraordinary legal remedy - reopening of proceedings under Article 327 of the CPC of BiH. The Criminal Procedure Code of Bosnia and Herzegovina does not contain provisions which could be applied and which define the procedure after a revocation of a final Verdict rendered by the Court of BiH in a regular proceeding. Particularly problematic is the course of action that remedies only the violation of Article 7 of the Convention, mandatory application of the more lenient law, which is corrected by revising the Verdict where the violation was made.

25. Article 327 of the CPC of BiH foresees a reopening of the proceedings to the benefit of the convicted person, as an extraordinary remedy when *"… a criminal proceeding was completed by a final verdict …"*, and under expressly listed circumstances and conditions, allowing in its paragraph f) a reopening of the proceeding *„if the Constitutional Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights establishes that human rights and fundamental freedoms were violated during the proceeding and that the verdict was based on these violations".*

26. The general precondition for reopening a proceeding, on which the Defense insisted, is the existence of a final verdict rendered in the criminal proceeding. In addition, the reopening of a proceeding to the benefit of the convicted person is allowed if it is **established that the rights and freedoms were violated** in a decision of one of the mentioned courts and that the verdict was based on these violations. In *Maktouf and Damjanović vs BiH*[3], the European Court of Human Rights found that the final verdicts rendered by the Court of BiH in the criminal proceedings of these Applicants violated Article 7 of the ECHR. The European Court did not disturb the verdict itself, it only noted the violation and ordered it be remedied. Pursuant to the said decision, when deciding upon the Motions to reopen the proceeding, filed by the Defense for the convicted persons Damjanović and Maktouf, the Court of BiH applied Article 327(1)f) of the CPC of BiH and allowed a reopening of the proceeding to the benefit of the convicted persons.

27. In accordance with the provisions which govern the reopening of criminal proceedings when final verdict is not revoked, the Court has the obligation to remedy the established violations of the rights of the convicted persons, reopen the proceeding and

[3] Applications No. 2312/08 and 34179/08, Decision of 18 July 20013.

issue a verdict which will entirely or partly render the final verdict out of force (revise) in the relevant part thereof, or uphold the verdict.

28. Based on the foregoing, the Appellate Panel examined only the objections raised in the Appeals as to the application of the criminal code and the imposed criminal sanction. On the other hand, since the Constitutional Court did not dispute the appealed part of the Verdict on the grounds of substantial violations of the criminal procedure and erroneously and incompletely established facts, this part is completely upheld and interpreted in the new Verdict.

29. The Panel held a session on 23 January 2014 with regard to the Decisions of the Constitutional Court, in the presence of the Prosecutor of the BiH Prosecutor's Office, the Accused Trifunović, Jakovljević, Džinić, Radovanović and Medan and their Defense Counsel, and gave the Defense Counsel the opportunity to present their appeals again, focusing on the objections as to the incorrect application of substantive law and related sanctions. The Counsel maintained their objections raised in the previous appeals, referred to the conclusions reached by the Constitutional Court in Decisions AP-4065/09 and 4100/09 of 22 October 2013, and noted all mitigating circumstances the Court should take into account. The Prosecution adhered to the written response to the Appeals, submitting that the Court would consider all relevant circumstances, and eventually impose maximum sentences.

II. GENERAL CONSIDERATIONS

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

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

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

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

III. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE

A. STANDARDS OF REVIEW

34. The Appellate Panel first notes that five relevant appeals have been filed in this case up to now, where some allegations are being repeated, so that the Appellate Panel has decided to group them in accordance with the grounds of appeal and in that way respond to every objection raised.

35. Before giving the reasoning, the Appellate Panel invokes the provisions of Article 295(1)(b) and c) of the CPC of BiH, which oblige the appellant to state in the appeal the grounds for contesting the verdict and the reasoning in support of his claim.

36. Pursuant to Article 306 of the CPC of BiH, the Appellate Panel shall review the verdict only insofar as it is contested by the appeal, therefore the appellant shall draft the appeal in such a manner so as to enable reviewing the verdict.

37. In that regard, the Appellant must clearly specify the grounds on which he appeals the verdict, state which part of the verdict is appealed, which piece of evidence or action of the court he disputes, and provide a clear and substantiated reasoning in support of the raised objection.

38. Mere general reference to the grounds of appeal and to the alleged irregularities in the first instance proceeding, without specifying grounds of appeal, does not constitute a valid basis to review a trial verdict. As a result, the Appellate Panel *prima facie* dismissed the unsubstantiated and vague allegations of the appeal as unfounded.

39. In terms of the gravity and significance of procedural violations, the CPC BiH distinguishes between the violations that, if found, create an irrefutable assumption that they adversely affected the validity of the trial verdict (absolutely essential violations) and the violations concerning which, in each specific case, it is left for the Court to evaluate

whether the found violation of the procedure had or might have had an adverse effect on the validity of the Verdict (relatively essential violations).

40. Absolutely essential violations of the CPC BiH are specified under Article 297(1) subparagraphs a) through k) of the CPC BiH.

41. Should the Panel find any essential violation of criminal procedure provisions, it shall revoke the trial verdict pursuant to Article 315(1)(a) of the CPC BiH.

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

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

1. Essential violations of the criminal procedure provisions under Article 297(1)a) of the CPC of BiH

44. With respect to this ground, the Appeals primarily object to the improper composition of the First Instance Panel, since it included two international judges. The Defense Counsel allege that:

> a) persons who are not nationals of Bosnia and Herzegovina may not serve as judges at any court in BiH, including the Court of BiH (Appeal by attorney Boško Čegar, Defense Counsel for the Accused Slobodan Jakovljević)
>
> b) there are no provisions allowing international judges to sit as Trial Panel judges, as Article 65 of the Law on the Court of BiH provides that an international judge can only perform the duties of a preliminary proceedings judge, preliminary hearing judge and individual judge, or a member of the Special 24(7) Panel, or the Panel foreseen in Article 16 of the Law on the Protection of Witnesses (appeal of Defense Counsel for the Accused Milenko Trifunović, attorney Rade Golić).

45. However, the Appellate Panel has dismissed these allegations of the appeals as unfounded.

46. There is no doubt that two international judges were members of the First Instance Panel - Judge Shireen Avis Fisher (international judge from the USA) and Judge Paul Melchior Brilman (international judge from The Netherlands).

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

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

49. The appellate claim implying that Article 65 of the Law on the Court of BiH proscribes the participation of international judges in trial panels is also unfounded.

50. Namely, the appellant refers to Article 65(5) and (6) of the Law on the Court of BiH. Those provisions indeed read as follows: *An International judge of Section I and Section II of the Criminal and Appellate Divisions may serve as a preliminary proceeding judge, a preliminary hearing judge or as a single trial judge in proceedings before Section I and Section II of the Criminal and Appellate Divisions and may serve as a judge in the panel as referred to in Article 24(7) of the Criminal Procedure Code of Bosnia and Herzegovina, including the panel as referred to in Article 16 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses of Bosnia and Herzegovina*.

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

2. Essential violation of the criminal procedure, Article 297(1)b) of the CPC of BiH

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

53. However, the case record and Annex B, paragraph A, of the Trial Verdict show that the Defense had already petitioned for the disqualification of the President of the Trial Panel, Judge Hilmo Vučinić, citing the reasons under Article 29(f) of the BiH CPC (circumstances raising reasonable doubt as to his impartiality). In their petition the Defense submitted the same facts and circumstances as in the present appeal from the Verdict.

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

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

56. Accordingly, the Court of BiH, in Plenum, rendered the decision number SU-373/06 of 8 May 2006, dismissing as inadmissible the petition of Defense Counsel for one of the co-accused (the petition was filed prior to the decision on severance of the proceedings) seeking that all Serb and Bosniak judges be disqualified from the proceedings. The petition that sought the disqualification of the President of the Trial Panel on the grounds that during the war he lived in the Goražde enclave where circumstances were similarly uncertain as they were in the Srebrenica enclave and because he is a member of the Bosniak people against whom the offence was committed, was dismissed as unfounded.

57. The reasoning of the Decision of the Plenum states that the arguments raised do not bring into question the impartiality of Judge Vučinić, and that in addition to him the Trial Panel comprises two international judges who participate in the making of all important decisions. It was emphasized that all decisions rendered in the course of the proceedings are subject to review on appeal before the Appellate Division (in cases when appeal is allowed pursuant to the law). That Division is comprised of judges of all ethnicities.

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

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

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

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

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

63. In the case at hand, the Appellate Panel concludes that the Defense failed to prove that a single personal or property right of the President of the Trial Panel was violated or

threatened by the criminal offense at issue. The Defense makes this inference based on the general fact of the judge's Bosniak ethnic background.

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

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

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

67. However, Judge Vučinić could be considered an aggrieved party in this case only if he himself, or a person close to him, was in the group of Bosniak civilians who were imprisoned and then killed, or had some property right of his violated by the instant criminal offence.

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

69. It follows that Judge Vučinić was not aggrieved by the instant criminal offence, as the Defense inaccurately tries to imply. Therefore, the Appellate Panel dismisses the assertion that judge Vučinić was an aggrieved party, which consequently should, as such, be disqualified not only as inadmissible, but also as unfounded.

3. Essential violation of the criminal procedure, Article 297(1)c) of the CPC of BiH

70. The appeals also contest the decision the Trial Panel made during the hunger strike of the Accused and their refusal to come from the detention unit and attend the main trial hearings. The Panel decided not to have the Accused brought to the courtroom by the use

of force. Rather, the main trial hearings were held without the presence of the Accused who had been duly summoned to attend.

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

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

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

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

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

76. From the commencement of the main trial on 9 May 2006 until 10 January 2007, the Accused attended every main trial hearing. On 10 January 2007, they refused to attend the hearing because they went on a hunger strike or supported the ongoing hunger

strike. The purpose of the strike was to obtain an urgent decision on their applications before the BiH Constitutional Court.

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

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

79. Resolving this procedural situation, the Trial Panel correctly concluded that the CPC BiH did not prohibit the conduct of the proceedings without the presence of the accused in the courtroom, and that such an action could not be defined as a trial *in absentia*.

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

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

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

83. It is therefore clear that forceful apprehension referred to by the Defense is used in situations when the accused is not held in custody. In such situations, apprehension is ordered first, as a more lenient measure to secure his presence in the proceedings. The most stringent measure of custody is ordered only if the more lenient measure does not achieve the desired purpose.

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

85. The Appellate Panel finds inadmissible the appellate claim implying that the First Instance Court should have had the Accused forcefully brought to the courtroom (Defense Counsel for the Accused Aleksandar Radovanović even suggested the use of "metal handcuffs" and "glass box" in the courtroom), in order to observe their rights to a fair trial. The Appellate Panel concludes that such a course of action would have had the opposite effect. The use of physical force would transform the right of the accused to be present and take part in the criminal proceedings into an obligation to do so. This is unacceptable, in terms of both the CPC BiH and the relevant international standards of human rights and fundamental freedoms.

86. The use of coercion suggested by Defense Counsel would be inhumane and would violate the mental and physical integrity of the accused, and would also undermine the authority and dignity of the Court. Other than their mere physical presence in the courtroom, it would not achieve an active and willing participation of the Accused in their own proceedings.

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

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

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

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

91. The purpose of the procedural prohibition from trying the accused *in absentia* is to enable the accused to be informed of the proceedings conducted against him and to participate in those proceedings to the extent he chooses, all in the context of his right guaranteed under Article 6 of the ECHR.

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

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

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

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

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

97. Defense Counsel for the Accused Slobodan Jakovljević incorrectly quotes expert witness Senad Pešto. Having examined the Accused, the expert witness stated at the hearing held on 18 January 2007 that the Accused was experiencing back pain. He expressly stated that that pain had nothing to do with his mental state and that the Accused *"was fully able to attend the proceedings".* Defense Counsel for the Accused Aleksandar Radovanović, attorney Dragan Gotovac, had a similar unfounded claim. The expert witness confirmed, at the same hearing, that Aleksandar Radovanović, as well as Miloš Stupar, Milenko Trifunović, Brano Džinić, Slobodan Jakovljević, Miladin Stevanović, Velibor Maksimović and Dragiša Živanović, are *"fully able to attend the proceedings and the court."*

98. The health condition of Milovan Matić on 17 and 18 January 2007 and his presence or absence on those dates had no bearing on the Defense of the Accused Slobodan Jakovljević and Aleksandar Radovanović. Therefore, their Defense Counsel were amiss when referring to that circumstance, especially since the Accused Matić was acquitted of charges in these proceedings, and accordingly lodged no appeal.

99. Bearing in mind that the Accused were aware of the charges against them all along; they were timely informed of and summoned to the hearings scheduled; they were able to attend the hearings; their Defense Counsel were always present at the main trial; the Accused every time clearly, willingly and explicitly waived their right to be present at the trial, the Appellate Panel concludes that they were not prevented from attending, following and participating in the main trial in any way. The Accused obviously waived that right willingly and thus accepted that the main trial would continue without their presence.

100. Accordingly, the Appellate Panel finds these grounds of appeal unfounded and dismisses them as such.

4. Essential violation of the criminal procedure, Article 297(1)d) of the CPC of BiH

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

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

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

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

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

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

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

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

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

105. Specifically, the first instance proceedings were completed on Thursday, 17 July 2008, and the Verdict was pronounced on Tuesday, 29 July 2008.

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

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

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

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

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

111. Therefore, a three-day deadline was evidently insufficient for the Trial Panel to deliberate and vote on the decision after a proper review of the entire body of evidence, which is exactly the reason why the Trial Panel extended the deadline.

112. The right of the Accused to a defense was not violated by such an action, so the appellate claims in that regard are unfounded.

113. The Appellate Panel concludes that in the interest of fairness, and particularly in the interest of the Accused, the Court must take sufficient time to review the evidence from all aspects before making its decision, even if that involves a slight extension of the deadline

for deciding. The Court is required to carefully review all evidence adduced. It is one of the most important statutory obligations of the Court in the course of the criminal procedure.

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

115. The appellate claim that the Trial Panel failed to compile the written Verdict within thirty days is unfounded, for the same reasons. A thirty-day deadline is the maximum time provided for by the law. However, in such a complex and extensive case the Verdict could not have reasonably been written within thirty days. The Verdict has 393 pages. The Trial Panel duly informed the Court President of the extension of this deadline, pursuant to Article 289(1) of the CPC BiH.[4]

116. Furthermore, the defense again fails to explain how such actions of the Trial Panel violated the Accused's right to a defense. Since the defense was on an equal footing with the BiH Prosecutor's Office and received the Verdict on the same day, with the same deadline for appeal, the Appellate Panel concludes that this appellate claim is unfounded and dismisses it accordingly.

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

118. By the submission dated 24 June 2008, the Prosecutor's Office specified the Indictment by adding the word "the majority of" under Count e) of the factual description of the offence, in order to be more precise about the number of Bosniak prisoners who were killed at the relevant time. In the part of the Indictment pertaining to the Accused Milovan

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

Matić, the Prosecutor's Office added that he, in addition to filling the ammunition clips used for the execution of prisoners, also *seized wrist watches, money, and gold from the captured Bosniaks* (emphasis added).

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

120. Article 275 of the CPC BiH reads as follows:

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

121. It stems from the cited provision that the amendment of the Indictment by the Prosecutor's Office is allowed. Taking into account that the Accused Milovan Matić was acquitted of charges, the only amendment to the factual description that pertains to the Accused is the inserted phrase "the majority of".

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

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

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

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

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

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

128. Neither the Defense Motion for Additional Cross-Examination in the first instance proceeding nor the appellate allegations indicate a single fact that was the subject of Butler's analysis and which the Defense had no opportunity to present to Butler during immediate cross-examination. The Trial Panel was correct in noting that the Defense was familiar with the Indictment and thus with this particular piece of evidence as well, since December 2005. The Report was not supplemented with new evidence or changed in the course of the proceeding. Therefore, it follows that the Defense had sufficient time to study it and prepare all questions they deemed relevant for this witness. Based on the reasons described above, the Defense's ground of appeal is refused as unfounded.

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

130. This is because the Defense had the right (which they exercised) to cross-examine witness S4 about all the circumstances relevant to them at the session held on 11 June 2008. The Defense failed to state in their Appeals a single circumstance which would indicate the relevance of delivering transcripts of that same witness's cross-examination in

another case, and the Appellate Panel itself fails to see a realistic need for that, taking into account that the Defense had already directly exercised their right to cross-examine this witness.

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

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

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

134. Based on the foregoing, this ground of appeal is also dismissed as unfounded.

5. Essential violation of the criminal procedure under Article 297(1)h) of CPC BiH

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

136. Contrary to the appellate claims, the Appellate Panel does not find any essential violation of the CPC provisions, as alleged by the Defense.

137. Namely, having considered all of the admitted evidence and having applied the *in dubio pro reo* principle, the Trial Panel, as discussed in detail on page 201 of the Trial

Verdict (*BSC version*), concluded that certain facts and acts alleged in the Indictment had not been proven. Therefore, the Trial Panel adjusted the Operative Part of the Verdict to their findings based on the presented evidence.

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

139. All of the parts that were left out are discussed in detail by the Trial Panel on pages 201-203 of the Trial Verdict (*BSC version*).

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

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

142. The court is allowed to intervene in the factual description if the intervention is aimed at a more precise specification of the offense. In doing so, it must be careful not to exceed the charge, or more precisely, make sure that the intervention does not result in a

qualification more severe to the accused. In the instant case, the factual description was only conformed with the established state of the facts in certain parts not related to the elements of the offense. The legal qualification in the Indictment was not changed and the fact that certain parts were left out from the description of the offense definitely did not put the Accused in a worse procedural position, but rather in a more favorable one.

143. The Defense for the Accused Milenko Trifunović is not correct when they claim that the Court should have rendered an acquittal for Forcible Transfer, since the Accused were not charged with that act as one that would by itself meet the elements of the criminal offense. Rather, it represented an integral part of the description of the criminal offense of Genocide.

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

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

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

6. Essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH

147. It is further alleged in the appeals that the first-instance Verdict "... is based on evidence that may not be used as the basis of a verdict under the provisions of this Code." The arguments raised under this ground of appeal may be summarized as noted below.

148. The Defense challenges the Decision of the Court of 18 April 2007 to partially accept the Prosecution's Motion, No. KT-RZ-10/05 of 5 May 2006, in which the Court ruled as follows:

- Records of statements given by the Accused are admitted into evidence and it is allowed that they be read out at the main trial:

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

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

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

- The following evidence proposed in the Indictment is accepted into the record:

- Exhibit No. 40 in the Indictment - Record on crime scene investigation and reconstruction with Petar Mitrović dated 4 October 2005, and

- Exhibit No. 122 in the Indictment - Sketch of the crime scene in Kravica.

149. The Defense further challenges the lawfulness of the investigative statements given by the witnesses listed below, which were admitted into evidence in the present proceedings, because these witnesses testified at the main trial that they had been put under pressure when giving these statements, that they had been forced in different ways to sign these statements, that some of them had not even read their statements and that generally there had been many irregularities during the taking of those statements. These witnesses are: Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Živojin Milošević, Ilija Nikolić, Obradin Balčaković, Danilo Zoljić, Stanislav Vukajlović, Mirko Sekulić, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić, Nebojša Janković, Dragan Kurtuma and Luka Marković.

150. It is further claimed that the Court should not have admitted into evidence the reports by Richard Butler and Dean Manning given that allegedly they are not expert witnesses, which is why their reports cannot be considered as expert witness findings, and that the matters which they analyzed in their reports allegedly do not fall within their area of expertise. As for the testimony of Jean-Renè Ruez, the Defense objects that it has not been admitted in accordance with the provisions of Article 5 of the LOTC.

151. The lawfulness of the admission into evidence of statements made by Miroslav Deronjić was also challenged.

152. The Defense also challenges the Court's decision to accept as proven the facts established in the proceedings before the ICTY in general, and also because there was no right of appeal against this decision during the first-instance proceedings.

153. With respect to the arguments raised on appeal in relation to the Decision of the Court to admit into evidence the records of statements given by the Accused Mitrović, Stevanović and Džinić, as detailed above, the Appellate Panel concludes that they are unfounded and that there has been no violation of the criminal procedure provisions.

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

155. By its Decision of 21 May 2008, the Trial Panel decided to sever the case against the Accused Miloš Stupar, Petar Mitrović, Milenko Trifunović, Miladin Stevanović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Velibor Maksimović, Dragiša Živanović, Branislav Medan and Milovan Matić into three separate cases, one against the Accused Petar Mitrović (I), the other against Miladin Stevanović (II), and the third one against Miloš Stupar and others (III).

156. By the same decision, the Accused Mitrović and Stevanović were made to testify in each other's cases, and in the third case too (Stupar *et al.*), and the Trial Panel in turn guaranteed to them that anything they might say as witnesses would not be used against them in their own cases.

157. The Trial Panel reasoned its decision to sever the proceedings on account of the fact that it had admitted and read out at the main trial the investigative statements given by Petar Mitrović and Miladin Stevanović to the BiH Prosecutor's Office, which directly or indirectly incriminate the other Accused in this case.

158. Thus, by the severance of the proceedings, Petar Mitrović and Miladin Stevanović became witnesses in the present case.

159. In view of one of the basic rights of the accused in the course of the proceedings – the right to put questions to witnesses (Article 259(1) of the CPC of BiH) and the right to cross-examination (Article 262 of the CPC of BiH), the Court had to provide the Accused with the opportunity to cross-examine the individuals whose statements incriminate them, either directly or indirectly.

160. As for Brano Džinić, the Trial Panel did not find it relevant to sever the proceedings in relation to him too, and have him tried separately, given that his investigative statement did not incriminate other co-Accused in this case.

161. In their appeals the Defense teams now challenge the Court's decision to admit the records of those statements because this allegedly violated the right of these Accused (witnesses in the present proceedings) to remain silent, in other words, not to incriminate themselves.

162. The Appellate Panel finds that this appeal argument is unfounded because Petar Mitrović and Miladin Stevanović are both tried in the proceedings separate from this one, which is why any appeal arguments filed on their behalf in this case are not relevant for the ruling in the present proceedings.

163. Whether the right of the Accused Petar Mitrović and Miladin Stevanović to remain silent has been violated by the admission of their investigative statements into evidence will be decided by the Court in their own cases (the proceedings in which they are the Accused), while in the present proceedings they appear as witnesses and, as a result of that, have a duty to testify.

164. The Defense further submits that their right to cross-examine witnesses Mitrović and Stevanović existed only in theory as both of these witnesses failed to appear at the hearing scheduled for their cross-examination, which also resulted in the essential violation of the provisions of the CPC of BiH.

165. These Defense allegations are not correct given that it clearly follows from the transcript of the main trial of 21 May 2008 that the decision to sever the proceedings was announced at this hearing, and that, at the same time, it was decided that all the Accused would be given an opportunity to conduct cross-examination in relation to the circumstances contained in Mitrović's and Stevanović's investigative statements. For this purpose, the Trial Panel scheduled a hearing on 28 May 2008. However, immediately

upon the commencement of the hearing, all defense counsel stated they did not wish to cross-examine witnesses Petar Mitrović and Miladin Stevanović. This includes explicit statements by attorneys Golić and Čegar that they do not wish to use the opportunity to cross-examine these witnesses, which was noted on the record. Therefore, the Defense allegations that they were not provided with this opportunity are simply not accurate.

166. With respect to the Defense arguments concerning the alleged formal deficiency of the statements admitted into evidence, they can be summed up as follows:

1. the argument that the statements were taken without the suspects receiving specific cautions prescribed by the CPC of BiH, this allegedly being the case particularly with the statement given by Petar Mitrović;

2. the argument that, on the statement, the name of Brano Džinić was added in handwriting next to the names of other members of the Skelani Platoon without any indication as to who added his name and why.

167. None of the above arguments are well-founded, and they do not challenge the validity of the statement given by Petar Mitrović to the BiH Prosecutor's Office on 21 June 2005.

168. It is beyond dispute that the Accused Petar Mitrović gave 2 statements in the course of the investigation – one at the CJB /Public Security Center/ Bijeljina on 20 June 2005 and the other at the BiH Prosecutor's Office on 21 June 2005.

169. Similarly, it is beyond dispute that the statement given at the CJB Bijeljina was taken contrary to the provisions of the CPC of BiH given that the suspect was examined as if he were a witness (receiving the cautions given to witnesses in accordance with Article 86 of the CPC of BiH), and not the suspect (which status implies different procedural guarantees prescribed under Article 78 of the CPC of BiH).

170. The Trial Panel did not accept this statement as a lawfully obtained evidence and duly provided reasoning for doing so, which is fully supported by this Panel too.

171. The Defense argues in their Appeal that Petar Mitrović's statement of 21 June 2005 is based on his statement given at the CJB Bijeljina the day before, that is, on 20 June 2005, and is therefore unlawful as well.

172. However, contrary to arguments on the appeal, the statement that the Accused Petar Mitrović gave at the BiH Prosecutor's Office on 21 June 2005, as the Trial Panel correctly concluded, was given in accordance with the provisions of the CPC of BiH and as such it meets all the formal requirements to be considered a lawfully obtained evidence.

173. In the appealed decision, the Trial Panel was mindful of the fact that at the time of giving his statement to the police (on 20 June 2005), the Accused Mitrović was not subjected to any threats or the use of force, which indicates that at the time of his interview at the Prosecutor's Office on the following day, he did not suffer from any trauma or fear from the day before.

174. Moreover, the second statement was taken on the next day, by different persons and in a different location, which presents a clear break in time and space continuum between the statements. Besides, prior to the second interview, a defense counsel was appointed to suspect Mitrović and he conferred with him, which is why he is considered to have been informed of his rights and options.

175. Based on these factual findings, the Appellate Panel concludes that the statement given at the CJB Bijeljina and the formal deficiencies that marked its taking did not have any effect on the regularity of the procedure and contents of the statement given at the Prosecutor's Office on 21 June 2005. As a result, the Trial Panel's decision to admit this statement into evidence was entirely justified and in accordance with the law.

176. A similar objection raised on appeal, namely that the statements of Miladin Stevanović and Brane Džinić were not taken properly, that is, that they did not receive cautions in accordance with Article 78 of the CPC of BiH ("Instructing the Suspect on His Rights"), is not well-founded either.

177. Having reviewed the records of these statements, the Appellate Panel found that they contain all the required cautions and that they were made entirely in accordance with the provisions of the Criminal Procedure Code in effect at the time.

178. On a total of 37 pages (from page 333 to 369) the Trial Panel addressed in detail each element of cautions given to the (then) suspects (Petar Mitrović, Miladin Stevanović and Brane Džinić) and found that the statements were valid in formal terms. This finding is entirely upheld by the Appellate Panel. The reasoning of this procedural issue contains a detailed analysis of each aspect of the validity of these statements and it cites the relevant

case law of the European Court of Human Rights, while the appeals, apart from arbitrary claims, do not contain any specific submission or evidence that would effectively challenge the Trial Panel's findings.

179. Almost all of the appeals point to a subsequent amendment of the CPC of BiH, which added to the cautions previously contained therein, the obligation that during the interview a suspect must be cautioned that his statement is admissible as evidence at the main trial and that it may be read out and used at the main trial without his consent.

180. However, this ground of appeal is unfounded too.

181. It is beyond dispute that the Law on Amendments to the Criminal Procedure Code of BiH was enacted on 17 June 2008 (Official Gazette, 58/08) and that it entered into force on 29 July 2008. This Law amended, among other things, the provisions of Articles 6 and 78(2)(c) and a new paragraph (3) was added in Article 273 of the CPC of BiH.

182. Article 6 of the amended CPC of BiH prescribes that the suspect, apart from the obligation that he be informed "on his first questioning... about the offense that he is charged with and grounds for suspicion again him", must also be cautioned that "*... any statement of his may be used as evidence in further proceeding."*

183. Article 78(2)(c) of the CPC of BiH, following the amendments, prescribes that a suspect shall be informed of "... the right to comment on the charges against him, and to present all facts and evidence in his favor and that, *if he does so in the presence of the defense attorney, the statement made is allowed as evidence at the main trial and may, without his consent, be read and used at the main trial*."

184. The added paragraph (3) of Article 273 of the CPC of BiH reads as follows:

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

185. The Defense teams invoke in their appeals provisions of the Law on Amendments to the CPC of BiH (containing the amended and added provisions cited above) without ever mentioning that this law actually entered into force on the very same day when the Trial Panel pronounced its Verdict.

186. It, therefore, follows that both the prosecutor seized of the case and the Trial Panel could not have acted in accordance with the legal requirement that did not even exist at the time the relevant procedural action was taken (the suspect's interview and the admission of his investigative statement into evidence respectively). In other words, according to the then applicable provisions of the CPC of BiH, the prosecutor was not obliged to caution the suspect that his statement, should he decide to give one, would be admissible as evidence at the main trial and that it may be read out and used at the main trial without his consent.

187. The Appellate Panel upholds the Trial Panel's reasoning that the notice that was given was lawful and proper according to the applicable criminal-procedural legislation that was in force at the time of the Trial Panel's decision on admission of the Accused Mitrović's statement into evidence. Later amendments to Article 273 of the CPC of BiH, which added new and specific language to this article, confirm the soundness of the position taken by the Trial Panel.

188. The Appellate Panel also reviewed Article 125 of the Law on Amendments to the Criminal Procedure Code (Official Gazette, no. 58/08), which reads as follows:

> "In cases where the indictment had been confirmed before this Law entered into force, the proceedings shall continue in accordance with the provisions of the Criminal Procedure Code of Bosnia and Herzegovina ("Official Gazette of BiH", nos. 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07 and 15/08), unless the provisions of this Law are more favorable to the suspect, or the accused."

189. The above cited provision introduces a principle that is not usually found in procedural codes, given that the principle of ban on retroactivity is more a characteristic of substantive criminal law. This is reinforced by Article 4(1) of the CC of BiH, which establishes a general principle of time constraints regarding the applicability of criminal code and according to which "[t]he law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense." This is the so called principle of ban on a retroactive effect of the criminal code or *ban on retroactivity.*

190. In this manner the principles of legality, and of legal security, are protected in such a way that no one can be sanctioned before being put on notice that such conduct is prohibited or illegal. This principle is also an established principle of international law set forth in some of the most important international instruments such as, for instance, Article 7 of the ECHR and Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

191. Article 4(2) of the CC of BiH provides for the possibility of retroactive application of a new more lenient criminal code (retroactive application is allowed when the new criminal code is more lenient - retroactivity *in mitius*). The issue of a more lenient law (*lex mitior*) occurs in situations when the criminal offense is committed at the time when one law is in effect, but is then amended once or several times before the rendering of the final verdict. It is a case of mandatory application of the new code if it is established that it is more lenient for a perpetrator of the criminal offense.

192. On the other hand, the existence of this institution in substantive criminal law is quite natural and logical, especially bearing in mind that the court, when deciding on the application of the more lenient law to a body of facts, has before it both (or several) laws and it is based on its analysis of these codes that the court then decides which law to apply in accordance with the *lex mitior* principle. In the case of procedural laws, this kind of situation is not possible given that the court conducting the proceedings applies the procedural law that is in force at the time of the procedural action, and that at that moment in time it cannot anticipate in any way whether there will be any future amendments to particular provisions of the procedural law, and if so, what they may be.

193. This position is supported by the Commentary on the CPC of BiH[5]:

> "In criminal-procedural law, unlike substantive law, this issue is treated in accordance with the provisions of the law which is in force at the time of the action (*tempus regit actum* rule), which means that the fact that the criminal offense was committed before the criminal procedure code entered into force is irrelevant. Rather, pre-requisites for the undertaking and validity of a procedural action are determined in accordance with the law which was in force at the time of the action. The problem, however, occurs in the criminal proceedings that are ongoing at the time of the entry of the new law into force because unlimited application of the new law may prevent the harmonization of results of procedural actions undertaken under the old law with those undertaken under the new law. In such situations old regulations would apply in the given cases until the conclusion of the stage or part of the proceedings that commenced under the old law, whereas new regulations would apply to the stages of the proceedings that postdate the entry into force of the new law. This is a compromise intended to protect the rights of the parties to the criminal proceedings. There are two rules in that respect: one, that *old procedural actions do not have to be repeated because their results are valid under the new law too*, and the other, that the deadlines that are ongoing on the day of the entry of the new law into force shall be counted under the rules that are more favorable to the party."

194. Based on the above, whether a procedural law is more lenient, or more stringent, is to be determined based on statutory deadlines prescribed for a given procedural action,

[5] Council of Europe/European Commission (2005), Commentary on the Criminal Codes in BiH, Sarajevo, page 65.

and, in that respect, the law that gives a longer deadline to the party to undertake a procedural action is to be considered the more lenient law.

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

196. The Defense claimed that the name of Brane Džinić was added in handwriting on the record of Petar Mitrović's statement of 21 June 2005 in the part of the statement where there is a reference to other members of the Skelani Platoon, without any note as to who added his name and why, which in the Defense's view rendered the statement unlawful.

197. Having reviewed this statement, the Appellate Panel notes that on page 4, after the second paragraph and after the reference is made to members of the Skelani Platoon, the name of *Branko Đinić* was indeed added in handwriting in brackets.

198. This issue was the subject of consideration by the Trial Panel too and, as a result, the following note is made on page 355:

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

199. It clearly follows from the above that the Trial Panel did not even take into consideration the name that was subsequently added in handwriting. In that way, the Trial Panel eliminated any possible doubt about the formal validity of the Record.

200. In their appeals, the Defense teams entirely overlook this decision by the Trial Panel and fail to provide any reasons in support of their claim that the Trial Panel should not have admitted this statement on the ground that it was an unlawfully obtained evidence. The Defense also failed to offer any arguments in support of their claim that the Record of the statement is invalid, especially in view of the fact that the Trial Panel, as noted above, did not take into consideration the added name.

201. Accordingly, the Appellate Panel finds that the appellate objections challenging the admission of Mitrović's investigative statement into the record are unfounded, and holds

that the admitted evidence has been obtained in accordance with the provisions of the CPC of BiH.

202. The Appellate Panel further finds that Exhibit No. 40 in the Indictment - Record on crime scene investigation and reconstruction with Petar Mitrović dated 4 October 2005, and Exhibit No. 122 in the Indictment - Sketch of the crime scene in Kravica, which the defense claimed were „fruits of a poisonous tree“, that is, that they resulted from the unlawfully obtained statement of Petar Mitrović, are not unlawfully obtained pieces of evidence.

203. The Defense objections concerning the alleged unlawfulness of investigative statements by witnesses Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Živojin Milošević, Ilija Nikolić, Obradin Balčaković, Danilo Zoljić, Stanislav Vukajlović, Mirko Sekulić, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić, Nebojša Janković, Dragan Kurtum and Luka Marković are unfounded too.

204. It follows from the case file that these witnesses were interviewed in the course of the investigation and that the records of these interviews were duly made. The records were made in accordance with the provisions of the CPC of BiH, which is to say that they contain all the necessary cautions prescribed by the relevant provisions of the CPC of BiH (Chapter VIII, Section 5 of the CPC of BiH). It is claimed in the appeals that these witnesses stated at the main trial that they were subjected to various forms of pressure during these interviews, that they did not know what they were signing, or why, that they did not even say the things that were on the record or that they said it differently. However, none of these witnesses objected to the record of their interview. Instead, they duly signed them below the written statement reading that they had no objections to the record and that their interview was conducted in accordance with ethical and professional principles. In that context, statements made by 11 above-mentioned witnesses (Siniša Bećarević, Nedeljko Sekula, Slobodan Stjepanović, Nikola Milaković, Danilo Zoljić, Stanislav Vukajlović, Predrag Čelić, Marko Aleksić, Ljubiša Bečarević, Tomislav Dukić and Dragan Kurtum), who stated at the main trial that in the course of the interview they faced pressures they did not know how to deal with, that they got confused or that they did not even read their statements, appear particularly unconvincing in light of the fact that they are police officers, employees of the RS Ministry of Interior.

205. The Appellate Panel holds that such a position by individuals who face this type of situations on a daily basis in their line of work and who are familiar with the basic principles

of functioning of the bodies such as the Ministry of Interior is untenable and an obvious attempt to modify their previous statements in line and for the benefit of the Defense for the Accused.

206. An obvious example of such conduct is witness Slobodan Stjepanović, a police officer at the RS Ministry of Interior. Below is the exchange between the Prosecutor and witness Stjepanović at the main trial about the circumstances under which he had given his statement in the investigation.

> „**Prosecutor**: Well, did you have an opportunity to say: well, it's not true what you're saying?
>
> **Witness Stjepanović**: Well, you know, it did take a while... Now, whether I read it, I don't know... I just wanted to get over with it, although..."

207. The same is true of witness Danilo Zoljić, who also gave a very unconvincing explanation at the main trial when asked by the Prosecutor about the circumstances surrounding his investigative statement.

> **Prosecutor Bulić:** Did inspector Goran Gajić request of you to agree with what he wanted you to say? Did you in any way have to confirm that what he asked of you?
>
> **Witness Zoljić**: In a disguised form, yes.
>
> **Prosecutor Bulić**: Were you aware as to why the record was being made?
>
> **Witness Zoljić**: No.
>
> **Prosecutor Bulić**: You work in the police, don't you?
>
> **Witness Zoljić**: Yes, but I was not aware of the purpose of this interview. It was only when the BiH Prosecutor's Office launched the investigation against Stupar in the case 10/05 that I realized that my statement was part of that investigation. I gave the statement lightly, so to say, as I could not recall exactly the events and consequently I could not make connection between them. It turned out the way it did. Even without your asking me, I'm aware that there are a few things on the record that do not correspond to what I said at the time.
>
> **Prosecutor Bulić**: You signed this statement, did you not?
>
> **Witness Zoljić**: Well, yes.
>
> **Prosecutor Bulić**: Why did you agree to sign the statement, thereby confirming it as your own statement, if it contained something you actually didn't say?
>
> **Witness Zoljić**: I'll tell you why. We're all human and we all have a capacity to tolerate things up to a certain point. When you're out of your comfort zone and are totally and utterly upset as a result of the other person's actions, you either accept it all or hit him and

leave. It rarely happens in these type of situations that anything is done in a conciliatory tone.

208. It follows from the above citation of the record that witness Zoljić is not telling the truth on this issue given that he himself stated that it was not until he learned that his statement was going to be used in the investigation against suspect Stupar that he allegedly realized that at the time of giving the statement he could not recall the events exactly. This explanation is absolutely illogical and clearly aimed at changing the statement for the benefit of the Defense.

209. The Trial Panel also noted such conduct on the part of the witnesses, which is evident in its analysis of the discrepancies between witness Siniša Bećarević's testimony at the main trial and his investigative statement (page 147 of the first-instance Verdict).

210. The Trial Panel noted that “[i]n order to clarify his mental condition, [it] hired an expert witness in neuropsychiatry Marija Kaučić Komšić, who established that the witness suffered from acute reaction to stress, and that there were no indications of any mental illness from before or his incapability of memorizing things, and that he was fit to testify.” The Trial Panel then went on to establish that this witness's investigative statement “... was given prior to the onset of the 'acute reaction to stress' that the neuropsychiatrist described” and soundly concluded that “the [investigative] statement is the more reliable evidence”.

211. It is also important to note that the Trial Panel made its findings in relation to decisive facts based on the testimony of a number of witnesses and documentary evidence that were mutually consistent, rather than relying only and exclusively on the testimony of the witnesses noted above.

212. For the reasons stated above, the Appellate Panel holds that the statements of the above-mentioned witnesses are lawful, and that by admitting them into the record and taking them into consideration in the process of rendering its decision, the Trial Panel did not violate the provisions of the CPC of BiH, as wrongly claimed in the appeals.

213. With respect to objections to the Trial Panel's Decision to admit into evidence the reports by Richard Butler and Dean Manning, the Appellate Panel finds that these objections are unfounded too.

214. On 4 December 2006, the Trial Panel rendered the Decision that it would, *inter alia*, admit the following evidence obtained by the ICTY:

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

215. The cited Decision is an integral part of the reasoning of the first-instance Verdict, while the Panel's argumentation on these matters is to be found on pages 315 and 316 of the Verdict.

216. In their appeals the Defense submits that these persons are not expert witnesses and that they did not produce expert witness findings but reports, which is why the Defense claims that these reports should not have been admitted into evidence in the present criminal proceedings.

217. However, it is clear from the cited Decision of the Court that the reports made by Richard Butler and Dean Manning were not accepted under Article 6 of the LOTC (Statements by expert witnesses before the ICTY), but instead under Article 4 taken in conjunction with Article 8 of the LOTC.

218. Article 4 of the LOTC reads:

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

219. Reasoning its decision, the Trial Panel stated:

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

220. The Trial Panel further made a clear distinction between the opinions contained in the proffered reports (which it did not accept) and the first-hand information (which it accepted) contained in the document admitted before the ICTY, to which it assigned the same probative value as any other piece of evidence in the proceedings.

> "First-hand information contained in the reports will be accepted as evidence under Article 4 of the LOTC because it is contained in a document admitted before the ICTY proceedings. It will be subject to the same limitations and analysis as all LOTC evidence, including Article 3(2)."[6]

221. The same is the case with the testimony of Dean Manning (Indictment Part 2, Number 2) and Jean-Renè Ruez (Indictment Part 2, Number 1) accepted under Article 5 of the LOTC.

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

223. In their appeals the Defense claims that the testimony of Jean-Renè Ruez was not admitted in accordance with Article 5 of the LOTC, without substantiating this claim in any way. The Appellate Panel notes that such unsubstantiated objection does not constitute a proper challenge to the soundness of the Trial Panel's decision.

224. Therefore, this ground of appeal is also dismissed as unfounded.

225. The Defense also contests the lawfulness of the Trial Panel's decision to admit into evidence the statement made by Miroslav Deronjić on the grounds that they did not have the opportunity to cross-examine this witness.

226. Having reviewed these claims, the Appellate Panel notes that the statement Miroslav Deronjić gave to the ICTY OTP on 25 November 2003 was admitted into evidence in the first-instance proceedings (Exhibit O 326).

227. However, as rightly noted by the Defense for the Accused Miloš Stupar, at the time when he was summoned to testify Miroslav Deronjić was seriously ill and not long after that he passed away.

228. Article 273 of the CPC of BiH prescribes exceptions from the general rule of direct presentation of evidence and it reads as follows:

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

> "1. Prior statements given during the investigative phase are admissible as evidence in the main trial and may be used in direct or cross-examination or in rebuttal or in rejoinder and subsequently presented as evidence. The person must be given the opportunity to explain or deny a prior statement.
>
> 2. Notwithstanding Paragraph 1 of this Article, records on testimony given during the investigative phase, and if the judge or the Panel of judges so decides, may be read or used as evidence at the main trial only if the persons who gave the statements are dead, affected by mental illness, cannot be found or their presence in Court is impossible or very difficult due to important reasons."

229. Given that the above cited Article 273(2) of the CPC of BiH allows for an investigative statement to be read out and used as evidence at the main trial if the person who gave the statement died (which was the case here), the Appellate Panel concludes that the Trial Panel's decision to accept Miroslav Deronjić's investigative statement as evidence under Article 273(2) of the CPC of BiH is lawful and that there is no procedural violation in that respect.

230. The Appellate Panel will get back to the probative value of this and other admitted evidence, as well as the credibility of witness Miroslav Deronjić, in the section dealing with objections to the established state of facts.

231. With respect to the objections concerning the Trial Panel's decision to accept as proven the facts established in the ICTY judgments, which are specified in the Trial Panel's decision forming an integral part of the challenged Verdict (Section F, page 244 onward), the Appellate Panel notes that some of the Defense teams claim that this constitutes a violation of the right to a fair trial and the right to a defense, while others invoke Article 297(1)(i) of the CPC of BiH claiming essential violation of the criminal procedure provisions. This being the case, the Appellate Panel will now proceed to address both of these objections.

232. As is evident in the first-instance Verdict, certain facts established in the proceedings before the ICTY were accepted as proven in the present case under Article 4 of the LOTC.

233. The facts accepted as proven by the Trial Panel, as well as those that were not accepted, were listed in Section F of the contested Verdict, starting at page 244.

234. The Defense's primary objection is that they had no opportunity to appeal the Decision on the acceptance of facts immediately in the course of the first-instance

proceedings, which in their view constituted a violation of the provisions of the CPC of BiH and the right to a fair trial.

235. Moreover, the Defense challenges the use of established facts in general, arguing that it violates the principle of the presumption of innocence by shifting the burden of proof from the Prosecution to the Defense.

236. Defense Counsel for the Accused Milenko Trifunović submits that “some of the facts [...] are irrelevant for this case taking into account the original Indictment”, that “certain facts are vague in nature and the analysis shows they were taken out of the context, which makes them unusable”, and finally that “some incriminate the Accused, whereby the Trial Panel violates the principles it set for accepting established facts.”

237. The Appellate Panel finds that these grounds of appeal are unfounded.

238. The Defense's claim that the denial of the right to immediately appeal the Decision to accept as proven the facts established in the proceedings before the ICTY violated the principle of legality, and that, as a result, the contested Verdict is based on evidence that cannot form the basis of the Court's verdict, is entirely without merit.

239. As the legal basis for their submission the Defense invokes Article 1(2) of the LOTC and Article 318(1) of the CPC of BiH.

240. Article 4 of the LOTC prescribes that “[a]t the request of a party or proprio motu, the court, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.”

241. Article 1(1) of the LOTC reads that “[t]he provisions set forth in this Law shall regulate the transfer of cases by the International Criminal Tribunal for the former Yugoslavia... to the BiH Prosecutor’s Office and the admissibility of evidence collected by the ICTY in proceedings before the courts in BiH”, while paragraph (2) of the same article stipulates that “[i]n case the provisions set forth in this Law do not provide for special provisions for the matters referred to in paragraph 1 of this article, other relevant procedures of the BiH Criminal Procedure Code... shall apply.”

242. Under Article 318 of the CPC of BiH it is prescribed that “[t]he parties, the defense attorney and parties whose rights have been violated may always file an appeal against the decision of the Court rendered in the first instance unless when it is explicitly prohibited to file an appeal under this Code”, while paragraph (2) of the same article stipulates that “[a] decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal against the verdict.”

243. It is true that the LOTC neither prescribes nor prohibits the right of appeal from the court's decision to accept as proven the established facts under Article 4 of the LOTC. However, it is equally true that the LOTC does not prescribe a specific format of that decision or the criteria to be taken into consideration in making that ruling.

244. In view of the fact that the LOTC points to the application of the CPC of BiH in relation to those matters for which no specific provisions exist in the LOTC, the Appellate Panel finds it proper to rule on such a matter in the form of a decision. The Appellate Panel takes this view given that the decision on this matter is made after hearing the parties (frequently upon their motion too) and that it has to contain a reasoning on whether the proposed facts meet the specific criteria to be accepted as proven, with the Trial Panel relying on the criteria developed by the ICTY, which is fully supported by this Panel too.

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

246. Contrary to the Defense claims suggesting that some of the established facts accepted as proven contain elements of the criminal offense of which the Accused has been found guilty, which is why, in the Defense's view, they are to be considered as decisions on the merits, the Appellate Panel holds that they are procedural decisions that do not allow for interlocutory appeals and that may be contested only in an appeal from the verdict.

247. It clearly follows from both the first-instance Verdict and the Decision specifically addressing this issue that only those facts that were distinct, concrete and identifiable, that were not conclusions, opinions or verbal testimonies and, most importantly, were not a characterization of legal nature, were accepted as proven. In addition, established facts that were accepted as proven meet the other criteria too – they contain essential findings of the ICTY and were not significantly changed; they do not directly or indirectly confirm

the criminal liability of the accused, they were either affirmed or established on appeal or were not contested on appeal; and, no further opportunity to appeal is possible; they are not subject of a plea agreement or voluntary admission and derive from the proceedings in which the accused had legal representation and the opportunity to defend himself.

248. In view of the above, this Panel shares the conclusion of the Trial Panel that the established facts that were accepted as proven in the above-mentioned decision entirely meet the relevant criteria and in no way violate the right of the Accused to a fair trial and his right to be presumed innocent. This is especially true in light of the fact that in the course of the proceedings established facts that were accepted as proven were treated as piece of evidence on the record, which the Defense could challenge by offering their own arguments and counter-evidence.

249. This conclusion is supported by the fact that in the same Decision, the Trial Panel dismissed the Prosecution's Motion of 4 May 2006 to accept as proven established facts from the following ICTY judgments: IT-02-60/1-A of 8 March 2006, IT-02-60/1-S of 2 December 2003 and IT-02-60/2-S of 10 December 2003 given that the Panel found that some of the proposed facts constituted legal conclusions and directly or indirectly incriminated the Accused. It follows from this that the Trial Panel made a clear and sound distinction between the facts that can be accepted and those which, if accepted, would jeopardize the right of the accused to a fair trial.

250. Besides, some of the facts established in the ICTY proceedings were accepted as proven in the present proceedings upon the Defense motions. This was the case with the Trial Panel's Decision to partially grant the Motion of 11 February 2008 filed by attorney Dragan Gotovac, Defense Counsel for the Accused Aleksandar Radovanović, moving the Panel to accept as proven the facts established in the ICTY cases *Prosecutor v. Radislav Krstić* and *Prosecutor v. Vidoje Blagojević and Dragan Jokić*. Additionally, on 2 April 2008 the Trial Panel partially granted the Motion of 26 March 2008 filed by attorney Rade Golić, Defense Counsel for the Accused Milenko Trifunović, moving the Panel to accept as proven the facts established in the Appeal Judgment in the ICTY case *Prosecutor v. Radislav Krstić*.

251. These circumstances indicate that the Defense was in an equal position to the Prosecution with respect to the availability and use of established facts as evidence in the present proceedings.

252. Furthermore, the essence of a decision to accept established facts as proven is to contribute to judicial economy, to respect the right of the accused to a speedy trial, and finally to find a balance between the right of the accused to a fair trial and the need to rationalize the number of times the same witnesses have to testify in relation to the same circumstances in several different cases. The decision on the acceptance of established facts as proven is, therefore, a purely procedural action of admitting evidence into the record, naturally if the evidence (in this case, established facts) meets the relevant criteria.

253. Accordingly, the Appellate Panel concludes that the Trial Panel's Decision to accept established facts as proven is essentially a decision on the admission of exhibits into evidence and that, as noted by the Trial Panel in the reasoning of its decision, "[i]n the proceedings... [the accepted facts] constitute a special evidentiary action and the Panel will treat them as a piece of evidence."

254. In view of all the above, it is entirely justified that the evidence is admitted into the record in the course of the proceedings by procedural decisions and that the contents and probative value of that evidence are weighed once the main trial has been completed and when the Trial Panel has before it all the presented evidence. It is at this time that the Trial Panel is able, pursuant to Articles 15 and 281(1) and (2) of the CPC of BiH, to freely evaluate each piece of evidence and its correspondence with the rest of the evidence.

255. If one were to accept the Defense's position on the admissibility of an appeal from the decision on acceptance of established facts as proven in the course of the proceedings, then this principle would have to be applied to the admission into the record of every other piece of evidence, which would mean delaying the proceedings until each and every such decision became final.

256. Apart from the fact that this is not prescribed by the Criminal Procedure Code, this method of appeal would be absolutely unacceptable both from the aspect of judicial economy and the right of an accused to a speedy trial.

257. Moreover, the Appellate Panel notes that in their appeals the Defense teams do not even challenge the contents of the facts accepted as proven (which they surely could have done in the appeal from the verdict), nor do they offer evidence indicating a possibly different state of facts. The Defense only challenges the principle of not allowing an immediate appeal from this type of decision.

258. The Defense for the Accused Milenko Trifunović is the only defense team that challenged contents of the facts accepted as proven, more specifically 3 such facts, one of which was deemed irrelevant for the present case while the other was imprecise and as such unusable (which renders as superfluous the objection raised in this respect on appeal). It should be noted here that the Trial Panel did not rely on these facts in making their ruling.

259. Finally, in relation to the fact: "*In some places, ambushes were set up and in others, the Bosnian Serbs shouted into the forest, urging the men to surrender (...)"* (T85), the Defense submits that it incriminates the Accused (without providing any further explanation). The Appellate Panel, however, fails to see how the cited fact incriminates any of the accused in this case.

260. Therefore, the Appellate Panel concludes that accepting the above established facts as proven did not result in violation of the provisions of the CPC of BiH or in violation of the right of the accused to a fair trial, as wrongly claimed by the Defense in their appeals.

7. Essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH

261. In his appeal, Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čegar, submits that "... the accused are charged only with their conduct in Kravica, whereas the reasoning of the impugned Verdict goes much further and imputes to the accused everything that happened in the wider area of Srebrenica and in other locations where they were not present at all. In this way, the reasoning of the Verdict assumes an extended and impermissible accusatory role because it moves *ultra petitum* the limits of the Indictment. This constitutes an essential violation in relation to decisive facts in the form of substantial and decisive contradiction on the one hand and an entirely erroneous factual basis on the other."

262. It may be concluded from this objection (although it is not entirely clear both with respect to the type of violation alleged and the facts that it deems erroneously established and contradictory) that the Defense for Slobodan Jakovljević submits that the first-instance Verdict exceeded the charges because the reasoning includes incidents not mentioned in the operative part of the first-instance Verdict.

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

264. Article 280 of the CPC of BiH prescribes that “[t]he verdict shall refer only to the accused person... [the so called subjective identity between an indictment and verdict] and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial... [the so called objective identity between an indictment and verdict]”.

265. Each verdict “... must have an introductory part, the pronouncement and the opinion” (Article 290(1) of the CPC of BiH), and if an accused is found guilty, the operative part must contain information prescribed in Article 285 of the CPC of BiH.

266. Article 285(1)(a) of the CPC of BiH reads that in a guilty verdict the Court shall point to “... the facts and circumstances that constitute the elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends.”

267. The above provisions of the law clearly indicate that a precise factual description of the offense is a mandatory segment of the operative part of a guilty verdict and it is exactly the operative part with all its elements prescribed in the law that is binding and that must illustrate the set of facts of which an accused has been found guilty. This is extremely important both from the perspective of adjudicating the matter and one of the basic rights of an accused/convicted person – the right to know charges against him and to know the acts he has been found guilty of.

268. For the reasons noted above, the operative part of a verdict must be sufficiently detailed and must reflect factual findings made by the court based on the presented evidence. In that context and with a view to establishing the facts as precisely as possible, the court may and should harmonize its description of an unlawful act constituting the crime the accused has been found guilty of with results of the evidentiary proceedings. The exercise of this authority by the court must not prejudice and be to the detriment of the accused. The court's qualification of the offense resulting from its interventions into the factual description of the offense must not be more severe than the one originally charged by the Prosecution, and moreover the court cannot find an accused guilty of an entirely different criminal offense from the one alleged in the Indictment. Otherwise, this would result in the exceeding of the charges, which constitutes an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH.

269. However, unlike the operative part that reflects the substance of the ruling on the Indictment with its integral parts strictly prescribed in the law, the reasoning of a verdict is a court's elaboration of the facts it finds proven or not proven, and the rationale for deciding one way or the other, with a special emphasis on the assessment of credibility of contradictory evidence, providing the reasons for refusing to grant certain motions by the parties, reasoning why it decided not to directly examine a witness or expert witness whose testimony or expert report have been read out, explaining the reasons that guided the court in ruling on specific legal issues, and especially establishing the existence of a criminal offense and criminal liability of an accused, and applying specific provisions of the Criminal Code to the accused and the offense he committed.

270. It clearly follows from the above analysis that the reasoning cannot “exceed the charge”, as wrongly claimed by the Defense in their appeal, because when stating the reasons for its ruling the court is not bound by anything but the law, whereas in the operative part the court is bound by the factual description of the offense from the Indictment.

271. Therefore, this ground of appeal is unfounded and was dismissed as such.

8. Essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH

272. Before discussing this alleged violation of the criminal procedure provisions, the Appellate Panel notes that most of the Defense objections in this regard suggest that the court weighed the evidence differently from what the Defense thought it should have done, or more concretely that the evidence of importance for the defense of the accused was not given due relevance. Based on this line of reasoning, the Defense submits that the contested Verdict does not „cite reasons concerning the decisive facts.“

273. However, having examined the above arguments raised by the appellants, the Appellate Panel concludes that they actually object to the established state of facts, or more precisely that the Trial Panel established the facts of the case erroneously.

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

275. Contrary to the Defense allegations, the contested Verdict does cite reasons concerning the decisive facts, but they are evidently different from the thesis of the Defense. For this reason, the Appellate Panel will address these Defense objections when it examines the established state of facts.

9. Essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH

276. The Defense's appeals contain some objections that have not been categorized under any grounds for appeal set forth in Article 297(1) of the CPC of BiH. The Appellate Panel thus examined them under Article 297(2) of the CPC of BiH.

277. These objections can be summed up as follows:

1. Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čegar, challenged the lawfulness of the Order to search the dwellings of the accused because the Order did not specify the names and surnames of persons conducting the search, there is no precise description of property that was the subject of the search, and finally he objected on the grounds that the defense counsel were not informed about the search;

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

278. This Panel finds that the Defense objections claiming that the Order of the Court of BiH of 9 July 2005 to search the family houses, yards and ancillary buildings owned or in possession of the accused was not produced in accordance with the law, are unfounded.

279. The primary reason for this finding is that the Defense raised identical objections (that the Order did not specify names of persons conducting the search, that there is no description of property that was the subject of the search, that the defense counsel were not informed about the search, and finally that the signature of witnesses did not guarantee lawfulness of the search) in the course of the first-instance proceedings and that the Trial Panel ruled on each of these objections in a separate Decision of 30 October 2006. The Appellate Panel finds that the explanation provided in the Trial Panel's Decision

is reasoned and sound, noting in particular that the Defense failed to point out in their appeal how the Trial Panel's Decision "affected or [at least] could have affected the rendering of a lawful and proper verdict."

280. Based on the above analysis, the Defense's objection is dismissed as unfounded.

281. The Appellate Panel further finds that the Defense's objection to the Court's decision, referring the aggrieved party *Mothers of Srebrenica and Žepa Enclaves Association* to take civil action to pursue their property law claims, is also unfounded.

282. Defense Counsel for the Accused Slobodan Jakovljević, attorney Boško Čegar, essentially challenges the standing of the Association as such to take civil action, claiming that "it has not been established whether any of the killed persons were related to members of that Association."

283. Article 198(2) of the CPC of BiH reads:

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

284. It follows from the above provision that in the criminal proceedings the court may either award the compensation sought by the aggrieved party or refer him to take civil action to pursue his claim under property law. In the criminal proceedings the aggrieved party's claim cannot be dismissed, and in case it does not award the claim, the court can only refer the claimant to take civil action.

285. In that civil action, the court of relevant jurisdiction will determine the aggrieved party's standing to file a claim, as well as the amount and basis of a potential compensation sought.

286. For the reasons noted above, the objection raised by attorney Čegar is unfounded because, in fact, it moves the court to render a decision that is not allowed by the law.

IV. INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF APPELLATE REVIEW

287. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. When considering the alleged errors of fact, the Appellate Panel will substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict.

288. 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.

289. The Appellate Panel will overturn a Verdict only if an error of fact caused a miscarriage of justice. Miscarriage of justice is defined as a grossly unfair outcome in judicial proceedings, as when an Accused is convicted despite the lack of evidence on an essential element of the crime.

290. In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the Trial Panel raise a reasonable doubt about the guilt of the accused. In order for a prosecutor to prove the miscarriage of justice, s/he must demonstrate that, considering the errors of fact made by the Trial Panel, any reasonable doubt with respect to the guilt of the accused is eliminated.

291. Therefore, only where the Appellate Panel finds, first, that no reasonable trier of fact could have reached the contested findings and, second, that the error of fact caused a miscarriage of justice, will the Appellate Panel grant an appeal invoking Article 299(1) of the CPC of BiH and claiming that facts have been incorrectly and incompletely established.

292. The Defense objections pertaining to the allegedly incorrectly and incompletely established state of facts may be summarized as shown below.

1. Incorrectly or incompletely established facts

293. All Defense appeals referred to the state of facts being incorrectly and incompletely established. In view of the fact that some grounds of appeal recur in all of the appeals, this Panel decided to first address joint grounds of appeal pertaining to all of the accused, and then move on to grounds of appeal that are relevant only to the individual accused person in order to respond to all objections raised in relation to incorrectly or incompletely established facts.

294. The Appellate Panel notes that it addressed only those objections alleging incorrectly or incompletely established facts and the resulting findings of the Trial Panel that were of decisive importance for the guilt of the accused, leaving aside those objections that were deemed irrelevant to adjudication in this criminal case.

2. Joint Appeal Grievances

295. The Defense is of the view that the state of the facts was erroneously established in terms of giving credence to the testimony of witness S4, considering that the witness entered into a plea agreement with the Prosecutor's Office of B-H.

296. However, this Panel considers the referenced appeal grievances to be unfounded.

297. The Appellate Panel primarily considers that the Trial Panel's arguments are valid with regard to the admissibility and reliability of the statement of witness S4 as a witness who entered into a plea agreement, and that the Trial Verdict provided good reasoning and valid grounds for such a decision. Specifically, starting from page 7 of the Trial Verdict, the Trial Panel provides a very detailed analysis of the reliability of the evidence given by witness S4. In that context, in addition to the provisions of Articles 15 and 281(1) of the CPC B-H, the Trial Panel also analyzed the jurisprudence of the BiH Constitutional Court (in the case of *M.Š.*, AP-661/04, *Decision on Admissibility and Merits*, 22 April 2005, para. 38), and concluded that *"… evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity is subject to the same standard, no stricter and no more lenient. Simply, with respect to evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity, there is neither a presumption of unreliability nor a presumption of truthfulness*." The Trial Panel also refers to the jurisprudence of the Court of B-H in *Maktouf* (KPŽ-32/05, Court of B-H, Second Instance Verdict of 4 April 2006): "*The Panel must, of course, consider all facts bearing on the reliability of the witness when*

analyzing the witness's evidence and exercise caution. However, the Panel must do the same when considering any evidence."

298. Therefore, the Trial Panel analyzed the statement of witness S4 carefully and conscientiously, in isolation and in connection with the other adduced evidence, not *a priori* attaching to it a lesser or greater probative value, which is a proper procedure.

299. Therefore, the Appellate Panel determines that this witness' statement was evaluated in accordance with the statute and the credence given to its contents is fully reasonable and corroborated by the other adduced evidence.

300. The Defense's objection regarding this witness' credibility comes down to the averment that his evidence cannot be considered credible for the sole reason that he entered into a plea agreement. However, discrediting a witness' statement only because of the referenced fact is not logical because no lawfully obtained evidence can *a priori* be dismissed or given preference, but must be evaluated individually and in correspondence with the other evidence, in order to verify its probative value, which was indeed done in the case at hand.

301. In a separate paragraph, the Trial Panel analyzed the discrepancies in the statements of this witness, so it is obvious that this appellate grievance of the Defense is absolutely unfounded and arbitrary.

302. According to the appellants, when evaluating the credibility of witness S4, in addition to using his two statements (of 18 April 2008 and 22 May 2008, respectively), the Panel should have also analyzed his testimony of 29 May and 11 June 2008 and evaluate the mutual correspondence of these three statements as well as their correspondence with the statements of the other witnesses who testified about the same matters.

303. The contested Verdict dedicates a separate section to the credibility of witness S4, addressing this issue with respect to the reliability of the information provided by witness S4 in the courtroom and the statements given before the Prosecutor's Office, and also with respect to the discrepancies in the statements he gave on two occasions: on 18 April as a suspect, and on 22 May as a witness. Considering the reasons provided by the Trial Panel in its decision, it is obvious that the statement witness S4 gave as a suspect was used with certain caution in the contested Verdict, given that he was not obliged to tell the truth since there existed grounds for suspicion that he had committed a criminal offense, which he

personally confirmed. On the other hand, the statement that he gave as a witness was taken based on the previously stated procedural guarantees under the procedural law and with prior cautioning of the witness that it was his duty to tell the truth, which witness S4 confirmed by stating at the main trial that his statement of the 22nd [May] was *more accurate*.

304. With regard to the reliability of the information provided by witness S4, the Trial Verdict took into account all circumstances – the lapse of time and the fact that he testified about the facts that he had personally saw or heard, rather than the ones he had learned of or obtained through hearsay, and focused on the details in his statement which the witness was reasonably able to observe and memorize, considering the circumstances of the event.

305. Finding that the testimonies of this witness are mutually consistent with regard to all essential facts and that they are also consistent with the testimonies of witnesses S1 and S2, who were the only survivors of the killings in Kravica on 13 July 1995, as well as with ample documentary evidence, that they are objective and persuasive, the Appellate Panel did not have any reason not to give credence to these testimonies, either. The Panel considered them a reliable basis for the finding of the Accused's criminal actions as stated in the enacting clause of this Verdict.

306. Furthermore, three Appeals claim that the event in the warehouse of the Kravica Farming Cooperative was a spontaneous incident and that, if Krsto Dragičević had not been killed, the captives would not have been killed. They also claim that the Trial Panel erred when it found that the killings on 13 July 1995 were planned and systematic.

307. The Appellate Panel is of the view that such a logic does not result from the referenced case record. More specifically, it is true that the killing of the captives was preceded by an incident, the murder of Krsto Dragičević by a prisoner after the prisoner snatched Krsto's rifle, which the parties (and the Defense Counsel) did not contest during the first instance proceedings. Rade Čuturić was also injured on that occasion. However, the perpetrator of Krsto's murder had immediately been discovered and killed before the mass killings of the captives started, which the contested Verdict properly states on page 145. While the captives were escorted to the warehouse and later on, during the execution, ethnic and religious slurs were heard at both sides of the entrance to the warehouse, of which the survivors S1 and S2 and witness S4 testified.

308. Witness S4 and Mitrović[7] testified about the clearly defined respective roles of the Accused Trifunović, Radovanović, Jakovljević, Medan, Džinić (and Mitrović) on the relevant day. S4 and Mitrović were armed with automatic rifles. S4 did not shoot. Mitrović fired two bullets toward the door. At that moment he received an order to go, together with Branislav Medan, Slobodan Jakovljević and one Željko Ivanović, toward the other side of the building and secure the openings to prevent the Bosniaks from jumping through the openings. While they were guarding the rear of the building, fire in rapid succession continued inside the building. He also heard explosions of hand grenades thrown in by police officers nicknamed Vojvoda and Čupo.

309. In his statement given during the investigation, Stevanović said that upon arrival in front of the warehouse, at about 16.00 hrs on 13 July 1995, he could see on the left side of the room about 150-200 persons; some were standing, some were sitting and right next to them Mirko Milanović was standing. He mounted a machine-gun on a desk[8] pointing at a group of prisoners. He saw Krsto Dragičević's body lying on the road. In the other room, which was larger and could receive about 400 persons, he saw dead people and a young man throwing hand grenades into the room. Screams, shrieks and moaning were heard from that room.

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

311. It follows from the Dispatch Note of the Zvornik PSC[9] that, in addition to the evacuation of about 15,000 civilians from Srebrenica, the execution of about 8,000 Muslim soldiers who were blocked in the woods around Konjević Polje was also arranged.

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[7] Investigative statement, number KT-RZ-10/05 of 21 June 2005.
[8] Witness Luka Marković stated that they had taken a desk and two chairs from his office and brought them into the hangar, Tr. of 7 June 2006, p. 50.
[9] Zvornik PSC Dispatch Note No. 283/95 of 13 July 1995.

312. All of this indicates that the killings of the captives were not incidental, but constituted the implementation of a systemic and organized event within which there was a clear division of roles of its participants, among whom the Accused also had their roles, as stated in the enacting clause of the Verdict.

313. In the context of the further developments, only the death of Krsto Dragičević could be regarded to be an incident, considering that it was the only isolated and unplanned event which, according to the presented evidence, resulted from the chaotic situation in the hangar: on the one hand, the fear of the captives that they would be executed and, on the other, the executors' resoluteness to complete the task. The fact that some of them recognized their neighbors and acquaintances among the prisoners made their task even harder.

314. The Appellate Panel also considers it reasonable that the killing of Krsto could not have been the motive for the killing of the other captives, as the Appeals claim, but rather, in view of the overall circumstances, it might only have accelerated the already planned order of events.

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

316. For the foregoing reasons, the appeal grievances to the contrary are refused as unfounded.

317. Three Appeals refer to erroneously established facts by arguing that the time of perpetration and the overall duration of the killings of the detainees were not properly determined.

318. With regard to the time of perpetration and the duration of the killings in the warehouse, the witnesses commented on that circumstance spontaneously and of their

own initiative within their respective testimonies or in response to a question by any party in the proceedings.[10]

319. On the grounds of these testimonies the Trial Panel concluded that the killings of the captives lasted for about 1.5 hours and that they took place between 16.00 and 19.00 hrs (on 13 July 1995).

320. However, the time-frame of the perpetration and the duration of the killings do not reach the degree of decisive facts that need to be established beyond any reasonable doubt, which, in the end, follows from the factual description pertaining to section I e) of the enacting clause of the Trial Verdict elaborating on the killings *in the early evening hours*, with no indication of the duration of the acts of killing.

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

322. Pursuant to the foregoing, the Appellate Panel refuses these appeal grievances as unfounded.

323. The Defense argues (in the three Appeals) that the Trial Panel did not properly establish the number of victims in Kravica, that is, that the Panel erroneously established that more than 1,000 persons were killed there.

324. The witnesses' statements about the number of captives ranged from 100, 150 captives (Đorđe Vukanović and Slobodan Mijatović respectively) to 2,000, according to witness S1. The Panel also reviewed the documentary evidence about this circumstance (Petrović's footage showing a soldier on the road talking about 3,000 to 4,000 captives; Dispatch Note of Ljubomir Borovčanin, No. 284/95 of 13 July 1995). Also examined with regard to this circumstance were expert witnesses Vlado Radović (civil engineering expert)

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[10] **Witness S1** (5 October 2006, p. 26) stated that the shooting began at about 16.00-17.00 hrs and that it lasted until dusk; Witness **Luka Marković** – "the fight commenced at about 6, 7 o'clock. (p. 29, 7 June 2006) and lasted 20-30 minutes, not at all for one hour"; **Witness S2** (p. 46, 12 October 2006) – about the commencement of the shooting inside the warehouse he stated: "it was getting dark, there was still some daylight left". "Firing in rapid succession lasted for half an hour -- hour, they would take a break and then throw hand grenades, then continue with automatic weapons". **Witness Zoran Erić** (8 June 2006, p. 77) – "It was about 5, 6 o'clock when a guard got killed, then the shooting began. The shooting lasted a long time and was also heard for the whole night". **Stevanović** (statement from the investigation) – after talking about the dead bodies in greater part of the warehouse which could receive about 400 people, he left Kravica at about 16.30 hrs., taking the body of Krsto Dragičević with him.

and Dragan Obradović (land surveyor). According to the survivors' testimonies, the captives in the warehouse were so crammed that there was no space between them at all. Correlating this with the fact presented by expert witness Radović about the warehouse area in the Kravica Farming Cooperative (630 m²) and the fact stated in the findings of expert witness Obradović, according to whom two adults occupy 1 m², the Trial Panel concluded that more than one thousand persons had been captured and subsequently killed in the warehouse of the Kravica Farming Cooperative.

325. Finally, with regard to the number of those killed in the warehouse, the Trial Panel concluded on page 36:

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

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

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

328. The Appellate Panel will below address individual claims by the defense teams for the Accused within the same ground of appeal.

(a) Appeal by the Defense for Milenko Trifunović

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

330. The conclusion on the existence of a widespread and systematic attack is stated in the contested Verdict on pages 22-31, while the nature of the attack is elaborated in the reference to individual witness testimonies and documentary evidence.

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

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

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

334. The conclusion on the existence of the attack also follows from the established facts T31-T33, T36 and T39.[11]

335. Therefore, the conclusion of the Defense Counsel that the contested Verdict in that part is based solely on the testimony of witness Butler is erroneous.

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

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

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

338. The Appellate Panel notes that the element of *substantiality* does not necessarily refer to the quantitative aspect, as claimed by the Defense, which is properly observed and reasoned by the Trial Panel in the contested Verdict on page 61 where the Panel corroborated its arguments and findings with the relevant jurisprudence of the ICTY and the ICTR. One of the aspects pointed out in the Trial Verdict is that the element of *substantiality* implies ***a substantial part of a protected group****.* The Trial Panel found that, in the circumstances at the relevant time, given the respective roles of men and women in the community, the destruction of the male population would have a greater impact on the ultimate destruction of the group. The Appellate Panel finds these arguments to be reasonable. Therefore, the appeal grievances to the opposite are refused as unfounded.

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

340. The participation of the Accused in the events as charged primarily follows from the testimony of witness S4 and the statements of suspects Mitrović and Stevanović given in the investigation stage. It follows from these statements that there was a clear division of roles of the Accused in the events as charged, including their contribution to the commission of the criminal offense.

341. On the grounds of the presented evidence the Trial Panel reasonably found that the Accused were aware of their Detachment being involved in the second phase of the task of “liberation of Srebrenica”, which did not imply a military attack on the safe zone, and that as early as on 12 July 1995 they could get a clear picture of what their task would be on the 13th, given that, in sight of all those present, some members of the Detachment

"cleansed the terrain", that is, transferred and took the remaining people to Potočari on the 12th. Therefore, the Accused could clearly see numerous buses and trucks on which women, children and elderly persons of Bosniak ethnicity (but not men) were boarded, while the Accused Trifunović certainly had a far better knowledge of the details concerning the continuation of the event (related to the killings in Kravica), given his position as Platoon Commander.

342. The Defense also argues that the total number of the captives in the Sandići meadow is questionable, and adds that the Defense expert witness, Dragan Obradović, has stated that there had been 450 captives there.

343. The Prosecutor's Office proved the number of those captured in Sandići on 13 July 1995 by the documentary evidence (aerial photographs) which shows a group of people in the meadow on the relevant day at 14.00 hrs.[12] With regard to that circumstance, the Defense presented evidence, Finding and Opinion of expert witness Dragan Obradović, land surveyor (Exhibit O-X-2), who concluded that, based on the aerial photograph, there were about 450 captives in the meadow at about 14.00 hrs. During the evidentiary proceedings, some witnesses also testified about the same circumstance, such as Hajra Ćatić, Luka Marković, S1, S2 and E.H. According to Hajra Ćatić, there were 250 to 300 captives in the meadow on the relevant day, while Luka Marković puts that figure at 1,000-1,200.

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

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

345. The Appellate Panel determines these findings to be reasonable. This is because it is evident that the persons who surrendered in Sandići on 13 July, except for witness E.H.,

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

were detained in the Kravica Farming Cooperative warehouse where, after the last group was brought in, they were executed.

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

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

348. Witness S4, and Mitrović and Stevanović, testified in their respective statements about the identity of persons who executed the people imprisoned in the warehouse. Witnesses S4 and Mitrović were present at the killings, while witness Mitrović himself participated in the shooting. Witness S4 identified the Accused Trifunović and Radovanović among those who formed a semi-circle in front of the building and who were shooting, while Jakovljević and Medan (and Mitrović) went behind the building in order to secure the windows and prevent anyone from getting out through them. In the statement given to the Prosecutor's Office Mitrović said that he fired two bullets in the direction of the door and that he did not know whether he had hit anyone and that he was then tasked, together with Branislav Medan, Slobodan Jakovljević and one Željko Ivanović, with securing the openings in order to prevent the captives from escaping. Many witnesses, members of the Skelani Platoon, testified that they knew the Accused from the Platoon, and the Accused themselves also commented on this circumstance. Also, many witnesses stated that they had learned indirectly, through others, that those from Skelani (*Skelanci* in the vernacular; translator's note) were responsible for the crime in Kravica. The documentary evidence[13] also proved that the Accused had been members of the Third Skelani Platoon.

349. Therefore, the finding of the Trial Panel on this circumstance is the only reasonable inference that any reasonable trier of fact could reach based on the case record.

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

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

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

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

353. The Defense also contests the Trial Panel's finding that Milenko Trifunović was the person seen on the footage urging the Bosniaks hiding in the woods [to surrender].

354. Witnesses S4, Nebojša Janković and Milojko Milovanović testified about this circumstance at the main trial. During their testimony they were shown the footage made by a journalist from Belgrade on which they recognized the Accused Trifunović. Trifunović was S4's platoon commander, witness Milovanović knows him from the early 1990s, while witness Janković was the Accused's best man.

355. Therefore, there was specific evidence that the Accused Trifunović was present in Sandići on the 13th and that he encouraged the Bosniak men who were hiding in the woods to surrender. Therefore, this appeal grievance has been refused as unfounded.

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

357. By the referenced evidence, the Defense attempted to challenge the validity of the Trial Panel's findings and stated that the facts remained incompletely established. The Appellate Panel notes that the evidence presented actually was not new evidence, since Richard Butler's testimony had already been the subject of evaluation by the Trial Panel. The testimony of witness S4, who was a protected witness in another case, cannot be used in this case. It does not contain any information of such nature and gravity so as to imply a possible different finding about the decisive facts which would make an essential

difference between the findings of the Appellate Panel and those of the Trial Panel. The Defense Counsel did not clearly point to such a possibility either.

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

(b) Appeal by the Defense for Brano Džinić

359. The Defense Counsel submitted in the Appeal that the Trial Panel had incorrectly established the facts when it found that Brano Džinić had participated in the events in the Kravica Farming Cooperative in the afternoon of 13 July 1995 and thrown hand grenades into the warehouse. In that regard, the Appeal avers that the Trial Panel incorrectly analyzed the statements of witnesses Zoro Lukić and Zoran Tomić, who testified about the whereabouts of the Accused Džinić on that day; moreover, the Panel failed to provide any explanation for not using these pieces of evidence in the determination of the whereabouts of the Accused at the relevant time.

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

361. The Trial Verdict provides the following explanation on page 153:

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

362. Contrary to the appellant's arguments, the Trial Panel took into consideration the referenced testimonies of the witnesses and commented on them in detail in the Verdict, assessing them individually and in the context of their mutual correspondence, while indicating the inconsistencies found therein. Thereafter, the Trial Panel made legal conclusions on the probative value of those testimonies.

363. Based on the foregoing, the complaints raised in the appeal have been refused as unfounded.

364. The Defense pointed to the fact that the Trial Panel incorrectly alleged that the Accused Petar Mitrović was an eyewitness to the event that took place in front of the Kravica Farming Cooperative because he stated during the on-site visit and reconstruction[14] that he did not see the man nicknamed Čupo on the relevant day in Sandići, adding that some soldiers told him that Čupo and Vojvoda had thrown hand grenades into the warehouse.

365. The Appellate Panel notes that it follows from the Record of on-site visit and reconstruction with the Accused Mitrović (No. KT-RZ-10/05 of 4 October 2005) that the Accused Mitrović stated that he had seen the police officer nicknamed Čupo in Sandići on the relevant day, but that he had not seen him in front of the warehouse. He heard from some soldiers who were present at the warehouse on the relevant day that Čupo and Vojvoda had thrown hand grenades at the prisoners in the warehouse.

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

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

368. Witness S4 confirmed the details regarding the identity of the individual who threw hand grenades into the warehouse on the relevant day. Mitrović also commented on this when questioned as a suspect during the investigation.

[14] Record of on-site visit and reconstruction with the Accused Mitrović, No. KT-RZ-10/05 of 4 October 2005.

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

370. Based on the foregoing, the conclusion drawn by the Trial Panel regarding this circumstance is the only reasonable conclusion to be drawn by any reasonable trier of fact. Therefore, the appeal grievances to the contrary have been refused as unfounded.

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

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

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

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

375. Witness Zoran Erić confirmed during the trial of 8 June 2006 (in direct examination) that the portion of his investigation statement pertaining to the commencement of the shooting in the hangar and the killing of a member of Ljubiša Borovčanin's special unit was correct, but he could not remember it instantly. The relevant portion of his statement in the investigation reads as follows:

> "At about 17.00 hrs. a burst of fire was heard coming from the hangar. After that, shooting started and lasted for about one hour. I subsequently heard that a member of Ljubiša

> Borovčanin's special unit was killed in the hangar. That man was from Skelani and he escorted the buses transporting the Muslims to the hangars."

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

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

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

379. The Defense also claimed that the Accused Brane Džinić never had the nickname of Čupo.

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

381. For instance, when giving evidence at the trial on 14 September 2006, witness Dragomir Stupar said that some called Brane Džinić *Mali* [Shorty] because of his height, but some also called him *Čupo*. Witness Nebojša Janković stated that Džinić's nickname, whom he recognized in the courtroom and on the photograph[15], was Čupo. He further added that Džinić played football well.

382. Furthermore, witness Đorđe Vuković testified at the trial on 1 September 2006 that the Accused's nickname was Mali Džino, Džin and, sometimes, Čupo, since he had long

[15] Exhibit O-62.

hair. In addition to the referenced witnesses, witnesses Stanislav Vukajlović and Slavoljub Gužvić also confirmed this in their respective statements in the investigation, with Gužvić stating that Čupo was Brano Džinić's nickname, and Vukajlović that he knew Džinić from before, from football matches. Witness Dalibor Džurđić stated that in 1994 and 1995 Brane Džinić had long hair he tied in a ponytail. Witness S4 also recognized Džinić in the courtroom, saying that Džinić's nickname was Čupo and that he threw hand grenades at the prisoners on the relevant day.

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

384. Additionally, the nickname *Čupo* in these areas is a frequent nickname of persons who have long hair, and it is evident that the Accused Džinić was the only one of the Accused with long hair tied in a ponytail at the relevant time, according to witness statements.

385. On 27 May 2009, Defense Counsel for the Accused Džinić, Attorney Suzana Tomanović, filed with the Court a supplement to the appeal from the Trial Verdict due to the existence of new evidence of which the Defense had not been or could not be informed. However, the CPC B-H does not recognize such supplement to an appeal as a special legal remedy. A supplement to an appeal is only possible and allowed as an integral part of the already filed appeal, while the statutory deadline for filing an appeal must be observed. Since the referenced supplement to the appeal was filed after the expiration of the deadline for appeal, it could not be considered. In addition, the Defense Counsel used her verbal address at the Panel session to also present the arguments submitted in the supplement to the appeal and, although the Panel will not specially comment on them, it did consider them in response to other grievances of the appeal.

(c) Appeal by the Defense for Aleksandar Radovanović

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

387. The Appellate Panel considers the Defense Counsel's conclusion to be in contravention of the adduced evidence. The contested Verdict expressly explained in several sections that the actions taken by the Accused were criminal in nature, and that he knew of the attack. It also elaborated on his role in the relevant incident. The Trial Panel reached the conclusion as to these facts having analyzed the admitted evidence, primarily the evidence given by witnesses Hajra Ćatić, Momir Nikolić, S1, S2 and Major Franken, who testified about the atmosphere in Potočari at the time, which beyond any doubt suggested the outcome of the whole incident everyone referred to as *the liberation of Srebrenica*. The Trial Panel also found credible the testimonies given by witness S4 and the Accused Mitrović and Stevanović (statements in the investigation), who identified the Accused and spoke about his role in escorting the prisoners to the hangar, and also in the subsequent shooting through the large entrance to the hangar where the prisoners were detained.

388. According to the Panel, the state of disorder in Potočari gave the feeling of superiority, invincibility and impunity to the executioners, who felt like being above and beyond law, as was the case with the Accused Radovanović. The Accused was a member of the special police force, an official person whose professional ethics required him to preserve law and order. Therefore, the Accused should have demonstrated a keen sense of the temporal and geographical context in which he acted. However, not only did the Accused fail to protect law and order, but he was actually one of those responsible for the ordeal of the prisoners. It follows from the testimony of witness S4, who abstained from the killings of the prisoners in the warehouse, that there was a choice. Nevertheless, the Accused Radovanović did not encourage the conduct of witness S4, but rebuked him for not shooting, saying: "Shoot, you traitorous Serb cunt."

389. The Appellate Panel reached the same conclusion as the Trial Panel that this shows that the actions of the Accused during the relevant incident were taken intentionally with the purpose of achieving the prohibited consequence, that he knew of the attack and that his actions were part of the attack. To that end, the appeal grievances to the contrary are refused as unfounded.

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

391. According to the case file[16], the Defense for the Accused Stupar proposed that General Borovčanin's driver be examined and granted certain protective measures. The Panel summoned the witness and heard him with regard to his testimony before the Court under protective measures. The witness informed the Court about the measures he wanted if he were to testify before the ICTY. Having heard the witness, the Trial Panel decided to allow the examination of this witness under the same protective measures that he would be granted if he were to appear before the ICTY. However, upon the announcement of the Trial Panel's decision, the Defense withdrew the proposed witness. In addition, the Trial Panel gave an opportunity to the Defense Counsel for all the other Accused to examine the proposed witness as their own witness, but the Defense Counsel refrained from doing so, allowing for a possibility to summon this witness on another occasion.

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

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

[16] Transcript of 22 August 2007, p. 55.

not be presented or that it is irrelevant since it does not lead to establishing decisive facts, such piece of evidence will not be presented.

394. The decisive fact in this specific case was the identity of the individuals who committed the killings in the warehouse. The appealed Verdict established this fact based on the testimony of witness S4 and Mitrović's and Stevanović's statements, corroborating that finding with relevant legal conclusions. Thus there was no need to further establish facts in that respect. On the other hand, the fact that the Court did not proceed with the presentation of additional evidence should not have prevented the parties and the Defense Counsel from so doing, given the available procedural options.

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

396. Therefore, the appeal grievances in that respect are refused as unfounded.

(d) Appeal by the Defense for Slobodan Jakovljević

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

398. The Appellate Panel considers that such a conclusion of the Defense Counsel is contrary to the presented evidence.

399. Namely, the unlawfulness of the actions of the Accused was expressly elaborated on in several places, as were his knowledge of the attack and the role in the incriminating incident.

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

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

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

403. The Trial Panel properly made a distinction between the actions of this Accused and the actions of the other Accused who were proved to have been in front of the warehouse and to have fired toward the interior of the warehouse. However, the actions of this Accused decisively contributed to the killings.

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

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

406. On pages 63-64 of the Verdict, the Trial Panel analyzed the statements of certain witnesses (and the Accused) regarding this circumstance:

> "Radovanović admitted knowing that the men surrendering at Sandići were from Srebrenica, and that only Bosniaks had been living in Srebrenica since 1993. S4 testified that Trifunović had told them on their way to their assignment on the road that they were expecting a large influx of *Bosniaks* fleeing Srebrenica, and this was confirmed to him when he saw those surrendering, some of whom he knew personally. He further confirmed that

> the men taken to the warehouse were from the group of Bosniak men who surrendered and that those were men fleeing Srebrenica.
>
> Their testimony is corroborated by the statements of Stevanović and Mitrović. Mitrović, in his statement to the Prosecutor, spoke of receiving the order to accept all Bosniaks who surrendered, as they had been 'hiding in the woods', explaining that he was guarding a group of 500 Bosniaks; he also stated that then the captured Bosniaks were taken to the Kravica warehouse. Stevanović, in his statement to the Prosecutor, confirmed S4's recollection, stating that after deployment to the Budak hill: 'Suddenly, we received the task, communicated to us through Commander Trifunović, to move in order to secure the communication between Bratunac and Konjević Polje, more specifically to Kravica, because Muslims should pass there.' Later in the statement he spoke of the Bosniaks surrendering."

407. It then adds that it was recorded in the footage made for the Serb Television that the soldiers who were deployed by the road knew that the men who were surrendering were Bosniaks from Srebrenica.[17]

408. Witnesses S1, S2 and Hajra Ćatić also testified with regard to this fact.

409. The foregoing evidence indicates that the Trial Panel's conclusions regarding this circumstance were reasonable. The Appellate Panel considers that any reasonable trier of facts would draw an identical conclusion. For the foregoing reasons, the grievances stating the opposite are refused as unfounded.

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

411. Therefore, the referenced appeal grievances are refused as unfounded.

412. The Defense Counsel states that it remains unclear on the basis of what evidence the Trial Panel established that the detainees from the bus entered the first section of the building and the ones who came on foot entered the other section.

413. Witnesses S1 and S2 testified about this circumstance. Witness S1 testified that he was taken to the warehouse in the column and described the appearance of the column and the position of the detainees in it. Witness S2 stated that he was taken by bus to the

warehouse. Witness S4 also testified with regard to this circumstance, and the description of the event is also supported in detail by Mitrović's and Stevanović's respective statements.

414. With regard to this matter, the Trial Panel concluded on page 37 as follows:

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

415. Therefore, contrary to the appeal grievances, specific evidence exists regarding the details of apprehension and placing the detainees inside certain sections of the warehouse.

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

417. For the foregoing reasons, the appeal grievances asserting the opposite are refused as unfounded.

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

419. The Appellate Panel finds the grievances of the Defense to be unfounded.

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

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[17] Srebrenica video recording ("Srebrenica Video"), transcript ("Video Transcript"), pg. L0092465-70 (Exhibit O-193). This exhibit includes a footage made by journalist Zoran Petrović.

421. The Trial Panel found there was no dispute concerning the type of the weapons used and to whom they belonged. Thus, the Trial Panel already knew the answers to the questions that would have been answered by a ballistic expert witness. The Appellate Panel fully agrees with the Trial Panel's finding, and considers that the referenced facts were sufficiently proved even without the referenced expert analysis.

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

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

424. Pursuant to the foregoing, the appeal grievances on this issue are refused as unfounded.

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

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

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

427. The Appellate Panel agrees with this conclusion of the Trial Panel. The Trial Panel established all decisive facts concerning a protected group pursuant to Article 171 of the CPC B-H and Article 141 of the Adopted CC SFRY, having consulted relevant international jurisprudence. Therefore, the objection of the Defense Counsel on this issue is refused as unfounded.

(e) Appeal by the Defense for Branislav Medan

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

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

430. The Appellate Panel considers the conclusion reached by the Defense Counsel and the Accused to be in contravention of the adduced evidence. The Trial Verdict expressly explained in several sections that the actions taken by the Accused were criminal in nature, and that he knew of the attack. It also elaborated on his role in the relevant incident. The Trial Panel reached the conclusion as to these facts having analyzed the admitted evidence, primarily the evidence given by witnesses Hajra Ćatić, Momir Nikolić, S1, S2 and Major Franken, who testified about the atmosphere in Potočari at the time, which without any doubt suggested the outcome of the whole incident that everyone referred to as *the liberation of Srebrenica*. The Trial Panel also found credible the testimonies given by witness S4 and the Accused Mitrović and Stevanović (statements given in the investigation), who identified the Accused among the group of people who had been in front of the warehouse. Subsequently, having received an order, together with the Accused Mitrović and Jakovljević (and one Ivanović), the Accused went behind the warehouse to secure the openings and thus prevent the detainees from escaping during the shooting.

431. In the opinion of the Appellate Panel, the state of disorder in Potočari gave the feeling of superiority, invincibility and impunity to the executioners, who felt like being above and beyond law, as was the case with the Accused Branislav Medan. The Accused was a member of the special police force, an official person whose professional ethics required him to preserve law and order. Therefore, the Accused should have demonstrated a keen sense of the temporal and geographical context in which he acted. However, not only did the Accused fail to protect law and order, but he was actually one of those responsible for the ordeal of the prisoners. It follows from the testimony of witness S4, who abstained from the killings of the prisoners in the warehouse, that there was a choice.

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

433. By acting in the described manner and adopting the purpose of his acts (killings) as the common one, the Accused Medan gave a *decisive contribution* to the perpetration of the criminal acts aimed at killing the detainees. The criminal level of his acts, on the one hand, and those of direct executioners, on the other, may be differently assessed with a lawful consideration by the Appellate Panel in the context of sentencing, which is in favor of the Accused.

434. Accordingly, the appeal grievances asserting the opposite are refused as unfounded.

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

436. Such a conclusion by the Defense Counsel is contrary to the adduced evidence, which is explained in detail on page 58 of the Trial Verdict.

437. It is true that the killings of the prisoners in Kravica were preceded by an incident in which one of the prisoners grabbed a rifle of a Skelani Platoon member (Krsto Dragičević) and killed him, while Detachment Deputy Commander Rade Čuturić was injured trying to prevent the prisoner from continuing to shoot at the others. The prisoner was killed

instantly. Soon thereafter, fire was opened at the prisoners, first from an M84 machine-gun and then from automatic rifles. The fire was followed by throwing hand-grenades. The killing of the prisoners in the warehouse lasted for about an hour and a half, whereupon the Detachment left the location to be replaced by members of other units who continued shooting and throwing hand-grenades long into the night.

438. However, as the Trial Verdict reasonably determined, the perpetrator of Krsto's killing was discovered and was already dead before the fire was opened at the remaining prisoners. Taking into account the overall circumstances of the event, no other prisoner in the warehouse was responsible for Krsto's death. Also, the prisoners were unarmed, exhausted and some were wounded and injured, while the Accused were armed with automatic rifles, an M84 machine-gun and hand-grenades. The warehouse was a completely closed area but for the windows in the back which were guarded by the Accused Jakovljević and Medan (and Mitrović). Consequently, the prisoners did not pose a threat of any kind to the armed soldiers, so acting in self-defense is out of the question.

439. By standing guard under the window in order to prevent the captives from escaping while the mass killing was going on inside the warehouse, the Accused Medan entered the punishable zone of crime commission, whereby his act became unlawful. Thus his actions pertaining to the killing of the captives were correctly qualified as co-perpetration.

440. The Appellate Panel shares this conclusion with the Trial Panel and considers that, given the circumstances of the perpetration, any reasonable trier of fact would reach the same conclusion.

441. Pursuant to the foregoing, the appeal is refused as unfounded.

V. VIOLATIONS OF THE CRIMINAL CODE UNDER ARTICLE 298 OF THE CPC B-H

442. Defense Counsel for the Accused Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan contested the first instance Verdict on the grounds of violations of the Criminal Code as well, noting that the Trial Panel erred in the application of the Criminal Code by accepting the legal definition of the criminal offense in the Indictment, that is, by defining the acts of the Accused under the CC B-H that came into effect on 1 May 2003. In the reasoning of this appeal grievance, Defense Counsel referred to Articles 3 and 4 of the CC B-H, which establish the principles of

legality and of prohibition of a retroactive application of law as the basic principles of criminal law. They particularly stressed the principle set forth in Article 4(2) of the CC B-H, stipulating that, 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. The Appeal adds that the assessment as to which law is more lenient to the perpetrator must always be made *in concreto*, taking into consideration the specific case and perpetrator with a view to determining which law in its entirety offers a more favorable outcome for the specific perpetrator.

443. Given that the adopted CC SFRY, as the law in effect at the time relevant to the Indictment, and the CC B-H codify the identical criminal offense with identical legal elements (Genocide), the Defense considers the adopted CC SFRY to be more lenient to the Accused as it stipulates the sentence of imprisonment ranging from 5 to 15, that is, 20 years, while the CC B-H stipulates the sentence of imprisonment of not less than 10 years or a long-term imprisonment for that offense. According to the Defense, Article 4a of the CC B-H that the first instance Verdict refers to shall not prejudice the application of Article 4 of the CC B-H with respect to the mandatory application of the more lenient law, as it sets forth a possibility of trying all kinds of criminal offenses over violations that constitute violations of rules of international law even if the referenced offenses were not prescribed under national laws.

444. The Appellate Panel primarily stresses that, in line with its right to an independent judicial opinion, it does not share the legal opinions presented in the Decision of the Constitutional Court. However, in compliance with the Constitutional Court's Decision, which is final and binding under Article VI/5 of the Constitution of B-H, the Panel granted the Defense Counsel's Appeal that there was an error in the application of the Criminal Code in the contested Verdict to the detriment of the Accused, that is, that the law most lenient to the Accused was not applied.

445. As noted earlier, the Decision of the Constitutional Court of B-H is binding on this Court and it is a duty of the Appellate Panel in these proceedings to remedy the established violation. However, given that the matter of a retroactive application of law, that is, evaluation which law is more lenient to the perpetrator, is a matter of major legal importance, repeatedly reviewed in several decisions of the Constitutional Court of B-H and the European Court of Human Rights (ECtHR) that have direct implications on the

cases conducted before this Court, the Appellate Panel finds it necessary to outline the conclusions from the relevant decisions of these courts.

446. The ECtHR Judgment in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*[18] preceded the decisions on the respective Appeals by the Accused Trifunović, Jakovljević, Džinić, Radovanović and Medan, and the Constitutional Court based its own decisions on the conclusions in that Judgment. When evaluating whether a retroactive application of the CC B-H to war crimes cases intrinsically constitutes a violation of Article 7 of the Convention, the ECtHR expresses its position in paragraph 65:

> "At the outset, the Court reiterates that it is not its task to review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favourable to the defendant (see *Scoppola*, cited above, § 109)."

447. Therefore, based on this view, it is clear that the ECtHR assessed a violation of Article 7(1) of the ECHR on Human Rights (ECHR) only with respect to the circumstances of the specific case, emphasizing that there should not be any generalization when assessing the matter of the more lenient law and the matter of retroactivity. Also, it is clear from the referenced ECtHR Judgment that the assessment of a more lenient law within the framework of the circumstances of that case was made comparing the respective prescribed minimum sentences, that is, that it pertained to the criminal offense that could not have been considered the most grave kind of war crimes. Paragraph 69 of the Judgment, therefore, reads:

> "…the Court notes that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code …. As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category. Indeed, as observed above, Mr. Maktouf received the lowest sentence provided for and Mr. Damjanović a sentence which was only slightly above the lowest level set by the 2003 Code for war crimes. In these circumstances, it is of particular relevance in the present case which Code was more lenient in respect of the minimum sentence, and this was without doubt the 1976 Code."

[18] Judgment of 18 July 2013, Applications nos. 2312/08 and 34179/08.

448. We note that the Court of B-H took an absolutely identical position with respect to the application of the law in several cases even before the rendering of the referenced Judgment of the ECtHR, as observed in paragraph 29 thereof[19].

449. Following the jurisprudence of the ECtHR in this Judgment, the Constitutional Court noted in the case on the Appeal of Zoran Damjanović (Decision on Admissibility and Merits, No. AP 325/08, 27 September 2013) that, as regards both the factual substrate and the legal issue, the case was not different from the referenced *Maktouf and Damjanović* case, and established the identical violation of Article 7(1) of the ECHR as did the ECtHR. It follows clearly from the referenced decision that, when establishing which law is more lenient to the perpetrator, the Constitutional Court was guided by the criterion of the lowest punishment, given that the Appellants were sentenced to imprisonment for a term of five years *(Maktouf)*, as the lowest possible punishment under the CC B-H (the punishment that can be pronounced with the application of provisions on punishment reduction), that is, for a term of 11 years *(Damjanović)*, as the punishment slightly above the lowest punishment of 10 years under the same Code.

450. Contrary to this, in the Decisions on the Appeals by the Accused Trifunović, Jakovljević, Džinić, Radovanović and Medan, the Constitutional Court, referring to the aforementioned decisions, established that in the case at hand it was necessary to determine which law set forth a more lenient maximum punishment, having in mind the long-term imprisonment that the Accused were sentenced to under the preceding second-instance Verdict, which, by its type, is the punishment set forth for the most serious kinds of offenses in the CC B-H that carried the death penalty under the law in effect at the time of the perpetration (the Adopted CC SFRY). Therefore, in paragraph 53 of the Decision No. Ap-4065/09, the Constitutional Court states: "*The Constitutional Court notes that it follows from the foregoing that in the case at hand, unlike in the European Court's case of Maktouf and Damjanović and the Constitutional Court's case of Damjanović, the prison sentence imposed on the Appellants was closer to the maximum prescribed sentence. Considering this, the Constitutional Court points that, unlike in these cases where it was determined which law was more lenient with respect to the minimum punishment, in the*

[19] *Kurtović,* Verdict of the Court of B-H, No. X-KRŽ-06/299, 25 March 2009; *Novalić,* Verdict of the Court of B-H, No. X-KRŽ-09/847, 14 June 2011; *Mihaljević,* Verdict of the Court of B-H, No. X-KRŽ-07/330, 16 June 2011; *Lalović,* Verdict of the Court of B-H, No. S1 1 K 002590 11 Krž4, 1 February 2012; *Aškraba,* Verdict of the Court of B-H, No. S1 1 K 005159 11 Kžk, 18 April 2012; *Osmić,* Verdict of the Court of B-H, No. S1 1 K 003429 12 Kžk, 28 June 2012.

case at hand it is necessary to determine which law is more lenient to the Appellants with respect to the maximum prescribed sentence." Paragraph 41 of the Decision AP-4100/09 with respect to the Accused Trifunović also reads that *"…given the extent of the punishment imposed on the Appellant, it is necessary to establish which law is more lenient to the Appellant with respect to the maximum punishment that may be imposed on him."*

451. Under the second instance Verdict, the Accused Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan were found guilty that, by the acts described in the enacting clause of the Verdict, they committed the criminal offense of Genocide in violation of Article 171, as read with Article 31 of the CC BiH, for which they were sentenced to long-term imprisonment. The Accused Trifunović was sentenced to 33 years in prison, the Accused Džinić and the Accused Radovanović to 32 years each, and the Accused Jakovljević and the Accused Medan to 28 years each. It is, therefore, obvious that the case at hand concerns a criminal offense that is classified as one of the most serious kinds of crimes, which resulted in deaths of a large number of people and which carried the death penalty under the CC SFRY. In paragraph 53, the Constitutional Court concludes: *"... for the acts that the Appellants were charged with in the case at hand, given the manner of perpetration of that criminal offense and its consequences, therefore, given that it is the gravest kind of war crime, they could receive the strictest punishment that was prescribed for the gravest kinds of war crimes only. Therefore, there existed a possibility of imposing the strictest punishment on the Appellants in the case at hand".* It is, therefore, obvious that this is a situation completely opposite to the one the ECtHR encountered in the case of *Maktouf and Damjanović*, and the Constitutional Court in the case of *Zoran Damjanović*.

452. When reviewing the grounds for the Appeals by the Accused, by analogy with the conclusions in the referenced Decisions the Constitutional Court established that in order to determine whether there was a violation of Article 7(1) of the ECHR, it was necessary to make a comparison between the respective maximum punishments in the CC SFRY and the CC B-H. However, the Constitutional Court failed to take into consideration all factual and legal circumstances of the case at hand, as well as the gravity of the resulting consequences relevant to resolving this legal issue. The Appellate Panel notes that the Constitutional Court compares the sentence of 20 years in prison, as the maximum punishment for the relevant criminal offense under the CC SFRY, with the sentence of long-term imprisonment of 45 years, as the maximum sentence for the same offense

under the CC B-H, and in doing so, contrary to its previous stance about the same issue it omits the death penalty as the sanction prescribed under the law in effect at the time of perpetration.

453. In other words, with its current decision in the case of *Jakovljević et al.*, the Constitutional Court has abandoned its position presented earlier in the case of *Abduladhim Maktouf*[20] and has offered a completely new position compared to the one previously established concerning the assessment of the matter of the more lenient law. The Constitutional Court has stated that the death penalty has been eliminated from the system of criminal sanctions, therefore, pursuant to Article 38(2) of the CC SFRY (*"The Court may impose a punishment of imprisonment for a term of 20 years for criminal offenses which carry the death penalty.")*, in a situation when it is no longer possible to pronounce the death penalty it is possible to "*...pronounce the maximum sentence of imprisonment of 20 years (which, under that Code, was pronounced as a substitute for the death penalty) or the sentence of imprisonment of 15 years (which that law envisages as the maximum prison sentence)"*.

454. In favor of the conclusion that the death penalty was eliminated from the system of criminal sanctions, it is argued that with the coming into effect of the Constitution of B-H (14 December 1995), Protocol No. 6 to the ECHR also came into effect, and that on 3 May 2002 the Council of Europe adopted Protocol No. 13 to the ECHR on the abolition of the death penalty in all circumstances, which Bosnia and Herzegovina ratified on 1 November 2003. This leads to the conclusion that in 2008, at the time the contested Decisions were rendered, it was not possible to impose the death penalty on the Appellant for the criminal offense concerned.

455. This Panel considers such an argument to be totally unclear, since it is not known what such a conclusion was based on, due to which it is not possible to evaluate the

[20] Case of *Abdulhadim Maktouf*, Constitutional Court of B-H, Decision on Admissibility and Merits, No. AP 1785/06, 30 March 2007, para 68. *"In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstic, Galic, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law."* 69. *"In this context, the Constitutional Court holds that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."*

quality of the reasoning. The Constitution of B-H (Annex IV of the Dayton Peace Agreement) does not contain a provision on death penalty, while Article 2 of Protocol 6 to the ECHR -- the ECHR being an integral part of the Constitution -- leaves room for a possibility of prescribing death penalty for the gravest offenses committed in times of war. However, the Constitutional Court does not provide the argument as to how the application of this provision of the Protocol reflected on the existing criminal legislation at the moment of the enacting of the Constitution. Also, the reference to Protocol 13 to the ECHR, which is the only document on the international level that abolishes the death penalty in all circumstances, has no effect in the case at hand, since it was adopted on 3 May 2002 and ratified in B-H on 1 November 2003, much later than the abolition of death penalty from the criminal laws in B-H (in 1998 in the Federation of B-H and in 2000 in Republika Srpska). The conclusion that the death penalty could not have been pronounced in 2008 would have been relevant only if the death penalty had been pronounced, which is not the case with the relevant court verdict.

456. In addition, in a situation when the case-law on an important legal issue is being significantly changed, which the Constitutional Court has done with such a position, the Appellate Panel finds it appropriate to refer to the relevant conclusion of the Constitutional Court in its Decision in the case of *Luca Tokalić et al.,* No. AP 1123/11, of 22 March 2013 (paragraph 115):

> "The Constitutional Court reiterates that the changes in the case-law and different decision of the court in circumstances that are factually and legally similar or the same, may not result in the violation of legal certainty. However, the lack of reasoning as to why the circumstances of the instant case are different in relation to all previous cases in which the position was applied in regard to an important legal issue and which should be applied in similar future situations, in the absence of a mechanism through which it would be reviewed, may result in legal uncertainty and may undermine public confidence in the judiciary, which is contrary to the principle of the rule of law."

457. The Appellate Panel concludes that the matter of retroactivity and application of a more lenient law must be solved on a case-by-case basis, without resorting to generalizations and automatic approach[21], as noted in paragraph 69 of the ECtHR Judgment in *Maktouf and Damjanović.* This implies the conclusion that the CC B-H should

[21] "The fundamental starting point is that the matter of choosing a more lenient law shall not be solved *in abstracto*, but *in concreto*, that is, not by a generalized comparison between the old and the new Criminal Code, but by comparing them with respect to a given, specific case." V. Group of authors: *Commentary on the Criminal Procedure Codes in Bosnia and Herzegovina*, Vol. I, Joint Project of the Council of Europe and the European Commission, p. 66.

apply to the gravest kinds of war crimes, as a law that is more lenient to the perpetrator and that ensures an adequate punishing of the perpetrators of the gravest criminal offenses contrary to international humanitarian law, which is also an obligation of the state of Bosnia and Herzegovina in compliance with the Convention on the Prevention and Punishment of the Crime of Genocide.

458. After an extensive analysis, the Appellate Panel concluded that with such a decision the Constitutional Court took a stance in favor of the application of a more lenient law *in abstracto* and suspended all other criteria for the assessing of a more lenient law, contrary to the ECtHR Judgment to which it refers, arguing that only an "intervening law" -- the Adopted CC SFRY without the death penalty -- may apply to these criminal offenses, which also constitutes a retroactive application of the law which the Constitutional Court established as the law in effect and at the same time the most lenient one.

Also, in the case at hand, both the law that was in effect at the time of the perpetration (CC SFRY) and the law that is currently in effect (CC B-H) prescribe the criminal acts that the Accused were found guilty of as the criminal offense of Genocide. It is, therefore, clear that there exist legal preconditions for conducting criminal proceedings against the perpetrator for the criminal offense of genocide and for his punishing, given that the acts that the Accused undertook constitute a criminal offense, both under the law that was in effect previously, that is, the law of the time of the perpetration, and the law that is currently in effect, that is, the law of the time of the trial.

459. It is not contestable that the criminal offense of Genocide the Accused were found guilty of was set forth as a criminal offense both by the CC SFRY (Article 141 of the Adopted CC SFRY) and the CC B-H (Article 171 of the CC B-H).

460. Article 141 of the Adopted CC SFRY reads:

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

461. Article 171 of the CC B-H reads:

> 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."

462. Also, the killing of members of a group of people, as *actus reus* of the criminal offense of Genocide that the Accused Milenko Trifunović, Slobodan Jakovljević, Brano Džinić, Aleksandar Radovanović and Branislav Medan were found guilty of, constitutes the *actus reus* of the criminal offense of Genocide under both Criminal Codes. It follows from the foregoing that the Adopted CC SFRY and the CC B-H defined the criminal offense of Genocide in the same way and that, when evaluating which law was more lenient to the perpetrator, it was necessary to analyze the prescribed punishment pursuant to the Constitutional Court's decision in the foregoing manner.

463. Also, the Appellate Panel considers that from the properly established state of the facts the Trial Panel drew a wrong legal conclusion that the Accused possessed a genocidal intent during perpetration, which also resulted in a wrong legal definition of the mode of the Accused's participation in the perpetration of the offense.

464. The first instance Verdict reads on page 140:

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

465. When evaluating the existence of the genocidal intent with the Accused, the Trial Panel took into consideration the number of victims, the use of derogatory language toward members of the targeted group, the systematic and methodical manner of killing, the weapons employed and the extent of bodily injuries, the methodical way of planning; the targeting of victims regardless of age, the targeting of survivors, and the manner and character of the perpetrator's participation. Based on this, the Trial Panel made the following finding:

> "In this case, the Panel considered evidence of the acts of the principle perpetrators (Section VI.C) and analyzed that evidence together with the general context in which the acts occurred (Section V) and the perpetrators' knowledge of that context (Sections VI.A and B)."[22]

466. On the basis of that analysis the Trial Panel concluded, beyond any reasonable doubt, that the killing of the majority of more than 1,000 Bosniaks in the Kravica warehouse was committed by the Accused with a view to destroying Bosniaks as a protected group, in whole or in part.

467. However, having in mind the evidence adduced and the facts established by the Trial Panel, the Appellate Panel considers that no reasonable trier of fact could make an inference that the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan possessed the genocidal intent, that is, the intent to destroy, in whole or in part, the protected group.

468. The Appellate Panel is of the opinion that the Trial Panel adduced all available necessary evidence and established all relevant facts relative to the existence of the essential elements of the criminal offense of Genocide. As reasoned earlier, the Appellate Panel considers that the Trial Panel did not establish the state of the facts erroneously or incompletely, hence it dismissed the appeal grievances arguing the contrary. Therefore, the Panel will not deal with the state of the facts in this part of the Verdict, but will use the established state of the facts to give a proper legal definition of the mode of participation of each Accused in the perpetration of the relevant offense.

469. Under the first instance Verdict the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan were found guilty that, together with Petar Mitrović, they participated in the killings in the Kravica warehouse, and that their activity constituted a decisive contribution to the perpetration of the criminal offense, hence the Trial Panel found them guilty as co-perpetrators under Article 171(a), as read with Articles 29 and 180(1) of the CC B-H. The specific acts that the Accused undertook are described in the enacting clause of the first instance Verdict:

> I. Milenko Trifunović in his capacity of Commander of the 3rd Skelani Platoon as a constituent element of the 2nd Šekovići Special Police Detachment, which he commanded, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, Brano Džinić as a special police officer in the 2nd Šekovići Special

[22] In accord with this analysis, see *Akayesu* Trial Judgment; *Ndindabahizi* Trial Judgment; *Cyangugu* Trial Judgment.

Police Detachment in the period from 10 July to 19 July 1995, in which the VRS and MUP carried out a widespread and systematic attack against the members of Bosniak people inside the UN protected area of Srebrenica, with the common purpose and plan to exterminate in part a group of Bosniak people by means of forced transfer of women and children from the Protected Area and by organized and systematic capture and killing of Bosniak men by summary executions by firing squad, having had the knowledge of the plan to exterminate in part a group of Bosniaks, on 12 and 13 July 1995 were deployed along the Bratunac – Milići road, on the section of the road between villages Kravica and Sandići, Municipality of Bratunac, and undertook the following actions:

c) on 13 July, secured the road and participated in the capture and detention of several thousand Bosniaks from the column of Bosniaks (trying to reach the territory under the control of the Army of R BiH), while Trifunović encouraged them to surrender;

d) on the same day, conducted security duties in or around Sandići Meadow, Municipality of Bratunac, where they were detaining at least one thousand captured men,

e) on the same day conducted in a column more than one thousand Bosniak male prisoners into the warehouse of the Kravica Farming Cooperative and detained them together with other imprisoned Bosniak males who were brought to the warehouse on buses, the total number of whom exceeded one thousand, in the Farming Cooperative warehouse and put most of them to death in the early evening hours in the following manner: the Accused Milenko Trifunović and Aleksandar Radovanović, together with Petar Mitrović, fired their automatic rifles at the prisoners; Brano Džinić threw hand grenades at them and the accused Slobodan Jakovljević, Branislav Medan and Petar Mitrović (after opening rifle fire) moved to the back of the warehouse where they stood guard to prevent the prisoners from escaping through the windows.

470. The Trial Panel concluded in the first-instance Verdict that the Accused conducted activities against the persons who belonged to a protected group, and the Appeals failed to contest this conclusion successfully, as reasoned in the part pertaining to the established state of the facts.

471. For the existence of the criminal offense of Genocide it is necessary to also establish the intent of the Accused, their state of mind and attitude toward the genocidal plan (the Accused must possess the genocidal intent). The Trial Panel concluded that not only that the Accused knew of the existence of the genocidal plan to destroy, in whole or in part, the protected group of Bosniak men, and that they participated in their killing with intent, but also that they shared that genocidal intent.

472. The Appellate Panel considers that the conclusion on the existence of the intent on the part of the Accused to kill members of the protected group is the only reasonable conclusion that follows from all the evidence adduced about that circumstance. Likewise, from the adduced evidence there also stems the conclusion that the Accused knew of the existence of the genocidal plan that was subsequently executed.

473. However, the Trial Panel's conclusion that, in addition to knowing of the genocidal plan and intent to kill members of the protected group, the Accused also possessed the special intent to destroy, in whole or in part, the national, ethnic, racial or religious group of people, does not follow beyond doubt from the established state of the facts, in the opinion of this Panel.

474. According to the Trial Panel's conclusions, the existence of the specific intent to destroy the protected group of Bosniak men, in whole or in part, follows from a multitude of indirect evidence. The Verdict reads that more than 1,000 people were executed in the Kravica warehouse and that the Accused participated in these killings, that they knew that the people they were shooting at were Bosniaks who lived in the Srebrenica Safe Area, and that the persons who were shooting during the execution exchanged with the prisoners swearwords and insults based on ethnic and religious grounds. The first instance Verdict reads further (on page 141):

> "The killing proceeded in a methodical manner. Three of the Accused were assigned to keep guard at the back of the warehouse to prevent any of the victims from escaping through the window openings along the back wall. Other Accused, along with other members of the Detachment who had marched the column to the warehouse, were ordered to make a semi-circle in front of the warehouse. The right section of the warehouse, where the column was deposited and which was not secured, was the side first targeted; while the left side, which was secured, was targeted second, after the Accused had 'finished' with the first one. Between the massacre in the right side and the massacre in the left, the Accused took a break. The manner in which they targeted the rooms was also organized. In the first room, the first to fire was the operator of the M84 machine gun, shooting from the side of the door opening. He was followed by the other shooters who cross-fired from both sides of the opening into and through the room of dying men. The shooters would change places at the doorways in order to reload their weapons. Clips were being refilled by one person designated for this task from additional ammunition supplies on the site.[23] At the conclusion of the shooting, the Accused Džinić and at least one other man threw hand grenades into the room full of dead and dying men. The grenades came from two boxes that had been supplied to the site. After a break during which the men relaxed, the Accused resumed the killing and commenced firing on the Bosniaks held in the left side of the warehouse, in the same order and in the same manner. Throughout, the three Accused at the rear of the warehouse continued to ensure that no prisoner escaped death. The task was undertaken in a calculated and thorough way. The Accused remained at the warehouse until officially relieved by another unit sent for that purpose."

475. In addition to the foregoing, the Trial Panel also emphasized the fact that the captured unarmed people crammed in two rooms were shot at from the M84 machine-gun that was mounted on a desk on the side of the entrance and from automatic rifles, reloaded as needed. Hand grenades were also used and they caused lethal injuries and

[23] Witness S4.

explosions that could be heard at a distance of one kilometer. The Trial Panel concluded (pages 144-145):

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

476. The persistence in the destruction on such a scale for such a long period of time indicates a rarely seen resolve aimed at destruction of lives.

477. The Appellate Panel considers that all the foregoing facts and circumstances indicate that there really existed a genocidal plan to destroy a group of Bosniak people, in whole or in part, and that the Accused were aware of the existence of that plan. However, the Appellate Panel considers that it cannot be concluded beyond any reasonable doubt from the evidence adduced regarding their state of mind and mental attitude toward the act that the Accused shared the special intent to destroy the protected group of Bosniaks, in whole or in part.

478. As properly concluded in the contested Verdict, the Accused knew of the existence of the genocidal plan even before 13 July 1995. The Appellate Panel is of the opinion that this conclusion is properly corroborated by the statements of witness S4 and the concrete pieces of information the Accused compiled on 12 and 13 July 1995, that is, upon arriving in the Srebrenica area.

479. The Appellate Panel upholds the Trial Panel's conclusion that the Accused were aware that their detachment was included in the second stage of the task of "the liberation of Srebrenica", which did not imply a military attack on the protected zone, as it had already "fallen". The Accused could get a clear picture of what their next task would be as early as on 12 July 1995, when in front of everyone present some Detachment members "were mopping up the terrain", that is, transferred and took the remaining people to Potočari. Also, the Accused could clearly see numerous buses and trucks on board which the Bosniak women, children and elderly men were loaded (but not the able-bodied men),

and witness S4 confirmed in his evidence that they, members of the Detachment, commented to each other that the remaining men would probably be killed. The Trial Panel established all referenced facts beyond any reasonable doubt, including the circumstances as follows (pages 136-137):

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

480. In view of the foregoing, the Appellate Panel also considers that the Trial Panel's conclusion that the Accused knew that the captured Bosniak men would be killed was the only reasonable conclusion that an objective trier of fact could draw.

481. However, the knowledge of the Accused of the genocidal plan and the genocidal intent of another does not suffice for them to be found guilty of the criminal offense of Genocide. The rendering of conviction for this gravest crime against the whole mankind requires proof that the Accused also possessed the genocidal intent, not that they only knew of such intent of another.

482. The Trial Panel correctly set the standard of proof for this special intent when it noted that it may be difficult to establish the explicit manifestations of genocidal intent on the part of the perpetrators, but that the genocidal intent may be established beyond any reasonable doubt based on the factual circumstances of the acts of the perpetrators.

483. In the case at hand, the Accused were aware of the genocidal plan and of the fact that it was conceived by someone else. As members of the 3rd *Skelani* Detachment, that is, the 2nd Šekovići Detachment of the Special Police (the Accused Džinić), the Accused acted following the instructions of their superiors and undertook the actions with which they contributed to the execution of the criminal offense, and in doing so they acted with direct intent. However, given the established state of the facts, the only conclusion that can

be made beyond any reasonable doubt is that the Accused acted with the intent to kill, that is, significantly contribute to the killing of the captured Bosniaks.

484. Contrary to this, the circumstances and facts that the Trial Panel analyzed in Section C, paragraphs 1-9, do not lead one to conclude beyond any reasonable doubt that they also possessed the genocidal intent. Admittedly, the Accused participated in the killings that were carried out in an extremely cruel and inhumane manner and persisted in carrying out the commenced task by complying with the pre-planned schedule of duties (who was to take guard, who to fire the shots and in what order, who to bring the clips for refilling). However, their commitment to the execution of the entrusted task, the number and the age of the victims, the weapons used, even the swearwords, rather lead to the conclusion that the Accused carried out their task very enthusiastically, but cannot place them at the same level with the ones who undertook illegal acts for the very purpose of destroying the protected group, in whole or in part.

485. It follows from the testimony of witness S4 that already in Srednje soldiers speculated why they were transferred to Bratunac. Upon their arrival in Bratunac and during the search of the terrain they realized that their task would be to “kill the men and separate the children”. Some members of the same platoon objected already in Srednje to their future transfer to Bratunac. The witness himself was thinking about fleeing. They disapproved of their transfer because they did not want to encounter the people they knew, since they assumed there would be some killing.

486. Both witness S4 and Mitrović were consistent in stating that their platoon was substituted in the evening hours by volunteers from Serbia, as Mitrović said. This is an important fact because it was proved during the proceeding that the captured Bosniaks were being killed in the warehouse all night long. This means that the Accused participated only in the first part of the execution (one hour and a half), while other persons continued to kill the remaining captives. According to witness S4, before they were withdrawn from the site, their Commander Trifunović said that a terrible thing had happened, that many people had been killed and that they would eventually “get busted” for that. The witness attended Krsto Dragičević’s funeral and the subsequent lunch, which is when he heard the participants in the incident saying they were sorry for what had happened, that it should not have happened and that someone would have to account for that.

487. The Panel finds these facts important for establishing the (non)existence of genocidal intent of the Accused. In the absence of explicit evidence to undeniably prove

the genocidal intent of the Accused, the Panel had to reach the conclusion in that regard on the basis of indirect evidence. In so doing, the Panel had to take into account one of the fundamental criminal procedure principles - *in dubio pro reo*, which obligates the court to decide in favor of the accused whenever there are doubts about the existence of the facts which satisfy the elements of the criminal offense, or when the application of some criminal law provision depends on them.

488. The Appellate Panel holds that the above stated facts (objections to deployment to Bratunac, expressing concerns over what had been done and how) cast doubt on the finding of the First Instance Panel about the existence of genocidal intent of the Accused.

489. The hitherto practice of the courts in BiH did not address the criminal offense of Genocide, so that the Appellate Panel referred to the ICTY case law in regard to this specific element of the criminal offense, since that Tribunal adjudicated this criminal offense in several cases. Particularly relevant is the Appeals Judgment in the case of Radislav Krstić (Judgment No. IT-98-33-1 of 19 April 2004), who was, *inter alia*, prosecuted for the same incident, as a Major General in the RSA and Commander of the Drina Corps *tempore criminis*.

490. According to the ICTY, all of the crimes that followed the fall of Srebrenica occurred in the Drina Corps area of responsibility (para 135). General Krstić knew of the genocidal intent of some of the members of the VRS Main Staff. Radislav Krstić was aware that the Main Staff had insufficient resources of its own to carry out the executions, and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan (para 137).

491. This Appellate Panel has reached the same conclusions as the Appeals Chamber in the Krstić case:

> "129. Given that the subordinate Brigades continued to operate under the Command of the Drina Corps, the Command itself, including Radislav Krstić as the Commander, must have known of their involvement in the executions as of 14 July 1995. The Trial Chamber found that Krstić knew that Drina Corps personnel and resources were being used to assist in those executions yet took no steps to punish his subordinates for that participation. As the Trial Chamber put it, "there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men. This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets." The Trial Chamber inferred the genocidal intent of the accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. **However, knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent on his part.**

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

492. Although the cited conclusions of the ICTY Appeals Chamber are not binding upon this court, they are very important for reaching a decision in this case, primarily because it concerns the application of international law standards by a tribunal which has extensive experience and authority in this respect. In addition, it concerns responsibility for the same incident of the person who was highly positioned in the chain of command. Not excluding the possibility that "ordinary soldiers" can commit genocide and share genocidal intent, this Panel holds that the presented evidence does not clearly show that, by their actions, the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan shared the genocidal intent of some members of the Main Staff. Their knowledge of the plan and participation in its execution still do not prove that they shared the genocidal intent. As said earlier, derogatory language used in relation to the Bosnian Muslims during the commission of the criminal offense does not necessarily lead to the conclusion that the Accused shared such a complex and serious criminal intent.

493. Genocide is one of the gravest crimes known to mankind, and the culpability for its commission can be established only if the intent for its commission is indisputably established.

494. This Panel holds that neither the adduced evidence nor the established account of facts proves beyond a reasonable doubt such intent of the Accused.

495. That is precisely why the Panel is obliged to render a decision which is more favorable to the Accused, that is, to conclude that the Accused did not have such intent.

496. The mode of participation of the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan has yet to be established in view of the facts that have been proved beyond any reasonable doubt.

497. Based on the foregoing, the Appellate Panel holds that the Accused participated in the commission of the criminal offense as aiders and abettors, not as co-perpetrators, as was erroneously defined in the trial Verdict.

498. Aiding and abetting is defined under Article 24 of the CC of SFRY:

> (1) Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced.
>
> (2) The following, in particular, shall be considered as aiding: the giving of instructions or counselling about how to commit a criminal act, the supply of tools and resources for the crime, the removal of obstacles to the commission of a crime, as well as the promise, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained through the commission of a criminal act.

499. Aiding and abetting as the mode of complicity is intentional support to someone else's criminal offense, and/or it includes the acts which enable the commission of the criminal offence committed by another person.

500. By its nature, the criminal offense of Genocide is specific because of its additional subjective element that has to be fulfilled – genocidal intent, so that the following offenses: (1) killing members of a group; (2) causing serious bodily or mental harm to members of a group; (3) deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part; (4) imposing measures intended to prevent births within a group; (5) forcibly transferring children of the group to another group; must be committed with such a specific intent so as to be considered acts of perpetration of this criminal offense.

501. This conclusion is substantiated by the ICTY case law. According to the ICTY, it is the intent that makes a distinction between the commission of genocide and aiding and abetting its commission: if a person whose acts contributed to the commission of genocide had the intention to destroy in whole or in part a group, that person is the perpetrator of genocide.

502. If a person only knew of the genocidal intent of the perpetrators, but he himself had no such intent, that person is an aider and abettor in genocide.

503. Since all important elements of the criminal offense of genocide have been satisfied, except the genocidal intent (as explained earlier in the Verdict), the Appellate Panel holds that the acts of the Accused amount to aiding and abetting the commission of the criminal offense.

504. This Panel has no doubt that genocide was committed in Srebrenica in July 1995. Due to its nature, that criminal offense could not have been committed by only one person,

but it required active participation of a number of persons, each of them having his own role in it. On the other hand, all participants in the events in Srebrenica obviously did not act with the same *mens rea*, nor did they perpetrate the same acts. The role of the court is to establish criminal responsibility for each accused independently, and in each individual case, taking into account his actions, intent and premeditation.

505. The established account of facts removes any reasonable suspicion that the Accused Trifunović, Džinić, Radovanović, Jakovljević and Medan, were *tempore criminis* aware of the existence of other people's genocidal plan and took actions by which they substantially contributed to its implementation, which makes them aiders and abettors in the criminal offense of genocide.

506. Article 314(1) of the CPC of BiH provides that the Panel of the Appellate Division shall render a verdict revising the first instance verdict if the Panel deems that the decisive facts have been correctly ascertained in the first instance verdict and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts. The Appellate Panel has partly upheld the appeals filed by the Defense Counsel and revised the first instance Verdict in terms of its legal definition and evaluation of the criminal offense. At the same time, the Panel has modified the factual description so as to completely reflect the established facts, the elements of the offense and the culpability of the Accused who were found guilty under this Verdict, in the manner favorable to the Accused.

VI. DECISION ON THE CRIMINAL SANCTION

507. The Appeals filed by all defense attorneys only refer to this ground of appeal in the introductory part, but they do not raise any specific objections to the conclusions reached in the trial verdict, so that they could not be examined in this respect. The only exception is the Appeal filed by the Defense Counsel for the Accused Branislav Medan, which explained this ground for appeal and could be examined.

508. The Panel has taken into account that the Defense Counsel for the Accused filed their appeals on the grounds of erroneous application of the criminal code. Also, the Decisions of the Constitutional Court found that the application of the criminal code violated Article 7(1) of the ECHR in respect of the possibility to impose a more lenient

sanction. Therefore, the Panel has adhered to the position taken in the Decisions of the Constitutional Court and, pursuant to Article 308 of the CPC of BiH, upheld the Appeals filed by the Defense for the Accused Medan, as well as the accused Trifunović, Jakovljević, Džinić and Radovanović.

509. Since the Panel has applied the CC of SFRY in this case, the same law had to be applied when deciding about the objections raised to dispute the decision on the sanction. Also, the Panel needed to stay within the range of sanctions foreseen in Article 141 of the CC of SFRY for the criminal offense of which the Accused are now found guilty, in accordance with the provisions which govern the sentencing and in line with the instructions and positions taken in the Decisions of the Constitutional Court.

510. Pursuant to Article 41(1) of the CC of SFRY, the Appellate Panel has first determined the range of sanctions foreseen for the relevant criminal offense, in particular the special maximum, given that the sanctions imposed on the Accused under the CC of BiH in the revoked Verdict went in that direction (the Accused Trifunović was sentenced to a long-term imprisonment of 33 years; the Accused Džinić and Radovanović to a long-term imprisonment of 32 years and the Accused Jakovljević and Medan to a long-term imprisonment of 28 years). The Decision No. AP-4065/09, paragraph 46, states: "The Constitutional Court notes that the criminal offense of Genocide was punishable under the CC of SFRY by a prison term of five to 15 years, or a prison term of 20 years, or the death penalty." At the same time, in its Decisions AP-4065/09, paragraph 58 and AP-4100/09, paragraph 48, the Constitutional Court rules that "*a maximum sanction for the relevant criminal offense in the situation when it is no longer possible to impose the death penalty shall be 20 years of imprisonment".*

511. Therefore, according to the Constitutional Court, in the situation when the death penalty is abolished, the sanction foreseen for the criminal offense of Genocide codified under Article 141 of the CC of SFRY ranges between 5 and 15 years of imprisonment, or 20 years of imprisonment as a special maximum and as the sanction which the court may impose for the criminal offenses carrying the death penalty. Thus, as it follows from the cited provision of Article 38 of the CC of SFRY, there is no possibility to mete out a criminal sanction within the range of between 15 and 20 years of imprisonment.

512. When deciding on the sanction, the Appellate Panel has upheld as correct all the decisive facts established by the First Instance Panel, which were important for meting out the sentence. This is why the Appellate Panel has largely relied on the correct findings of

the first instance Verdict, primarily with regard to the general considerations and the criteria stipulated by law that have to be taken into account when meting out a sentence. The Appellate Panel has also relied on the individually established facts and circumstances which are important when deciding on the sentence in this case.

513. The purpose of punishment and general principles in fixing punishment are laid down in Articles 33 and 41 of the adopted CC of SFRY.

514. A general principle is that the type and range of criminal sanction must be "necessary" and "commensurate" with the "nature" and "extent" of the danger to the protected property: personal freedoms and human rights, and other fundamental property. When genocide is concerned, the nature and extent of the danger will always be extremely high. The type of sanction the court may now impose in cases involving genocide is restricted to a prison term of 5 to 15 years or to 20 years of imprisonment. In addition to the general principle, when meting out and imposing the sentence, the court has to take into account the circumstances which can be divided in two groups: those relating to the relevant criminal offense and their impact on the community, including the victims; and those relating specifically to the sentenced person.

(i) Sanction must be necessary and commensurate with the danger and threat to protected property

515. Genocide is a denial of the right of existence to entire human groups, as homicide is the denial of the right to life to individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of the United Nations.[24] Punishment of genocide is the principle which is recognized by civilized nations as binding on States, even without any conventional [contractual] obligation.[25]

516. The appropriate punishment will be decided upon only if it is proved that genocide was committed and if the manner of its commission is established in every individual case. *"Genocide embodies a horrendous concept, indeed, but a close look at the myriad of*

[24] Introduction to the UN General Assembly Resolution 96(I), of 11 December 1946.

situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes".[26] The Panel has examined both the general threat to protected property and persons as a consequence of the commission of genocide and the real violence suffered by the protected persons in this specific case.

(ii) Sanction must be "necessary" and "commensurate" with the suffering of direct and indirect victims of the crime

517. Direct victims of the crime of genocide of which the Accused were convicted are hundreds of men who lost their lives in the massacre in the Kravica warehouse on 13 July 1995, which lasted around one hour and a half, and the women and children related to those men, whose lives are permanently destroyed by losing those men in this way. The indirect victim is the protected group of Bosniaks from Srebrenica whose existence was threatened by this genocidal act.

518. Direct victims experienced horrendous physical and mental suffering. The captured men of all ages who were killed in the Kravica warehouse were unarmed captives who were captured or who surrendered to Bosnian Serbs because they were promised safety. There are no words which could describe the physical and mental agony of those men during an hour-and-a-half-long massacre.

(iii) Sanction must have a deterring effect on others.

519. Prevention of genocide has always been connected with punishing. The name of the Convention on Genocide speaks for itself. Genocide can be prevented only if the crime is defined and perpetrators thereof brought to justice, they must not be allowed to benefit from their participation in genocide. Preventive action is particularly important in this case. The Accused were direct participants in the killings.

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[25] *Adherence to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)*, 1951. ICJR Reports 16, p. 23.
[26] *Krstić,* Trial Judgment, para 694.

(iv) The purpose of punishment is to express the community's condemnation of a perpetrated criminal offense

520. The community in this case is the peoples of Bosnia and Herzegovina and the whole international community who were empowered by both national and international law to unequivocally condemn the crime of genocide and to practically punish the commission of genocide. International community gives primacy to the punishment of genocide since it is a norm from which no derogation is permitted (*ius cogens*);[27] and the category of obligations (*erga omnes*) which apply to and are binding on all states.[28] Genocide is defined as a crime "directed against the entire international community rather than the individual".[29] The international community has made it clear that those crimes, notwithstanding who committed them and where, are equally unacceptable and may not go unpunished. The legislation of both SFRY and now Bosnia and Herzegovina reflects the same resoluteness. In this case, the crime of genocide was committed in a particularly unacceptable manner, and the sanction should reflect the condemnation of this act both in national and international public.

(v) Sanction must be necessary and proportionate to the necessity to raise awareness of citizens of the danger of criminal acts

521. The danger associated with genocide arises not only from the physical destruction of a group, but also from the intention to cause mental suffering and from the risk of escalation of that intention. The sanction imposed for this crime must send a signal that genocide will not be tolerated and, by bringing the case to the court, show that it is the proper way to recognize the crime publicly and to break the vicious circle of personal vengeance. The court is not in the position to order reconciliation, nor can the sanction request it. Nevertheless, the sanction which entirely reflects the gravity of the offense can contribute to reconciliation by providing a response that is in accordance with the rule of

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (BiH v. Serbia), Decision on Further Requests for the Indication of Provisional Measures, 13 September 1993, p. 440; Vienna Convention on the Law on Treaties, Article 53.
[28] *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February1970, ICJ reports 1970, No. 4, p 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (BiH v. Serbia), Decision on Preliminary Motions, 11 July 1996, para 31.
[29] William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), p. 6

law principle. The sanction can also promote a desire to substitute personal or group revenge by understanding that justice has been served.

(vi) Sanction must be necessary and proportionate to the necessity to raise awareness of citizens of the fairness of punishing perpetrators.

522. Sanctions for genocide, "the crime of crimes" as it is called, include the most severe sanctions that can be imposed under national and international legal systems. The death penalty for genocide is foreseen even in those countries in which the death penalty has been revoked or abolished for all other crimes.[30]

523. Bosnia and Herzegovina has accepted the abolishment of the death penalty for all criminal offenses, which entirely satisfies the standard of respect for human life. It is precisely the absence of this respect that makes the crime of genocide so horrendous. A prison term of 20 years may be absolutely appropriate for the killing of one person. On the other hand, participation in the killing of hundreds of helpless people, as it was obviously done in this case, even in the absence of genocidal intent, would reasonably require the imposition of the most severe sanctions foreseen under national legislation. No sanction can adequately reflect the gravity of killing of hundreds of people, the mental anguish caused to their families, or even a more severe crime - when the killing was committed in order to deprive the entire group of human beings of their right to existence. Therefore, the fairness of sanction does not depend only on the nexus between the gravity of the offence, the evil caused by its commission and its condemnation, but more specifically, it depends on the nexus between the available penalty options and the sanction imposed for the criminal offense.

524. In this specific case, the Panel is restricted by the binding order under the Decision of the Constitutional Court. Still, the Panel has strong doubts that the imposed sanction indeed achieves the purpose of punishment for the gravest criminal offense known to mankind. In addition, the sanction is not commensurate with the standards laid down in relevant international documents and practice in punishing the crime of genocide.

[30] Rwanda, *de facto* considered as a state that has abolished the death penalty, executed 22 individuals convicted of genocide before national tribunal in 1997; Israel has abolished the death penalty for all criminal offenses except genocide and sentenced Adolph Eichmann to death. Schabas, *Genocide, p.* 396-397. The death penalty is justified as a "fair" punishment for the commission of the crime of genocide, which sends a

525. In order to satisfy the legal requirement of imposing a fair sanction, both personal circumstances of the perpetrator and the criminal offense itself have to be examined. There are two legal goals that have to be achieved when convicting a person of a criminal offense: (1) to deter the perpetrator from perpetrating criminal offences in the future, and (2) rehabilitation. The obligation of the court to impose rehabilitation arises not only from the national legislation, but also from international law which governs human rights and recognizes and explicitly calls for its application. On top of that, this obligation of the Court arises from the Constitution. Article 10(3) of the International Covenant on Civil and Political Rights (ICCPP) prescribes: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.“

526. There is a number of statutory reasons which are important to achieve the purpose of punishment, like rehabilitation and deterrence, which affect the punishing of the convicted person as an individual. They include: degree of responsibility; behavior of the perpetrator prior to the commission of the offense, at or about the time of perpetration of the criminal offense and after the commission of the offence; the motive and personality of the perpetrator. These circumstances can be aggravating or extenuating when meting out the sentence based on facts. The purpose of these reasons is to help the Panel to decide on the sanction that is not only necessary and proportionate to the aims and circumstances surrounding the criminal offense itself and its impact on the community, but also to impose a sanction that will deter the perpetrator from committing further offenses and help in his rehabilitation.

527. Having evaluated all circumstances that have had an effect on the type, length and severity of sentence, the Appellate Panel has found that the manner of perpetration of the criminal offense and the consequences thereof show that it was committed in a particularly cruel way and left extremely serious consequences. The Panel has considered this as an aggravating circumstance, since the necessary essential elements of the criminal offense were exceeded. On the other hand, the fact that the Accused are now convicted of aiding and abetting as a mode of perpetration of the criminal offense, represents a mitigating circumstance, but not to such an extent so as to justify imposing a more lenient sanction, below the foreseen special statutory minimum. The Panel has also taken into account the fact that the Accused have no prior convictions, and that there are no other criminal

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message that the perpetrators of the crime whose aim is to deprive the entire group of the right to existence,

proceedings ongoing against them, and that the Accused Trifunović, Radovanović and Jakovljević are family men.

528. The Panel has also taken into account some specific circumstances on the part of the Accused. For instance, the Accused **Milenko Trifunović** was Commander of the 3rd Skelani Platoon, which is considered as an aggravating circumstance. The Appellate Panel notes that the Accused Trifunović is not found guilty under the command responsibility concept, but it is precisely this role of his that puts him in a different position in relation to the other Accused who were his subordinates. In this context, his position of Commander has to be taken as an aggravating circumstance, given that his responsibility threshold and commanding authority are much higher in relation to the other Accused.

529. In the opinion of the Appellate Panel, in addition to the common aggravating and mitigating circumstances, the Accused **Brano Džinić** was more determined to commit the criminal offense in relation to the other Accused. This follows from the fact that the Accused threw hand grenades at the captives in the warehouse once the shooting ceased, to make sure that no one survived. The Appellate Panel has considered such determination of the Accused as an aggravating circumstance.

530. In the opinion of the Appellate Panel, in addition to the common aggravating and mitigating circumstances, the Accused **Aleksandar Radovanović** expressed a somewhat affirmative opinion about the killings in Kravica, thereby agreeing to such acts. The Appellate Panel has considered this as an aggravating circumstance. This conclusion follows from the fact that Radovanović mocked S4 when S4 refused to participate in the killing, reprimanded him, called him names, and in so doing the Accused encouraged the killing of the captives who were kept in the warehouse.

531. According to the Appellate Panel, during the events in Kravice, the Accused **Slobodan Jakovljević** stood guard on the backside of the Kravica warehouse and he did not use fire arms. Notwithstanding that this fact does not at all diminish his criminal liability, nevertheless the consequences of his acts cannot be compared with the consequences arising from the acts of the other Accused, who fired at the captives. Therefore, this circumstance is to be evaluated as mitigating on the part of the Accused Jakovljević.

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lose their own right to existence, *Id.* p. 397.

532. As for the Accused **Medan**, the Panel has upheld the appellate grievances regarding the mitigating circumstances, that is, the Accused had no prior convictions, he opposed the deployment in Srebrenica, he stood on the backside of the warehouse and did not use fire arms – he did not shoot. His relationship with Bosniaks before and after the war is also found to be an extenuating factor.

533. Since the Accused are now found guilty as aiders and abettors in genocide, provisions of Articles 24(1) and 25(1) of the adopted CC of SFRY[31] are relevant in meting out the punishment. These provisions require from the court to carefully examine the limits of the Accused's intent as aider and abettor in the commission of the acts, and it is up to the court to decide on the mode of punishment, *"as if he himself had committed it"*, or that *"his punishment may also be reduced"*. This implies that the law itself defines aiding and abetting as the mildest form of complicity, which results from the position that aiders and abettors most often support the act of the perpetrator.

534. However, the acts of perpetration of the Accused in this case amount to aiding and abetting only since the presented evidence did not prove beyond any reasonable doubt that the Accused, perpetrating the acts of which they were found guilty, acted with genocidal intent. At the same time, the specific acts of aiding and abetting amount to co-perpetration in the killing, which by far exceeds usual acts of aiding and abetting in the commission of criminal offenses that do not require "special intent". Therefore, the Accused could not receive a more lenient sanction.

535. In view of the foregoing, when meting out the sanction for the Accused, the Appellate Panel has evaluated all circumstances that could have an effect on the length of sentence, and found that the circumstances surrounding the commission of this criminal offense and its consequences show that the offense was committed in a particularly brutal manner and left extremely severe consequences. In the opinion of the Panel, this is an aggravating circumstance because it exceeds the essential elements of the criminal offense. Also, the fact that the Accused are now found guilty of aiding and abetting, as a mode of participation in the commission of the criminal offense, does not justify opting for a

[31]Article 24(1) of the CC of SFRY reads: Anybody who intentionally aids another in the commission of a criminal act shall be punished as if he himself had committed it, but his punishment may also be reduced. Article 25(1) of the CC of SFRY reads: The co-perpetrator shall be criminally responsible within the limits set by his own intention or negligence, and the inciter and the aider -- within the limits of their own intention.

more lenient sanction as foreseen by the law. The Panel has taken into account that the Accused have no prior convictions, nor is there any other criminal proceeding ongoing against them. Pursuant to the Decision of the Constitutional Court, former death penalty is substituted by a prison term of 20 years for the gravest criminal offense of genocide, while a prison term of 5 to 15 years is foreseen for less severe modes of commission of the given criminal offense.

536. Based on the foregoing, the Panel concludes that this criminal offense belongs to the most serious form of *actus reus* of genocide, notwithstanding that the acts of the Accused are defined as aiding and abetting. Since the acts of the Accused resulted in the death of a huge number of people, they obviously have to be given the most severe sentence.

537. According to the conclusions of the Constitutional Court, the death penalty earlier foreseen for the criminal offenses carrying maximum sentences is now substituted with a prison sentence of 20 years. Hence, having taken into account all the circumstances of this case, the Panel has imposed precisely this sentence on the Accused. In the opinion of the Appellate Panel, a prison sentence of 20 years is the only applicable sanction that can be imposed on the Accused given the gravity of the offence, the circumstances thereof, its consequences, manner of perpetration, specific acts of the Accused and their personalities.

538. Pursuant to Article 50 of the CC of SFRY, the time spent in custody under the decisions of this Court shall be credited towards the sentence, as well as the time served under the Verdict of the Court of Bosnia and Herzegovina No. X-KRŽ-05/24 of 9 September 2009: the Accused Milenko Trifunović – custody from 22 June 2005 up to his referral to serve the sentence and the time he served from 28 October 2009 to 18 November 2013; Aleksandar Radovanović – custody from 22 June 2005 up to his referral to serve the sentence and the time he served from 28 October 2009 to 18 November 2013; Brano Džinić - custody from 22 June 2005 up to his referral to serve the sentence and the time he served from 28 October 2009 to 18 November 2013; Slobodan Jakovljević – custody from 21 June 2005 up to his referral to serve the sentence and the time he served from 28 October 2009 to 18 November 2013; Branislav Medan – custody from 23 August 2005 up to his referral to serve the sentence, and the time he served from 28 October 2009 to 18 November 2013.

539. Based on the foregoing and pursuant to Article 314 of the CPC of BiH, the appealed Verdict is revised in the legal definition of the criminal offense and in the sentencing part, as rendered in the Operative Part of Verdict.

RECORD-TAKER	**PRESIDING JUDGE**
Legal Advisor	**J U D G E**
Belma Čano-Sejfović	Tihomir Lukes

LEGAL REMEDY: No appeal lies from this Verdict.