

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case No.: S1 1 K 010294 14 Krž6

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Before the Appellate Panel composed of Judges:

Mirko Božović, Presiding
Redžib Begić, reporting Judge
Tihomir Lukes, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

EDIN DŽEKO

SECOND INSTANCE VERDICT

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

Vesna Ilić

Counsel for the Accused Edin Džeko:

Attorneys Edina Rešidović and Vasvija Vidović

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CONTENTS:

VERDICT	1
Reasoning	5
I. CONVICTION	9
A. APPELLATE GROUND CONCERNING ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS.....	9
1. Appeal filed by Counsel for the accused Edin Džeko	9
(a) Essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC of BiH - the Court's Verdict has not fully resolved the contents of the charges	9
(b) Essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH - the charges exceeded by the Court's Verdict	10
(c) Essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH – violation of the right to defense	12
i. Vague and unreasoned finding that the Accused could have been present in the place of Gaj at the time when the critical incident occurred, namely that he could have reached Gaj from the Gostovići infirmary at the time when the incriminating incident occurred.....	12
(ii) Rejection of the Accused's alibi that he was continually present with the wounded by violating the principle of <i>in dubio pro reo</i>	14
(iii) Conclusion that the Accused was present near the store where the Ivanković spouses were killed	15
(iv) The Court did not consider the testimonies of witnesses Rasema Handanović and witness E in relation to the testimonies of witnesses Marija Miškić and Milka Drljo, concerning the position of the bodies of the killed spouses Ivanković.....	16
(v) Conclusion on the decisive fact – who shot Ilija Ivanković and Anđa Ivanković...	17
(vi) Violation of the right to defense through non-submission of documents to the Defense	18
(vii) Violation of the right to defense by violating the Defense's right to examine the witnesses.....	19
(d) Essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH.....	19
(e) Essential violation of the criminal procedure provisions under Article 297(2) of the	

CPC BiH	21
B. APPELLATE COMPLAINT UNDER ARTICLE 299 OF THE CPC BiH- INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS	27
1. Appellate complaints of the Prosecution.....	27
(a) Section 1 of the Enacting Clause of the Convicting Part of the Trial Verdict.....	28
(b) Section 2 of the Enacting Clause of the Convicting Part of the Trial Verdict.....	29
2. Appeal by Counsel for the accused Edin Džeko	30
(a) Section 1 of the Enacting Clause of the Convicting Part of the Verdict	30
(b) Section 2 of the sentencing part of the Verdict	43
C. APPELLATE GROUND UNDER ARTICLE 298 OF THE CPC OF BIH - VIOLATIONS OF THE CRIMINAL CODE	51
1. Prosecution’s Appeal	51
D. APPELLATE GROUND UNDER ARTICLE 300 OF THE CPC BiH - DECISION ON THE CRIMINAL SANCTION	53
1. Prosecution’s Appeal	53
2. The appeal filed by the Defense for the Accused.....	54
3. Conclusion of the Appellate Panel	54
II. aPPELLATE GROUNDS RELATING TO THE ACQUITTAL.....	55
A. APPELLATE GROUND UNDER ARTICLE 299 OF THE CPC BiH - INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS.....	55
1. Section 5 of the enacting clause of the acquitting part of the Verdict	55
2. Section 5.b) of the enacting clause of the acquitting part of the Verdict.....	58
3. Section 5. c) of the enacting clause of the acquitting part of the Verdict.....	60
4. Section 6 of the enacting clause of the acquitting part of the Verdict	62
B. APPELLATE GROUND UNDER ARTICLE 298 OF THE CPC BiH – VIOLATIONS OF THE CRIMINAL CODE	64
1. Sections 1 and 2 of the enacting clause of the acquitting part of the Trial Verdict ..	64

Number: S1 1 K 010294 14 Krž6

Sarajevo, 4 December 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Appellate Division Panel of Section I for War Crimes, comprised of Judges Mirko Božović, as the Presiding, and Redžib Begić and Tihomir Lukes, as members of the Panel, with the participation of Legal Advisor Nevena Aličehajić as the record-taker, in the criminal case against the accused Edin Džeko, for the criminal offenses of War Crimes against Civilians under Article 173(1)(c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina and War Crimes against Prisoners of War under Article 175(1)(a) of the Criminal Code of Bosnia and Herzegovina, all as read with Article 180(1) and Article 29 of the Criminal Code of Bosnia and Herzegovina, deciding upon the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and Counsel for the accused Edin Džeko, Ms. Edina Rešidović and Ms. Vasvija Vidović, from the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 010294 12 Kri of 6 June 2014, after a public session of the Appellate Panel held in the presence of Ms. Vesna Ilić, Prosecutor of the BiH Prosecutor's Office, Accused Edin Džeko and his Attorneys, Ms. Edina Rešidović and Ms. Vasvija Vidović, on 4 December 2014, delivered the following:

VERDICT

The appeal filed by Counsel for the accused Edin Džeko is hereby **refused as ill-founded**, the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina **granted, in part**, and the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 010294 12 Kri of 6 June 2014, **altered in the decision on compound sentence**, in the way that the accused Edin Džeko, for the criminal offenses of which the Trial Verdict found him guilty, namely War Crimes against Prisoners of War under Article 144 of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the

Criminal Code of the Socialistic Federative Republic of Yugoslavia, as read with Article 22 of the same Code, and for which he received a sentence of 10 (ten) years in prison, and the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia, for which he received a prison sentence of 7 (seven) years, pursuant to the foregoing legal provisions and Articles 33 and 48 of the same Code, imposes on the Accused a **compound sentence of imprisonment for a term of 13 (thirteen) years**. Pursuant to Article 50(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, adopted pursuant to the Law on the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia, the time the Accused spent in custody, during the period from 20 December 2011 through 3 June 2013, shall be credited towards the imposed prison sentence.

The Trial Verdict shall remain unaltered in the remaining part thereof.

Reasoning

1. The Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 010294 12 Kri of 6 June 2014 found the accused Edin Džeko guilty because by the actions described in the enacting clause of the convicting part of the contested Verdict, he committed, under Section 1, the criminal offense of War Crimes against Prisoners of War in violation of Article 144 of the Criminal Code of the SFRY, adopted pursuant to the Law on the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the SFRY^[1], as read with Article 22 of the same Code, and under Section 2, the criminal offense of War Crimes against Civilians under Article 142(1) of the adopted

^[1] The Decree with the Force of Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia adopted as a Republic law during the imminent war danger or during the state of war (Official Gazette of the RBiH, No. 6/92) and the Law on Recognition of Decrees with the Force of Law (Official Gazette of the RBiH, No 13/94)- hereinafter: the Adopted CC SFRY.

CC SFRY, so the Trial Court, pursuant to Articles 33, 38 and 41 of the adopted CC SFRY, for the criminal offense of War Crimes against Prisoners of War under Article 144 of the adopted CC SFRY, imposed on him a sentence of imprisonment for a term of ten (10) years, and for the criminal offense of War Crimes against Civilians under Article 142(1) of the adopted CC SFRY a prison sentence of seven (7) years, and thus, applying Article 48 of the adopted CC SFRY, sentenced the accused to a compound sentence of imprisonment for a term of twelve (12) years. Pursuant to Article 50(1) of the adopted CC SFRY, it was decided that the time the accused Edin Džeko spent in custody, running from 20 December 2011 to 3 June 2013, shall be credited towards the imposed sentence. Pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), as read with Article 186(2) of the same Code, the Accused shall reimburse the costs of the criminal proceedings and a lump sum determined by the Court in a separate decision. Pursuant to Article 198(2) of the CPC of BiH, the injured parties were instructed to pursue their claims under property law in a civil action.

2. The same Verdict acquitted the accused Edin Džeko of the charges in relation to Sections 1-4 of the acquitting part of the enacting clause of the Verdict under Article 284(1)(a) of the CPC BiH, and in relation to Sections 5 and 6 of the acquitting part of the enacting clause under Article 284(1)(c) of the CPC of BiH, that by the actions covered by Sections 1 and 2 (acquittal), he would have committed the criminal offense of War Crimes against Civilians under Article 173(1)(f) of the Criminal Code of Bosnia and Herzegovina (CC BiH), that under Sections 3, 4, 5(b), 5(c) and 6 (acquittal) he would have committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH, and Section 5(a) (acquittal) the criminal offense of War Crimes against Civilians under Article 173(1)(e) of the CC BiH. In relation to the acquitting part of the Verdict, the Court decided, pursuant to Article 188(4) of the CPC of BiH, to relieve the Accused of the duty to reimburse the costs of the proceedings, which shall be paid from within the budget appropriations of the Court. Pursuant to Article 198(3) of the CPC BiH, the injured parties were instructed that they may pursue their claims under property law in a civil action.

3. The Prosecutor's Office of Bosnia and Herzegovina (the BiH Prosecutor's Office or the Prosecution) and Defense Attorneys for the Accused Edin Džeko, Ms. Edina Rešidović and Ms. Vasvija Vidović, timely filed their respective appeals from the referenced Verdict.

4. The Prosecution filed its appeal for violations of the criminal code under Article 298(1)(a) and (d) of the CPC of BiH, the erroneously and incompletely established

state of facts under Article 299 of the CPC of BiH and the decision on criminal sanction under Article 300(1) of the CPC BiH. The Prosecution moved the Appellate Panel of Section I for War Crimes of the Court of BiH to grant the appeal as fully well-founded, alter the contested Verdict in the acquitting part thereof, and imposed on the Accused a long-term prison sentence exceeding 12 (twelve) years for the crimes committed.

5. Defense Attorneys for the Accused Edin Džeko, Ms. Edina Rešidović and Ms. Vasvija Vidović, contested the Trial Verdict for essential violations of the criminal procedure provisions under Article 297 of the CPC BiH, the erroneously and incompletely established state of facts under Article 299 of the CPC BiH, and moved the Court to alter the impugned Verdict by acquitting the Accused of the charges, namely to revoke the Trial Verdict, order a hearing before the Appellate Panel and present the new evidence proposed pursuant to Article 295(4) of the CPC BiH.

6. The Prosecution submitted, within a statutory deadline, its response to the appeal filed by the Accused's Counsel, and moved the Court to refuse it as ill-founded in terms of both essential violations of the provisions of the criminal procedure and the erroneously and incompletely established state of facts.

7. Counsel for the accused Edin Džeko submitted their response to the Prosecution's appeal and moved the Court to refuse it as ill-founded, grant the appeal filed by the Defense and alter the contested Verdict by acquitting the Accused of the charges, that is, to revoke the Verdict and order a trial before the Appellate Panel.

8. On 4 December 2014, the Appellate Panel held a session pursuant to Article 304 of the CPC BiH, which was attended by Ms. Vesna Ilić, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the accused Edin Džeko and his Defense Attorneys, Ms. Edina Rešidović and Ms. Vasvija Vidović.

9. Before the presentation of their respective appeals and responses to the appeals, Defense Attorneys for the accused Edin Džeko, Ms. Edina Rešidović and Ms. Vasvija Vidović, proposed that the public session of the Appellate Panel be postponed because they had found a new piece of evidence. Specifically, an article, published on 4 December 2014 in the *Dani Weekly Magazine*, revealed that there was a new piece of evidence or a video-recording which, Counsel believed, could be exculpatory for the accused Edin Džeko. The Defense therefore moved the Court to order the Prosecution to submit to them the referenced material, and to postpone the session and thus provide the Defense with a

possibility to review and inspect the material at issue. Secondly, or alternatively, the Defense proposed the Court to hold a public session, but also to provide the Accused's Defense with an additional deadline to supplement its appeal upon reviewing the material at issue.

10. The Prosecutor objected to the Defense's proposal, arguing she neither possessed the evidence mentioned by the Defense nor did she have any information whatsoever that such evidence existed at all.

11. The Appellate Panel dismissed the Defense's proposal, first for the fact that the CPC BiH does not provide for a situation of presenting evidence once the appeals and responses to the appeals were filed. Specifically, Article 304 of the CPC BiH clearly defines that appeals and answers to the appeals shall be presented at the panel session, that reading of certain documents may be proposed, but all the explanations should be with regard to their points in the appeal. The Appellate Panel dismissed such a proposal by the Accused's Defense due to the lack of legal grounds and resumed the public session.

12. At the resumed public session, the Prosecutor briefly presented the contents of its appeal and stood entirely by the reasons and proposals provided therein.

13. The Accused's Counsel presented their appeal and also stood by the reasons and proposals forwarded therein. The Accused fully supported his Counsel's presentation. Both the Prosecution and the Accused's Counsel commented on their respective appeals, and fully stood by their responses to the appeals submitted in writing.

14. Pursuant to Article 306 of the CPC BiH, the Appellate Panel examined the contested Verdict within the boundaries of the complaints presented, reviewed the case file and decided as stated in the enacting clause of the Verdict for the reasons that follow:

I. CONVICTION

A. APPELLATE GROUND CONCERNING ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. Appeal filed by Counsel for the accused Edin Džeko

(a) Essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC of BiH - the Court's Verdict has not fully resolved the contents of the charges

15. According to the Accused's Counsel, in the contested Verdict the Trial Panel made an essential violation of the criminal procedure under Article 297(1)(h) of the CPC BiH for it has not fully resolved the contents of the charges. Specifically, Counsel argued that the content of the charges was not resolved in relation to the killing of Kata (daughter of Ivan) Drljo, born in 1932. This is so because, even though the confirmed Indictment charged the Accused with the referenced killing too, and even though the Accused pled not guilty of that action, for which evidence was adduced during the proceedings, the enacting clause of the Verdict neither found the Accused guilty nor acquitted him of the charges, and the charges for the action at issue were not dismissed either.

16. The Appellate Panel has concluded that the referenced complaint was ill-founded.

17. It is true that the Trial Panel indeed deleted from the enacting clause the name of Kata (daughter of Ivan) Drljo, born in 1932, because, as it ensues from the reasoning of the contested Verdict, it did not find proved that the Accused had indeed killed this old woman. Notwithstanding the foregoing, this Panel has concluded that no essential violation of the criminal procedure provisions was thereby made, as Counsel argued in this part of the appeal.

18. The Court's duty to fully resolve the contents of the charges implies its obligation to include in its verdict all the accused and all the acts contained in the filed indictment, or in the indictment amended during the main trial.

19. In the concrete case, the Prosecution's Indictment charged the accused Edin Džeko, and the impugned Verdict refers to him. This Panel has concluded that, from this aspect, the Trial Panel had acted properly. In addition, the Accused was charged under

Count 2 of the Indictment (which also forms Section 2 of the enacting clause of the convicting part of the Verdict), that by the acts described therein he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC BiH. The Trial Panel's impugned Verdict found that the Accused's acts satisfied the essential elements of the criminal offense of War Crimes against Civilians, but it qualified the referenced crime pursuant to the CC SFRY. Therefore, the Accused was charged with, and found guilty under the impugned Verdict of the criminal offense of War Crimes against Civilians committed by killing a large number of individuals.

20. There will be no essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC BiH if the Court deletes certain unproved facts from the factual description of the crime, provided that such facts do not bring into question the existence of the crime charged against the Accused. The contents of the charges include events from the real life, the nature of which has satisfied the underlying elements of the criminal offense.

21. Since the referenced Count of the Indictment incriminates an event that occurred on 16 April 1993, when three civilians, including Kata (daughter of Ivan) Drljo, born in 1932, had been shot dead by fire weapons, and since the criminal offense charged against the Accused under this Count of the Indictment still exists despite the fact that the act of killing of the referenced injured party was deleted from the enacting clause of the Verdict, there was no need, in this situation, to deliver an acquitting verdict for this particular act. Instead, it had to be done exactly in the way as the Trial Panel did in the impugned Verdict, that is, it treated it as an unproved act, whose omission did not bring into question the existence of the crime, and simply omitted it from the factual description, with an obligation to provide in the Verdict the reasons for doing so. The Trial Panel had indeed acted in this way.

22. For the foregoing reasons, in contrast with the objections forwarded by Counsel for the Accused, this Panel has concluded that the Trial Panel fully resolved the contents of the charges in relation to the acts described under Count 2 of the Indictment.

(b) Essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH - the charges exceeded by the Court's Verdict

23. According to the Accused's Counsel, the Trial Panel also made an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC BiH by

exceeding the charge by deleting from the factual description of Count 1 of the Indictment the word "civilians" in front the names of victims Zdravko Drljo, Željko Blažević and Franjo Drljo, and at the same time marking them as "the HVO soldiers". In such a way, the referenced individuals, indicated in the Indictment as civilians, were given the status of war prisoners. Given the fact that the Trial Panel did not find these individuals to be civilians and that thereby the crime at issue was not the criminal offense of War Crimes against Civilians, Counsel argued that the Trial Panel should have rendered an acquitting verdict in relation to these victims. According to Counsel, the Court altered the decisive facts by intervening with the factual substratum of the Indictment, and thereby exceeded the charges, that is, it made an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC BiH.

24. The Appellate Panel has concluded that the referenced complaint is ill-founded.

25. Counsel's appeal properly insisted on the fact that the identity between the contents of the charges and the verdict must exist. The identity between the indictment and the verdict shall be considered in relation to the factual basis, on the one hand, and the legal grounds, on the other. Therefore, the prosecutor's indictment determines the criminal offense both factually and legally. In terms of the facts, the indictment first identifies the person against whom the charges are being brought, and because of which ordering and holding the main trial is being requested (subjective identity). As to the referenced ground of charges, which is important for the objective identity of both the indictment and the verdict, the prosecutor provides in his indictment the factual description and legal qualification of the criminal offense charged against the accused.

26. Article 280(2) of the CPC BiH, however, strictly provides that the Court is not bound to accept the proposals of the Prosecutor regarding the legal evaluation of the act. This means that the Court may freely subsume the facts under the substantive criminal law. If the Court finds, on the basis of the charges, that a different legal qualification is needed, it will provide its reasons for legal evaluation in the reasoning of the verdict, particularly referring to the legal evaluation contained in the indictment. Contrary to the appellate complaint, if the Court finds that the Prosecutor failed to prove his evaluation of the civilian status of certain victims on the basis of the adduced evidence (as in the concrete case), and thereby does not accept the legal qualification of the act as War Crimes against Civilians (finding that the three referenced persons had the status of war prisoners and providing its reasons in the reasoning of the Verdict), the Court is not supposed to acquit

the accused of the referenced charges; instead, it is supposed to find him guilty, providing the qualification it deemed proper, and the reasons for doing so were provided in the reasoning of the impugned Verdict.

27. The Trial Panel acted exactly in the above referenced way. The Trial Panel found that all the executed persons, referred to in Section 1 of the enacting clause of the convicting part of the Verdict, had the status of war prisoners rather than that of civilians, and that the Accused took part in their execution exactly in the way the Indictment described. With the foregoing explanation in mind, and given the fact that the Trial Panel rendered no acquitting verdict for the criminal offense of War Crimes against Civilians, this Panel has concluded that no essential violation of the criminal procedure provisions was made by exceeding the charges, as this part of the appeal indicated.

(c) Essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH – violation of the right to defense

28. Counsel's appeal argued that the Trial Panel made multiple violations of the accused Edin Džeko's right to defense for the reasons that follow:

i. Vague and unreasoned finding that the Accused could have been present in the place of Gaj at the time when the critical incident occurred, namely that he could have reached Gaj from the Gostovići infirmary at the time when the incriminating incident occurred

29. Counsel argued that the Trial Panel had violated the Accused's right to defense by not accepting the Accused's alibi that, after providing first aid to the wounded in Gostovići, the Accused stayed with them continually, and took part in their transportation. Counsel further argued that the Indictment did not allege that the Accused had come from the medical station to Gaj before the onset of summary execution, but only that he participated in the critical incident. Also, the Prosecution even made no effort to prove that the Accused could have crossed the distance between Gostovići and Gaj to arrive right on time to participate in the summary execution. The Trial Verdict found that the Accused had started off from Gostovići towards Gaj and reached it, and, in this way, shifted the burden of proof onto the Accused. In the appellate proceedings, the Accused was obligated to prove that

the sequence of events, as found in the Trial Verdict, was absolutely impossible. In this way, the Accused's right to defense and the principle of *in dubio pro reo* were violated, which affected rendering a proper and lawful Verdict. Therefore, an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH was made. At the same time, the Trial Panel also violated the Accused's right to defense for not taking into account the Defense's evidence, that is, the evidence of the witnesses who testified about the transportation of the wounded from the place of Gostovići to the place of Suhodol. The Trial Panel found that the summary execution, described under Section 1 of the enacting clause of the Verdict, had occurred before the wounded reached Suhodol. The accurate time of the critical incident's occurrence, however, was never specified.

30. In the Appellate Panel's view, the foregoing complaints are ill-founded.

31. Truly, the factual description of the Indictment contains no theory that the Accused either went from, or returned to the place of Gaj after leaving the wounded in the Gostovići medical station. This is understandable because the Accused was charged with and found guilty of the summary execution of six captured HVO soldiers in the place of Gaj. The Trial Panel analyzed the acts taken prior to the critical incident [the wounding of members of the *Zulfikar* Special Purposes Detachment within the Army R BiH (SPD *Zulfikar*), the transportation of the wounded to the medical station, etc..] only in the part important for the evaluation of the Accused's alibi presented by the Defense. The Trial Panel found, on the basis of the presented evidence, that the accused Džeko was present at the site where the captured individuals were summarily executed. Also, the Trial Panel provided the reasons for not giving credence to the Defense's witnesses who had testified that the Accused was present during further transportation of the wounded members of the SPD *Zulfikar*, as well as during and after they received first aid in the Gostovići medical station. This Panel will examine the correctness of such Trial Panel's finding in terms of the complaint relating to the incorrectly and incompletely established state of facts. From the aspect of essential violations of the criminal procedure provisions, however, this Panel considers that Counsel's complaints that the Accused's right to defense was violated because the burden of proof was shifted onto him (that he could not reach Gostovići from Gaj to participate in the summary execution), are ill-founded. Specifically, the Prosecution proved the Accused's presence at the execution site, and the Trial Panel found it proved, contrary to the Defense's assertion that he was not present there, namely that it was realistically impossible for the Accused to reach the execution site. Ultimately, this Panel has

concluded that the Defense contradicted itself when arguing that the Trial Panel had never accurately determined the time the summary execution occurred, but nevertheless indicated, in its complaint, the time frame required for crossing the distance between the Gostovići medical station and the place of Gaj.

(ii) Rejection of the Accused's alibi that he was continually present with the wounded by violating the principle of *in dubio pro reo*

32. The Defense argued that the Trial Panel violated the principle of *in dubio pro reo* to the detriment of the Accused by rejecting the Accused's alibi and requesting a solid and clear evidence that would "with certainty" prove that the Accused was continually present with the wounded, and thereby violated the Accused's right to defense too. The referenced Counsel's complaint pointed to the importance of alibi as means of proof. Counsel argued that the alibi evidence brought into suspicion the Prosecution's evidence that the Accused committed the crime described in Count 1 of the Indictment. Considering that exactly such evidence was offered to the Court by the Defense, the Prosecution was required not only to contest the validity of alibi, but also to prove, beyond a reasonable doubt, the Accused's guilt in the way as the Indictment indicated.

33. The Appellate Panel has concluded that the referenced complaints are ill-founded.

34. In this Panel's view, the essence of Counsel's complaint is mirrored in the fact that the rejection of the Accused's alibi shifted the burden of proof onto the Defense, which is in violation of both the principle of *in dubio pro reo* and the right to defense. The Appeals Chambers in *Zigiranyirazo* and *Čelebići* have found that, even though the alibi was considered as means of proof, it is not genuinely a defense, and that by referring to his alibi, the accused only denies that he was in a situation to commit the crime charged against him. With an alibi correctly presented, the prosecution must prove beyond a reasonable doubt that, despite the alibi, the facts contained in the Indictment were true. This certainly does not mean that, in a situation when the Accused's Defense refers to the alibi, as Counsel tried to present through their appeal, the Prosecution needs to present new evidence to contest the defense through alibi. This rather means that the Panel is not obligated to accept the Accused's alibi if it finds, on the basis of the other adduced evidence, that the prosecution's allegations were proved.

35. In the concrete case, the Panel did not accept the Accused's alibi that he was

present with the wounded persons during the whole period from the moment of their wounding until their accommodation in the Suhodol medical station, or after they had received first aid in the Gostovići infirmary. Even though the Trial Panel discussed, to a significant extent, the time the Accused would need to cross the distance from point A to point B, from the place where the persons were wounded to the infirmary in Gostovići, and thereupon to the place of Gaj, where the summary execution took place, it did not determine the accurate time when the referenced incident occurred. Decisive for the Panel's conclusion that the Accused's alibi was unacceptable was exactly the fact that several eye-witnesses to the incriminating incident at the execution site identified the Accused as a person who had directly partaken in the referenced execution.

36. For the foregoing reason, the Trial Panel did not consider in detail, as stated in the Verdict, the evidence of the witnesses who testified that the Accused was continually present during the transportation of the wounded to the Suhodol infirmary, which is directly opposite to the testimonies of the witnesses who connected the Accused with the site where the incriminating incident occurred, and identified him as one of its perpetrators. The Panel will further discuss the foregoing in the part addressing the complaint of incorrectly and incompletely established state of facts. For the above reasons, the Panel has concluded that the Trial Panel made no violation of the Accused's right to defense by non-acceptance of his alibi, nor did it shift the burden of proof onto the Accused and thereby violated his right to defense, as Counsel's appeal indicated.

(iii) Conclusion that the Accused was present near the store where the Ivanković spouses were killed

37. The appeal stated that the Trial Panel's conclusion, that the accused was present near the store where the Ivanković spouses had been killed, was based on the testimonies of witnesses Rasema Handanović, E, M and R, and that these witnesses were motivated to put the blame for the killings they committed on the Accused. According to Counsel, the Trial Panel did not take into account the testimonies of witnesses Ramiz Bećiri, U and J-4. These witnesses confirmed that the Accused had not been present near the store, and thereby brought into suspicion the testimonies of the Prosecution's witnesses. Counsel argued that, having acted in the referenced way, the Trial Panel violated the principle of *in dubio pro reo*, as well as the Accused's right to defense. Considering that the evaluation of evidence was made in violation of Article 281(2) of the CPC BiH, that is, considering

that the Trial Panel failed to evaluate all pieces of presented evidence, individually and in combination with the other evidence, Counsel believes that an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH was also made.

38. Contrary to this complaint, the Appellate Panel has concluded that the Trial Panel fully met the obligations provided for in Article 281(2) of the CPC BiH. Also, in drawing its conclusions on all legally relevant facts, including the killing of the Ivanković spouses, the Trial Panel took into account all relevant and adduced evidence, individually and in combination. Listed in para. 271 of the impugned Verdict was all the evidence the Trial Panel considered in relation to the charges of which the Accused was found guilty under Section 2 of the enacting clause of the convicting part of the Verdict, including the testimony of witnesses Ramiz Bećiri and J-4. Witness U, however, gave no evidence whatsoever regarding the circumstances described in this Count of the Indictment. Further in the reasoning, the Trial Panel examined the contents of the evidence important for determining the decisive facts. It ensues from the reasoning that the Trial Panel found that the evidence of witnesses Rasema Handanović, E, M and R given about the circumstances described in this count were mutually consistent, harmonized in relation to the decisive facts, reliable as such, and that its conclusion on the Accused's guilt was based on these very facts. This Panel will examine, within the complaints contesting the proper determination of the state of facts, whether such a conclusion was proper. For now, the Panel considers as ill-founded Counsel's appellate complaints regarding a violation of the right to defense and of other essential violations of the criminal procedure provisions.

(iv) The Court did not consider the testimonies of witnesses Rasema Handanović and witness E in relation to the testimonies of witnesses Marija Miškić and Milka Drljo, concerning the position of the bodies of the killed spouses Ivanković

39. According to Counsel, witnesses Marija Miškić and Milka Drljo testified contrary to the testimonies of witnesses Handanović and E regarding the position of bodies of the killed couple Ivanković and thereby also brought into suspicion their testimonies regarding the way in which the referenced killings were committed, and that the perpetrator of these acts was the accused Edin Džeko. Counsel argued that, in this way, the Trial Panel violated the principle of *in dubio pro reo* and the Accused's right to defense. Since the violation of Article 3(2) of the CPC BiH affected proper nature and lawfulness of the contested Verdict, an essential violation of the criminal procedure provisions under

Article 297(2) of the CPC BiH was also made.

40. The Appellate Panel considered this complaint as ill-founded too.

41. The appeal unreasonably stated that the Trial Panel did not consider the testimonies of witnesses Marija Miškić and Milka Drijo in relation to the testimonies of witnesses Rasema Handanović and E. Instead, having considered the referenced evidence, the Trial Panel drew the conclusions on the decisive facts other than those that should have been drawn, in Counsel's opinion. The foregoing, however, falls within the domain of proper determination of the state of facts, which is another appellate ground for reviewing the contested Verdict. Considering that the referenced testimonies were examined, the appellate complaint concerning essential violation of the criminal procedure provisions is deemed ill-founded.

(v) Conclusion on the decisive fact – who shot Ilija Ivanković and Anđa Ivanković

42. Counsel for the Accused argued that the Trial Panel's finding on the decisive fact, that the accused Edin Džeko fired at the married couple Ivanković, was based on the unreliable testimonies of witnesses Rasema Handanović and witness E, which are contrary to, and bring into suspicion the testimonies of the "absolutely credible" Defense's witnesses. Having acted in this way, that is, in violation of Article 3(2) of the CPC BiH and the principle of *in dubio pro reo*, the Trial Panel violated the Accused's right to defense and, as Counsel believes, also made an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH. In addition, Counsel argued that the Verdict lacked a careful and diligent evaluation of evidence, namely that the Trial Panel's conclusion on the referenced decisive fact was drawn with no evaluation of the pieces of evidence, individually or in combination, and that an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH, in addition to the violation of the right to defense, was also made. By contrast, the Appellate Panel has concluded that the appellate complaints unreasonably pointed to the violations of the principle of *in dubio pro reo* and the Accused's right to defense, because the evidence was considered exactly pursuant to Article 281(2) of the CPC BiH. In reviewing the appellate complaints under Article 299 of the CPC BiH, the Appellate Panel will address the issue of whether the state of facts regarding the decisive fact of who killed the Ivanković spouses was properly

determined on the basis of such evaluation of evidence.

(vi) Violation of the right to defense through non-submission of documents to the Defense

43. The Defense argued that the Trial Panel violated the Accused's right to defense by failing to order the Prosecution to submit to it all the evidence (documents, the witnesses' statements and official notes made during the examination of witnesses), of which the Defense became aware during the first instance proceedings, and because of which it filed repeated requests for such evidence submission. In particular, Counsel pointed to the statements of witness Rasema Handanović aka Zolja, which were not delivered to the Defense, although the witness confirmed, during the examination, that she had been interviewed by the Prosecution on several occasions. Counsel also pointed to the statements of witnesses E, J-2 and X, from which it ensues that they had given other statements as well, but these were also not submitted to the Accused's Defense.

44. The Appellate Panel has concluded, contrary to this complaint, that the Defense was given an opportunity to review the Prosecution's case record in *Edin Džeko*, which they confirmed in their appeal, and that all evidence currently available to the Prosecutor in the concrete case was also submitted to it. The Prosecutor in the case confirmed the foregoing at the Appellate Panel's public session and offered Counsel to review again all the evidence in her possession. Counsel, however, confirmed that the statements given in the concrete case were not at issue, but rather the statements given in some other Prosecution's cases, about which they had some indirect information. The Defense, however, did not specify which cases were in question.

45. Even if the above referenced statements existed, the acting Prosecutor did not possess them, they do not form part of the case against the accused Edin Džeko, and it cannot be determined with certainty if they existed at all. The Appellate Panel has therefore concluded that there was no option for the Trial Panel to order the Prosecution to submit such statements to the Defense, so that the Accused's right to defense could be possibly violated by its failure to do so. In the Panel's view, the equality of parties to the proceedings was not violated either, because the statements at issue were not part of the Prosecution's case record in the concrete case. Therefore, the Defense was not brought in a less favorable position due to non-delivery of these statements to it, which could, by its

nature, be a violation of the Accused's right of defense.

(vii) Violation of the right to defense by violating the Defense's right to examine the witnesses

46. The Defense Attorneys argued that the Accused's right to defense was also violated because they were deprived of a possibility to pose certain questions to the Prosecution's witnesses, particularly witnesses Rasema Handanović and witness E (whose testimonies severely incriminated the Accused), or the witnesses were forbidden to answer certain questions posed by the Accused's Defense. In this way, the Defense was prevented from discrediting these witnesses, which was the purpose of the referenced examination. The appeal further indicated the questions to which the witnesses could not answer, namely which were as such forbidden by the President of the Trial Panel.

47. In examining the grounds for the referenced complaint, the Appellate Panel took account of Article 263 of the CPC BiH. This Article provides that the judge or the presiding judge shall forbid the inadmissible, or the repetition of irrelevant questions as well as answers to such questions. In addition, the Panel also took into account the contents of Article 84(1) of the CPC BiH, providing that the witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon him. Bearing in mind the contents of questions posed to the referenced witnesses by the accused Edin Džeko's Counsel, the Appellate Panel has concluded that the nature of these questions, primarily those posed to witness Rasema Handanović, were such that they would result in bringing prosecution upon her, wherefore she was not obligated to give her response. Therefore, President of the Trial Panel acted properly by forbidding such questions or answers. In the opinion of the Trial Panel's President, the second group of questions posed to the referenced witness concerned the events not covered by the Prosecution's Indictment. Therefore, this Panel's view is that the Trial Panel's President acted properly pursuant to Article 263 of the CPC BiH, and forbade posing the referenced questions, or giving answers to such questions, if posed.

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

48. Counsel for the Accused argued that the Trial Panel made an essential violation

of the criminal procedure provisions for a failure to provide reasons for a number of decisive facts in the Verdict. The appeal stated that a) the Verdict contains no explanation as to the Defense's complaints relating the legality of the Accused's extradition procedure from the USA; b) the Court made no reference to the Defense's arguments related to the misuse of the official notes in this case, namely the statements of witness U-4 given in the various stages of the proceedings¹; c) the Court provided no explanation as to why the Defense was not allowed to pose questions to the witnesses that severely incriminate the Accused, or forbade the witnesses to answer the questions concerning their credibility; d) the Court gave no reasons on the decisive facts of importance for the Accused's alibi; e) the Court gave no explanation regarding the period of time needed to cross the distance between the places of Gostovići and Gaj, taking into account the conditions in the field; f) the Court did not explain why the Defense's witnesses Redžo Poturović and Mustafa Hakalović were not given credence, but rather only arbitrarily explained that the referenced statements were given in order to support the Accused and undermine the evidence of witness E, indicating no motives these witnesses could have had; g) the Court did not take into account the evidence of witnesses Ramiz Bećiri, U and J-4 given in relation to the acts described in Section 2 of the enacting clause of the Verdict, provided no reasons for considering these witnesses possibly unreliable, and i) the Court provided no reasons for not giving credence to the evidence the Accused gave at the main trial.

49. An essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH exists where the verdict contains no reasons at all, or does not provide the reasons on decisive facts. In the concrete case, Counsel's complaint concerns the lack of reasons on the decisive facts, but does not explain why would the facts, for which they believed the Verdict contained no reasons, be considered decisive. Thus, this Panel considers the advanced complaint too arbitrary to evaluate it. In addition, the concept itself of Counsel's complaint, in fact, suggests that the Verdict is being contested on the other appellate ground – that of erroneously and incompletely established state of facts. This is so because the Attorneys themselves referred to the parts of the appeal contesting the proper establishment of the state of facts, to which they related certain complaints advanced in this part of the appeal. Therefore, optional reasonability of these complaints will also be addressed by the Panel within the scope of the complaint of the erroneously

¹ Official Note of the State Investigation and Protection Agency (SIPA) No. 17-04/2-04-2-04-2-240/10 of 19 February 2010, Witness Examination Records, Prosecutor's Office of 14 June 2012 and 4 June 2013.

and incompletely established state of facts, where they were concretized to a significant extent. From the aspect of alleged essential violation of the criminal procedure provisions, however, the Appellate Panel has concluded that the referenced complaint is ill-founded.

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

50. Counsel argued that the Trial Panel made an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH, on the grounds that it failed to apply provisions set forth in Article 261(2)(e) of the CPC BiH and Article 269(1) of the CPC BiH. In their view, the Trial Panel should have applied the referenced Articles in order to correctly and completely establish the state of facts and render a proper and lawful verdict. The Trial Panel failed to explain the fact of time the Accused needed to cross the distance between the place of Gaj and the Gostovići medical station, and adduced no additional evidence along this line. In addition, no evidence was adduced to clarify the witness E's earlier given statements regarding the execution in Gaj. The Defense argued that all the foregoing amounted to violations of the referenced legal provisions, and that rendering a proper and lawful verdict was thereby affected and Article 297(2) of the CPC of BiH violated. The other option, which was at the Trial Panel's disposal in the concrete case, according to Counsel, was to apply the principle of *in dubio pro reo* under Article 3(2) CPC BiH, or Article 15 of the CPC BiH, on the basis of which it could have rendered an acquitting verdict. Considering that the referenced provisions were not applied, the foregoing is, by its nature, an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH.

51. In the Appellate Panel's view, the foregoing complaints are ill-founded.

52. Pursuant to the provisions of the applicable CPC BiH, the basic rule of criminal procedure is that the parties and defense attorneys in criminal proceedings are entitled to summon witnesses and adduce evidence, and that the court proposes the presentation of evidence only if it deems, during the proceedings, that this is necessary in order to establish and explain the decisive facts. The burden of proof lies on the prosecutor. The defense can summon its witnesses and present evidence to contest the prosecution's allegations, or to prove its own submissions. The court may present its own evidence, but is not obligated to do so. The parties' complaint of essential violation of the criminal

procedure provisions cannot be based on the fact that the court did not adduce or propose adducing certain pieces of evidence. The law does not prescribe for such an obligation, but rather leaves at the trial panel's discretion to render its decision. Thus, in the concrete case, it is the matter of the Trial Panel's free evaluation and belief whether it is necessary that evidence be presented pursuant to the court's proposal so as to clarify certain decisive facts.

53. The Defense had an option to propose an expert evaluation of the time needed for crossing the distance between Gostovići and Gaj if it considered this was a decisive fact. The fact that the Trial Panel ordered no presentation of such evidence does not amount to an essential violation of the criminal procedure provisions. It may have possible importance in evaluating the complaints related to the proper establishment of the state of facts.

54. In addition, the Defense examined witness E. His testimony from the main trial was fully a piece of evidence, and it was as such evaluated both individually and in combination with the other pieces of evidence. If the Defense believed the referenced witness's earlier statements contained certain relevant facts, differently presented in relation to what the witness stated at the main trial, it could have and should have proposed that such record be adduced as evidence in the case record. Considering the failure of the Defense to do so, the Trial Panel properly noted, in this Panel's view, that such a statement could not be considered in rendering the verdict. The fact that the Court did not order adducing the referenced evidence cannot be considered as an essential violation of the criminal procedure provisions, as Counsel suggested, because there is no provision in the CPC BiH under which the Court is bound to adduce any pieces of evidence.

55. In view of the foregoing, the Appellate Panel concluded that the Trial Panel was not bound to apply the provisions Counsel's appeal referred to so as to be able to examine whether rendering a proper and lawful verdict was thereby affected, and whether an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH was made. It also ensues from the reasoning of the contested Verdict that the Trial Panel established beyond a doubt that the Accused was present and participated in the incriminating acts of which he was found guilty. Whether this finding is proper may be examined only on the grounds of the erroneously and incompletely established state of facts. Therefore, Counsel's appeal unreasonably pointed to a violation of Article 3(2) of the CPC BiH, because the Trial Panel's Verdict did not find even a slightest extent of

suspicion concerning the Accused's role in the incriminating acts at issue.

56. Counsel's appeal further stated that these criminal proceedings were conducted in an unlawful manner, that is, in violation of Article 2 of the CPC BiH, and thereby in violation of Article 123(2) of CPC BiH too, which Counsel further viewed as an essential violation of the provisions of criminal procedure under Article 297(2) of the CPC BiH. The appeal stated that the accused Edin Džeko was extradited from the United States of America (USA), that he voluntarily waived all his rights, and accepted to be unconditionally extradited from the USA as soon as possible. However, the request filed by the acting Prosecutor did not specify the counts of Indictment pursuant to which the Accused's extradition was requested, and particularly, did not submit evidence for each count individually. Therefore, the extradition procedure was unlawful, which renders the proceedings conducted against the Accused also unlawful. Despite the fact that the Accused's consented to extradition, the Prosecution requested that the Accused be placed into custody, the Court upheld this request and the Accused remained in custody during the period between 21 December 2011 and 29 May 2013. The appeal stated that, in the foregoing way, the Trial Panel acted in violation of Articles 2 and 123(2) of the CPC BiH, as a result of which an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH was made.

57. According to the Appellate Panel, the foregoing complaints are ill-founded.

58. First to be examined at this point is what is being considered an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH, as Counsel's appeal suggested. Specifically, the referenced provision provides as follows:

"There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code or during the main trial, or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict."

59. Considering the referenced provision and Counsel's complaint, the Appellate Panel has concluded that the Defense argued that the Trial Panel acted in violation of, that is, it did not apply, or improperly applied Article 2 and Article 123(2) of the CPC BiH, and that such act affected or could have affected rendering a lawful and proper verdict.

60. Counsel considered the Accused's extradition from the States was unlawful, which is where they saw a violation of Article 2 CPC BiH. Counsel argued that the Trial Panel did not at all consider their complaints related to the lawfulness of the Accused's extradition,

but rather simply accepted the reasons provided in the Decision of the Preliminary Hearing Judge, who had decided on the preliminary motions concerning the Indictment. It ensues from the first instance Verdict, however, that the Trial Panel did consider the referenced appellate grievances, but found that the reasons of the contested Decision were proper, accepted them as such, and presented them in its Verdict.

61. By advancing such appellate complaint, the Defense Counsel themselves accepted (as it ensues from the case record), that the Accused had consented to extradition and thereby waived all his rights and guarantees he would have been entitled to had he not exercised his right to request unconditional extradition. It ensues from the Prosecution's evidence² that after the Accused had been instructed about his rights pursuant to the Convention on Extradition applicable between the USA and the Republic of Bosnia and Herzegovina, in the presence of his Attorney who also informed him about his rights and with whose services he was satisfied, he *waived any and all such rights, and asked the Court to expedite his return to the Republic of Bosnia and Herzegovina under escort.* Exhibits T-79 and T-80 showed that the accused Džeko waived his right to extradition-related hearing, in the course of which the following facts should have been established: *“(1) that the Convention on Extradition between the USA and the Republic of BiH is presently in force; (2) that the Convention includes the acts for which [my] extradition was requested; (3) that I am the person whose extradition is requested by the Republic of Bosnia and Herzegovina; (4) that there is a probable cause to believe that I committed the offenses due to which the extradition is being requested”.* Thereupon, the Accused personally confirmed that he was the person against whom an indictment was brought in the Republic of Bosnia and Herzegovina, and against whom the proceedings are pending there. The Accused also stated he understood that, if he did not wave his rights he could not be forced to return to BiH, unless and until the US court rendered a decision confirming his extradition was possible, and ordered extradition by issuing an extradition warrant. The Accused further stated he had examined the indictment proposal, and fully understood the right to a hearing, where he and his attorney could contest the extradition request submitted by the BiH Government. At the same time, the Accused stated the following: *“I waive all my rights under the Convention on Extradition and under the applicable sections of Title 18 of the US Code. I agree to be extradited under escort, as soon as possible, to the Republic of Bosnia and Herzegovina, and to remain under custody until the arrival of*

the agents from the Republic of Bosnia and Herzegovina...". The US District Court thereupon issued an order approving the waiver of the right to extradition-related hearing.³ Prior to this, the same document also noted that the accused Edin Džeko "...has been fully instructed about his rights *in this country in accordance with the Convention on Extradition, which is in force between the US Government and the BiH Government, and in accordance with the US Code, Section 3184 onwards, and that he waived these rights consciously and voluntarily...*". In the view of both this Panel and the Trial Panel, all the foregoing confirms that, despite being repeatedly cautioned of the consequences of his rights' waiver in the extradition procedure, pursuant to the applicable provisions of the Convention on Extradition between the USA and BiH, the accused Džeko strictly refused to exercise these rights. Therefore, the Convention itself is not applicable to the Accused's extradition procedure, namely at this stage, when the Accused waived all the rights he would be entitled to under the Convention, there are also no grounds to refer to the Convention provisions which would have been undoubtedly applicable without the Accused's statement waiving his rights.

62. The foregoing is also supported with Exhibits T-81 and T-82, or the diplomatic note in response to the inquiry of the BiH's Chief Prosecutor sent to the US Ministry of Justice regarding the extradition of the accused Edin Džeko to Bosnia and Herzegovina. As it ensues from the referenced response, the inquiry was sent with the view to determining the options, or possible obstacles for prosecuting the Accused for the crimes he had allegedly committed in Donja Jablanica in September 1993, which obviously were not covered by the request for his extradition. The referenced document stated the following:

"Considering that Mr. Džeko has waived all his rights, he was not transferred in custody of Bosnia and Herzegovina pursuant to the Extradition Agreement, but rather pursuant to his consent. We have consulted the US Foreign Ministry and agreed that, in such a situation, the principle of specificity, provided for in Article VIII of the Extradition Agreement, would not apply. We believe that, in this case, the Extradition Agreement does not prevent Bosnia and Herzegovina from prosecuting Mr. Džeko for the criminal offenses allegedly committed in Donja Jablanica in September 1993."

63. In view of the foregoing, the Appellate Panel has concluded that Counsel's objection concerning the unlawfulness of both the Accused's extradition from the USA and the entire proceedings conducted and pending against him before the BiH judiciary is ill-founded.

² See Exhibits T-77 through T-82.

³ Exhibits T-77 and T-78.

64. Counsel further pointed to a violation of Article 123(2) of the CPC BiH. The Appellate Panel has concluded that, during the proceedings and during the period the Accused spent in custody, the justifiability of custody, as the most stringent measure, was reviewed within the statutory deadlines, and the Accused was kept in custody as long as both general and particular custody grounds existed. The fact itself that the Accused consented to extradition does not preclude a possibility of ordering him into custody. In such cases, if the Prosecution filed a custody motion, as it was done in the concrete case, the justifiability of the motion is being evaluated in relation to all the circumstances of the concrete case.

65. Ultimately, the Appellate Panel has concluded, in relation to the complaint of essential violation of the criminal procedure principle, that not only that Counsel's appeal unreasonably indicated that the Trial Panel had violated the referenced CPC provisions, but particularly that it did not explain how would such optional violations, had they been made by the Trial Panel, affect or could have affected rendering a proper and lawful verdict that is being contested.

66. Counsel's appeal saw a violation of Article 2 of the CPC BiH, resulting in a violation of the criminal procedure provisions under Article 297(2) of the CPC BiH, also in the fact that Mato Zeko, BiH Presidency's employee, was involved in the investigation. According to Counsel, the principles of independence and impartiality in performing the prosecutorial duty (Article 2 of the Law on the BiH Prosecutor's Office and Article 5 of the Rules on Internal Organization of the BiH Prosecutor's Office), as well as the principle of lawfulness provided for in Article 2 of the CPC BiH and Article 6 of the ECHR, were violated by including Mato Zeko in the Prosecution's investigation. Therefore, the evidence obtained with the participation of Mato Zeko is unlawful evidence.

67. The Defense correlated the referenced objection with the violation of Article 297(1)(i) of the CPC BiH, that is, it argued that the Verdict was based on the unlawful evidence. However, the Appellate Panel has first noted that this form of absolutely essential violation of the criminal procedure provisions in relation to the complaint reasoned in the above referenced way cannot be discussed at all because Counsel suggested no concrete piece of evidence whatsoever that was unlawfully obtained and on which no verdict could be based pursuant to the provisions of the CPC BiH.

68. This Panel has also considered the complaint advanced in the context of relatively essential violation of the criminal procedure provisions under Article 297(2) of the CPC

BiH, as suggested by the appeal, and concluded it is ill-founded in that context too. Even if it were accepted as proved that one Mato Zeko, employee of the BiH Presidency, was involved in the Prosecution's investigation, about which the Defense tendered evidence in the case record, that thereby the principles of independence and impartiality of the prosecutorial function were violated, and that such an act was in violation of Article 2 of the CPC BiH because only the prosecutor is authorized to conduct the investigation, and authorized official persons may be authorized to conduct certain investigative actions, and that Mato Zeko cannot be considered as an authorized official person. In considering the justifiability of the referenced complaint, this Panel has taken into account that, not only that the Defense did not specify the evidence allegedly obtained with the participation of Mato Zeko, but they particularly did not explain that the Verdict is based on this evidence, and that the foregoing affected the rendering of a proper and lawful verdict, as properly noted by the Trial Panel in the contested Verdict. In this regard, the Defense unreasonably argued that, having so concluded, the Trial Panel unjustifiably shifted the burden of proof onto the Defense, because each party to the proceedings, should it have reasons to consider any piece of evidence unlawful, must specify such averment primarily by presenting such piece of evidence and explaining the reasons for considering such evidence unlawful. The Defense in the concrete case failed to do so.

69. Therefore, this Panel has concluded that the appellate complaint, pointing to an essential violation of the criminal procedure provisions, is ill-founded too.

B. APPELLATE COMPLAINT UNDER ARTICLE 299 OF THE CPC BIH- INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

1. Appellate complaints of the Prosecution

70. The Prosecution's appeal, filed on the grounds of incorrectly or incompletely established facts, contests the Trial Verdict both in its convicting and acquitting parts. However, for the purpose of taking a systematic approach, this part will only address the Prosecution's complaints relating to the convicting part of the Trial Verdict, while the Prosecution's complaints relating to the acquittal will be dealt with in a separate section of this Verdict.

(a) Section 1 of the Enacting Clause of the Convicting Part of the Trial Verdict

71. The Prosecution's appeal argued that the state of facts in the contested Verdict was incompletely established because the Trial Panel deleted from the factual description of Section 1 of the enacting clause of the Verdict a part of the factual description contained in the Prosecution's Indictment, namely the words "*within the Headquarters of the Supreme Command of the ARBiH*", and thereby failed to establish that the accused Edin Džeko was a member of the *Zulfikar* Special Purposes Detachment within the Headquarters of the Supreme Command (SPD HSC). The Trial Panel found that the referenced fact was irrelevant, and that it was established beyond a doubt that the referenced unit, whose member was the accused Džeko, was active within the forces of one party to the proceedings, specifically the ARBiH. Unlike the Trial Panel, the Prosecution argued it was important to establish, from the managing and commanding aspect, that the accused Džeko was a member of the unit that performed its activities as the *Zulfikar* SPD HSC until 5 October 1993, namely which formed no part of the IV Corps, but existed independently.

72. In relation to this count of the Indictment, the Prosecution further argued that the state of facts was still incompletely established also because the Trial Panel deleted from the factual description the words "in a well prepared" and "taking no account of the difference between the civilian and military targets", all because it found that the referenced parts of the factual description were irrelevant considering it was established that the Accused's status was that of an ordinary soldier.

73. The Appellate Panel's view is that the grounds for the Prosecution's conclusion, that the referenced facts are decisive by nature, remain unclear even after advancing the referenced complaints. This is so particularly bearing in mind that the accused Edin Džeko was not even charged with having any managerial or commanding function, but rather with directly participating in the summary execution of the persons identified in Section 1 of the enacting clause of the Verdict. With this in mind, and considering the charges against the accused Edin Džeko under this Count of the Indictment, the Trial Panel properly concluded that the facts of whether the unit of which the accused Džeko was a member was subordinated to any, or to which specific unit of the Army BiH, whether the attack in which he participated was prepared, or whether civilian targets were discerned from military ones in this attack, are irrelevant for the existence of the criminal offense and the Accused's criminal liability. For the foregoing reasons, the Appellate Panel has concluded that these

complaints are ill-founded

(b) Section 2 of the Enacting Clause of the Convicting Part of the Trial Verdict

74. The Prosecution argues that the Trial Panel's finding of the state of facts relating to Section 2 of the convicting part of the Verdict was also incorrect because the name of Kata (daughter of Ivan) Drljo, born in 1932, was omitted from the factual description. The Prosecution argued that Witness X testified he had eye-witnessed the murder of Kata (daughter of Ivan) Drljo, born in 1932. In this regard, the Trial Panel properly found, contrary to the Defense's averment that he was not present in Trusina on 16 April 1993, that *"it would be unclear why would anyone describe his own participation in an action together with soldiers suspected of the commission of war crimes, unless he himself indeed participated in that very action"*. The referenced witness described the murder of the old lady Drljo, and Witness S also testified about it. The Prosecution therefore argued it was proved beyond a doubt that the accused Edin Džeko committed this murder too, which is why the state of facts in the contested Verdict, in Section 2 of the convicting part thereof, was incorrectly established.

75. Contrary to the foregoing Prosecution's complaint, the Appellate Panel has concluded that the state of facts in the Verdict in relation to Section 2 of the enacting clause, and in the part contested by the referenced complaint, was properly established. Specifically, after analyzing the testimonies of the heard witnesses, who had provided information about the killings in the village of Trusina, described in this Section of the convicting part of the Verdict, including the testimonies of Witness X and Witness S, particularly indicated in the appeal, the Appellate Panel has also concluded, like the Trial Panel, that there still exists a significant degree of suspicion regarding the fact that the accused Edin Džeko also killed the old lady Kata Drljo too. Truly, Witness X indeed described the killing of the old woman and identified the accused Džeko as a perpetrator of this murder. His testimony in this part, however, is not corroborated with any other pieces of evidence, not even with the testimony of Witness R, with whom he had stood together and watched the referenced killing. Describing the events in Trusina, Witness R did not mention that the accused Džeko had killed a woman, but only that he killed a woman and a man together (of which the Accused was found guilty). Since the other witnesses heard regarding the killings described in this Section of the enacting clause could only confirm that old woman Kata Drljo was killed on the referenced day, which was uncontested by

the Accused's Defense itself, this Panel has concluded, like the Trial Panel, contrary to the Prosecution's submission, that it cannot be established beyond a doubt, on the grounds of the quantum of evidence available to the Trial Panel and its quality, that the Accused indeed committed the referenced killing. Therefore, the Trial Panel properly omitted the name of the injured party Kata Drljo, born in 1932, from the factual description of Section 2 of the enacting clause of the Verdict.

2. Appeal by Counsel for the accused Edin Džeko

(a) Section 1 of the Enacting Clause of the Convicting Part of the Verdict

76. According to Counsel's appeal, the state of facts relating to Section 1 of the convicting part of the Verdict was incorrectly established because of: a) an absolute impossibility that the Accused was present in the hamlet of Gaj at the time when the critical incident occurred; b) the Accused was continually present with the wounded co-combatants from the moment they sustained injuries until their arrival in Suhodol (non-acceptance of the Accused's alibi); c) the other circumstances undetermined by the Court, which would further indicate that the Accused could not have been present in Gaj during the summary execution, and 4) other examples of systematic incorrect or incomplete establishment of facts. In relation to this section of the enacting clause of the convicting part of the Verdict, the Defense's appellate complaint essentially aims at contesting the Trial Panel's conclusion that, participating in the transportation of his wounded co-combatants during a part of the transportation, or until they reached the Gostovići medical station, the Accused arrived in the hamlet of Gaj in time to participate in the execution. In other words, the Defense's complaint was aimed at proving that the Trial Panel's conclusion not to accept the Accused's alibi was improper (through which the Defense was proving that the Accused accompanied the wounded members of his unit all the time, from the moment they were wounded until they reached the Suhodol infirmary).

77. The Defense's appeal stated that, according to the contested Verdict, the Trial Panel accepted the Defense's submissions that, immediately after his two co-combatants had been wounded, the Accused transported them to the medical station in Gostovići, where they received first aid, and did not accept that the Accused further participated in the transportation of the wounded, but concluded that the Accused went to the hamlet of Gaj

and took part in the critical incident. Counsel argued that, in order to construct such a sequence of events in this way, the Trial Panel had to determine that such a sequence was possible in terms of time. This appears to be a decisive fact the Trial Panel failed to determine. Counsel explained such a theory examining in detail the testimonies of the witnesses who testified about the period of time required to cross certain distances (from the site where soldiers were wounded to the Gostovići infirmary, and from Gostovići to the hamlet of Gaj), as well as to carry out certain actions (dressing the wounds of the wounded soldiers). Counsel also examined the evidence of the witnesses who testified about the time-frames when certain events occurred, the wounding and execution of the HVO soldiers. As a result, Counsel concluded it was impossible that the Accused could have reached the hamlet of Gaj in time to take part in the execution if he only drove the wounded to the Gostovići infirmary where their wounds were dressed.

78. The Appellate Panel has analyzed the referenced appellate complaints and the reasons of the contested Verdict in this context, and concluded that, in establishing the decisive facts relating to the charges described in Section 1 of the enacting clause of the convicting part of the Verdict of which the accused Džeko was found guilty, the Trial Panel analyzed in detail all the circumstances important for the incident at issue, namely the ones that preceded the execution itself, those relating to the attack on the village of Trusina, the wounding of two members of the *Zulfikar* SPD HSC and their transportation to the infirmary for providing them with first aid, and thereupon to a farther medical station for a full medical treatment, the fact of the execution itself based on the testimonies of eye-witnesses to this incident, and ultimately, the circumstances relating to the Accused's alibi. On the basis of such a detailed analysis of evidence on the foregoing circumstances, the Trial Panel concluded that the Accused's alibi, pursuant to which he could not have taken part in the execution of the captured HVO soldiers, could not be given credence, and that on the basis of the adduced evidence, the Prosecution proved beyond a doubt that the Accused indeed committed the acts charged against him under this Count of the Indictment.

79. The appeal filed by the Accused's Counsel mostly addresses the periods of time the Accused needed to transport the wounded to the Gostovići infirmary, particularly considering the fact that, during this transport, the vehicle driven by the Accused and by which the wounded were transported "skidded" off the road. This was determined beyond a doubt on the basis of the witnesses' testimonies. According to Counsel, the time needed

to return the vehicle back on the road, the time needed to dress the wounds of the wounded, and the time the Accused needed to return to the hamlet of Gaj, point that it was, in fact, impossible for the Accused to reach the hamlet of Gaj so as to participate in the execution described in Section 1 of the enacting clause of the Verdict.

80. It ensues from the reasoning of the contested Verdict that, analyzing the testimonies of witnesses U, Ramiz Bećiri, Rasema Handanović, E, J-4 and M, the Trial Panel found beyond a doubt that, after two members of the *Zulfikar* SPD HSC ARBiH, witnesses U and Samir (Samko) Šemsović had been wounded, and after Ramiz Bećiri had dragged them out of the site, away “from the fire”, the accused Džeko drove a vehicle, by which he and witness C transported these wounded soldiers to an improvised medical station, where veterinarian Atif Karović provided the wounded with first aid.

81. It was established beyond a doubt, on the basis of the evidence given by witnesses Ramiz Bećiri, Redžo Poturović and Mustafa Hakalović, the testimony of the accused Edin Džeko, and the testimony of witness Rasema Handanović, whom the accused Džeko had told about the incident at issue, that at one point, prior to arriving at the improvised medical station in Gostovići, the vehicle transporting the wounded skidded off the road, and that because of this incident they had to take the wounded out of the vehicle.

82. The Trial Panel, however, did not find proved that, after the wounded had received first aid, the Accused further participated in their transportation, and drove them to the Suhodol hospital, or that he carried them at certain stages along the way. The Trial Panel did not accept the Accused’s alibi in this part, and this issue will be dealt with separately, considering that this specific complaint of the Defense points to the incorrectly and incompletely established state of facts. This Panel will now analyze Counsel’s objections pointing that it was impossible, in fact, that the Accused returned to the hamlet of Gaj to take part in the execution of 6 captured HVO soldiers, even if it was accepted that he took no part in further transportation of the wounded to the Suhodol medical station, once their wounds had been dressed by veterinarian Atif Karović.

83. In this regard, Counsel pointed to the testimonies of the witnesses who testified about the period of time elapsed since the moment when two members of the *Zulfikar* SPD were wounded until their transportation to the improvised medical station in Gostovići, which most of the heard witnesses limited to around 15 minutes. This Panel has concluded, however, that the Trial Panel’s finding was erroneously interpreted by the

Defense when it argued this was undisputable, namely that the Court's conclusions showed that the Accused was in Gostovići when the wounded received first aid, which lasted for around 15-20 minutes. In this Panel's view, para. 198 of the Verdict, which is incorrectly interpreted by Counsel above, showed it was found beyond a doubt that the Accused drove the two wounded soldiers of the *Zulfikar* SPD HSC ARBiH by a vehicle to the improvised medical station in Gostovići, where they received first aid, but it certainly did not conclude that the Accused was present during the period when his wounded co-combatants were receiving this aid.

84. Upon evaluating and examining the evidence of the witnesses who testified about the fact that, even after he had brought them to the medical station, the Accused was present during the time when the wounded received first aid, this Panel too could not draw such a conclusion beyond a doubt. Witness C, who had together with the Accused brought the wounded members of the unit to the improvised medical station, could not confirm beyond a doubt that the accused Džeko was present while veterinarian Atif Karović dressed the wounds of his injured co-combatants. On the contrary, Witness C stated that "he (the Accused) was supposed to be there...*he thought he was there, but he did not look carefully....*". Atif Karović himself could not confirm the foregoing. He stated that "*after he had dressed the wounds, soldiers came in to carry the wounded further away*". Thus, he did not confirm that anyone was present while he provided the wounded with first aid, and in particular, he could not confirm that the accused Džeko was present there. As to the eye-witnesses and actors in the incident at issue, this Panel has concluded, like the Trial Panel, that their testimonies are objective and relevant, and can be given credence in their referenced parts, unlike the testimonies of the Defense's witnesses Redžo Poturović, Mustafa Hakalović and Muharem Hakalović, who had obviously testified exclusively with the aim to confirm the Accused's alibi, which were thus properly evaluated as unconvincing and biased. The foregoing will be further explained in detail in the reasoning itself.

85. In the context of time-frames, the Defense's appeal further suggested, in terms of time, it was allegedly impossible for the Accused, even if after the wounded received first aid he indeed headed off towards the hamlet of Gaj where the execution took place, to arrive there in time to take part in the critical incident. In this regard, the Defense pointed to the evidence of witnesses E, X and M given with regard to the time elapsed between the moment when the members of the Army RBiH were wounded and the moment when

members of the HVO were executed. These witnesses testified that this was a period of between 15 minutes and a half an hour. The Accused's Defense argued that this just confirmed their assertion that the Accused drove the wounded persons to the medical station after they had been wounded, as established beyond a doubt, that his vehicle skidded off the road and thereupon participated in dragging the wounded out from the vehicle, and that he did not have sufficient time to return from the improvised medical station to the hamlet of Gaj within this half an hour maximum, which according to the referenced witnesses' testimony elapsed between the moment of wounding and the acts of execution itself.

86. The Panel has held that, by the foregoing complaint, the Defense disregarded a decisive fact. The Prosecution's Indictment set up the time-frame for this count by stating that the referenced incident occurred "*in the morning hours of 16 April 1993*". The Trial Panel's Verdict accepted this time-frame as proved, accurate and sufficiently definable. Counsel's appeal stated that the Trial Panel examined the evidence of the witnesses who testified about the duration of time elapsed between the moment when members of their unit had been wounded and the moment the captured HVO members were executed. Despite the foregoing, the Trial Panel found, nowhere in the Verdict, that the execution took place no sooner than a half an hour after members of the *Zulfikar* SPD ARBiH were wounded, as Counsel's appeal erroneously interpreted. The Trial Panel's Verdict even mentioned the evidence of witness Cecilija Šimunović and Witness R, who testified that the captured members of the HVO had been executed some time "around noon". Therefore, with such a definition of time-frame within which the acts charged against the Accused were committed, any emphasis of the accurate time the Accused needed to reach the execution site suggests that such an approach to setting-up the Accused's alibi is ill-founded.

87. Contrary to Counsel's complaint, this Panel has concluded that the proper establishment of the state of facts in the contested Verdict was not brought into question by the fact that the Trial Panel did not accurately determine the time when the referenced incident took place. This is so because the Trial Panel found proved that the incident had occurred in the morning hours of the critical day, as the Prosecution's Indictment indicated. Having evaluated mutually consistent and corroborative evidence of a number of witnesses, eye-witnesses to, or actors in the incident at issue, including those who were together with the Accused present both during the incident related to the wounding of their

two co-combatants and the incident when the lined-up members of the HVO were executed (witnesses Rasema Handanović, R, E, and J-4), the Trial Panel found proved, beyond a reasonable doubt, that the Accused stood in the firing squad and participated in the act of execution itself. Therefore, all other circumstances analyzed in the Defense's appeal, relating to the time-frames needed for crossing certain distances, were properly not found to be decisive facts.

88. In this regard, the appellate complaints related to the need to determine the accurate distance (between the execution site in Gaj and the improvised medical station in Gostovići), and the time needed to cross this distance during a state of war are irrelevant from the aspect of properly established state of facts under Section 1 of the enacting clause of the convicting part of the Verdict. The Defense made efforts to prove the foregoing circumstances on the basis of the Finding and Opinion of expert witness Almir Šahinović, land survey technician, on which basis Damir Gogić, Major in the BiH Armed Forces, evaluated the time needed to cross the relevant distance. The Appellate Panel has first held that, by its character, the referenced evidence attached to the appeal is not *novum*, or new evidence which could not be presented at the main trial despite due diligence and caution. In presenting the alibi-based defense, Counsel could have proposed such expert evaluation and presented this evidence in the first instance proceedings, but they failed to do so. Considering the formalities of the criminal proceedings, it is too late for taking such an action at this stage. Also, the referenced evidence would be irrelevant for determining the decisive facts, considering the earlier explanation provided in paras. 86-88 of the Verdict. Therefore, the Appellate Panel has concluded that Counsel's complaints, that the state of facts was incorrectly and incompletely established due to the failure to determine, in an expert analysis, the time needed to cross the distance between the Ilić's house in Gostovići (improvised medical station) and Gaj (the execution site) in a combat situation, are ill-founded, and therefore dismissed them as such.

89. The Accused's Counsel further argued that the facts were incorrectly established also because the Trial Panel did not accept the Accused's alibi that during the whole period of time (from the moment when the wounded members of the *Zulfikar* SPD ARBiH were put in the car brought there by the Accused for their transportation until the moment when they reached the medical station in Suhodol, which means even after they received first aid from veterinarian Atif Karović at the improvised medical station in the village of

Gostovići), the Accused participated in the transportation of the wounded and escorted them along the whole way. The Defense made efforts to prove such Accused's alibi through the testimonies of witnesses Mustafa Hakalović and Muharem Hakalović. These witnesses testified with regard to the transportation of the wounded, and remembered the accused Edin Džeko as one of the two soldiers who had, together with them, participated in the transportation of wounded from the improvised medical station in Gostovići to the medical station in Suhodol. Also, witness Redžo Poturović, who despite being unable to identify the soldiers-participants in the transportation of the wounded towards Buturović Polje, testified that "Zuka's soldiers" too participated in this action.

90. Like the Trial Panel, the Appellate Panel does not hold that such Accused's alibi is sufficiently convincing to the extent to which it could be given credence, and which would in any way bring into suspicion such a proper factual finding, contrary to the testimonies of the witnesses who consistently, convincingly and in a mutually harmonized way positioned the Accused in the firing squad in the place of Gaj, and identified him as one of members of Zuka's unit who took part in the execution of the captured members of the HVO.

91. The Appellate Panel has evaluated the referenced appellate complaints, and upheld the Trial Panel's finding that witnesses Mustafa Hakalović and Muharem Hakalović were unconvincing and arbitrary when they confirmed that, all the time along the way, the accused Džeko accompanied the wounded members of this unit, more specifically, that he participated in their transportation together with them. In support of this evaluation goes the fact that these witnesses had not known the accused Džeko from before, but rather, as they themselves testified, remembered him because Samko, one of the wounded men who subsequently died, had called the Accused by his name begging him not to leave him there.

92. Samko was severely wounded in his abdomen, as a result of which he subsequently died. The Panel has noted it was very likely and certain that Samko, talking deliriously, also called out the name of his good friend, who was at his side during the first stage of transportation, just after he had been wounded, as determined beyond a doubt. This Panel finds particularly illogical the testimony of Witness C. This witness testified that the accused Džeko accompanied the wounded and that he remembered him because he had allegedly "avoided" carrying the wounded. Such testimony of his is contrary to the testimonies of the witnesses Mustafa Hakalović and Muharem Hakalović. These witnesses allegedly remembered the accused Džeko as a person who had been continuously

present during the transportation of the wounded. The relationship between the accused Džeko and wounded Samko (good friends) suggests the conclusion that the Accused would not “avoid” carrying his severely wounded, good friend. Contrary to Counsel’s objection, witness C could not confirm with certainty that the accused Džeko participated in the further transportation of the wounded, just as he could not confirm that he was present during the wounds dressing. Instead, witness C at one point stated with regard to the foregoing that the Accused was present there. However, responding to the subsequently posed questions, witness C brought this fact into suspicion suggesting it was possible that the Accused was present there, or that he was supposed to be present there.

93. Therefore, considering the time elapsed since the referenced incident, the instability of human perception and the traumatic nature of the event itself, there is a real possibility that the persons, participants in the transportation of the wounded who had to pay full attention to the wounded, got confused about certain stages of the transportation, and thought that the Accused also participated in the transportation of the wounded at the stage where, in fact, he was not present at all, with no direct intention to testify falsely. This fact was, in the Panel’s view, also properly evaluated by the Trial Panel. Specifically, contrary to such uncertain and unconvincing evidence of the referenced witnesses, there are reliable and convincing testimonies of the witnesses who have positioned the Accused at another location – the execution site in the hamlet of Gaj.

94. Having so concluded, this Panel also reviewed Counsel’s complaints indicating that credence was given to the unreliable witnesses (Rasema Handanović, R, E, J-4 and X) regarding the fact that the Accused committed the criminal acts of which he was found guilty under Section 1 of the enacting clause of the Verdict, contrary to the above analyzed alibi evidence. Therefore, the state of facts in the contested Verdict was incorrectly established. This appellate complaint of the Defense pointed to a motive the referenced witnesses could have, that is, to incriminate the Accused with the criminal offenses they had committed themselves, which generally suggested these witnesses were unreliable.

95. Counsel’s appeal stated that witness X testified that he did not see the Accused in the hamlet of Gaj when the critical incident, described in Section 1 of the enacting clause, occurred. Therefore, in proving the referenced charges, the Trial Panel could not refer to the evidence of witness X.

96. Counsel’s appeal stated that the evidence witness J-4 gave at the main trial was

unreliable because, contrary to the Trial Panel's finding, it directly contradicts the statement he had given during the investigation, namely that he was not certain if the accused Džeko had fired, or even that he had been at all present in the hamlet of Gaj during the critical incident described in this section. In addition, Counsel contested witness J-4's credibility and argued that, during the attack on the village of Trusina, he had committed a number of criminal acts, and therefore had a motive to falsely testify against the accused Džeko.

97. The Trial Panel's finding, that the charges described in this section of the enacting clause were proved, was also based on the testimony of witness E. Contrary to this, Counsel argued that this witness's testimony was not consistent, convincing and harmonized with the other witnesses' testimonies because, unlike all the other witnesses, witness E testified differently about the decisive facts concerning the wounding itself, the transportation of the wounded members of the unit, and the act of execution itself. Specifically, Counsel argued that witness E stated that the wounded person Samko was placed on the vehicle engine cover, that they drove the car in reverse, that in Gostovići Samko was leaned straight against the wall in his stretcher, that the Accused transported the wounded from Gostovići by a medical corps vehicle. Ultimately, regarding the act of execution itself of the captured members of the HVO in the hamlet of Gaj, this witness testified at the main trial that the Accused was present in the firing squad. In his statement given during the investigation, witness E stated that the captured members of the HVO were in the hamlet of Gaj "*killed by Džoni who fired in rounds to retaliate for Samko's wounds...*". The Trial Panel arbitrarily interpreted this witness's statement and incorrectly quoted it by stating that the captured soldiers were shot "*...also by Džoni*", implying that Džoni had not done it alone.

98. The Defense also argued that, contrary to the Trial Panel's finding, witness R was also motivated to falsely testify against the accused Džeko, for he had himself participated in the commission of the crimes at issue. In addition, this person had alcohol-related problems, and he stated that he had mixed up the events from Trusina with some other events. According to the Defense, all the foregoing suggests that witness R's testimony was unreliable.

99. Ultimately, the Defense argued that witness Rasema Handanović was an insincere and unreliable witness, who had had a key role in the execution of the captured HVO members in Gaj, and who herself participated in the commission of a number

of the committed crimes, about which she had already provided false information (to the relevant US bodies), in order to ensure benefits for herself. Specifically, the appeal stated that the Trial Panel erroneously interpreted the Defense's arguments, because the Defense had never argued that witness Handanović was unreliable only because of the fact that she had entered a Plea Agreement with the Prosecution. As opposed to such Trial Panel's view (which "remained blind" when it comes to all the circumstances and the facts indicated by the Defense in contesting the referenced witness's credibility, and solely analyzed whether the verdict could be based on her testimony considering the existing Plea Agreement), Counsel pointed to all other issues which render her testimony unreliable. The appeal stated that, even though the fact that witness Handanović entered the Plea Agreement poses no obstacle to base the verdict on her testimony, and even though it is not a single testimony on which the convicting Verdict was based, which would also be in violation of the right to a fair trial pursuant to the view of the Constitutional Court of BiH, the Trial Panel should have considered that the witnesses, whose testimonies corroborated the witness Handanović's testimony, also participated in the critical incident, and that, as such, they were motivated to give false evidence. In addition to witness Handanović's personal characteristics and her involvement in the incriminating acts, all the foregoing suggests that her testimony lacks credibility and reliability, as opposed to the clear, consistent, logical and convincing testimonies of the Defense's witnesses proving that, at the time when the critical incident occurred, the Accused was far away from Gaj accompanying the wounded. Therefore, all the foregoing suggests that, in relation to section 1 of the enacting clause of the Verdict, the state of facts in the contested Verdict was incorrectly established.

100. Contrary to the complaints of the Accused's Counsel, the Appellate Panel has also concluded, like the Trial Panel, that the testimonies of witnesses Rasema Handanović, E, M, J-4 and X are mutually consistent regarding the decisive facts, and that, when analyzed individually and in combination, the conclusion on which the Accused's Defense insists, namely that these witnesses had deliberately shifted the blame for the incriminating events onto the Accused, cannot be drawn. Among the witnesses heard with regard to this fact, witness Rasema Handanović entered the Plea Agreement exactly in relation to the referenced charges and thereby admitted her participation in the execution of the captured men. Witness Handanović testified about this fact, described the referenced incident, and identified other members of the unit who had, along with her, stood in the firing squad. Thus she identified the accused Džeko, Nedžad Hodžić, one Popara and Orhan as the

persons who had participated in the execution along with her. Even though they were not actors in the incident at issue but rather its indirect observers, the other witnesses, namely witnesses E, J-4 and R, watched the act of execution from the immediate vicinity, and thus identically described the execution of the captured men in relation to the decisive facts. From among 5-6 members of the *Zulfikar* SPD ARBiH, all these witnesses, with no exception, identified Rasema Handanović, Nedžad Hodžić and the accused Džeko as the perpetrators of this act. All these witnesses further testified that the incident itself occurred very fast, that the men were lined up against an underpinned wall, and that after Nedžad had shouted “firing squad” (according to witness Handanović), or “kill them” (as witness J-4 testified), one of the captives started running, and the persons lined up in the firing squad started shooting and killed all the 6 men.

101. According to the Appellate Panel, the foregoing testimonies are mutually consistent regarding the decisive facts, and all the heard witnesses, with no exception, identified the accused Džeko as a person who stood in the firing squad and carried out the execution. Like the Trial Panel, this Panel too concluded that the foregoing testimonies are reliable, sincere, and can be fully credited. According to this Panel, Counsel’s appellate complaints did not bring into doubt the reliability of the referenced testimonies. This Panel considers unconvincing the Defense’s objection that all the referenced witnesses had intentionally shifted the blame for the incident at issue onto the accused Džeko. Witness Handanović, who had pled guilty by entering the Plea Agreement, could hardly have any motive to falsely charge anyone because she has been already serving her prison sentence. This Panel further holds that an issue arises as to why would other three eye-witnesses to the critical incident, in addition to witness Handanović, have any motive to put the blame for the referenced crime exactly on the accused Džeko, rather than on some other members of their unit or some other units that had also taken part in the attack on the village of Trusina on the critical day. Specifically, Counsel’s appeal did not state why witness Handanović, or any other heard witnesses, would be motivated to put the blame exactly on the accused Džeko for the execution of the captured men if he had not carried it out.

102. This Panel has held that the credibility of witness Rasema Handanović’s evidence was not brought into question by the testimony of witness Fata Kozić either. With regard to this fact, the Defense enclosed with the appeal a part of the transcript of the referenced witness’s evidence given in the case of *Mensur Memić*. Witness Kozić testified about the subsequent events, after the unit’s return to Parsovići following the action in Trusina, about

the moment when the wounded members of the unit had arrived, and were subsequently transported further away. This Panel has concluded that witness Kozić's testimony had in no way whatsoever affected the properly established state of facts relating to the incident in the hamlet of Gaj, of which the accused Džeko was found guilty.

103. This Panel has concluded that the Trial Panel did not draw the conclusion on the Accused's guilt based on witness X's testimony, as the Defense objected, because this witness was neither an eye-witness to the act of execution, nor did he mention at all that he had in any way learned that the Accused was an actor in the incident at issue. The Trial Panel found that the Defense's argument, that witness X was not generally present in the place of Gaj, was ill-founded, and provided convincing reasons with regard to this fact. This Panel has upheld the foregoing finding since, as noted in the contested Verdict, it would be illogical that any witness described his/her participation in an action together with persons suspected of war crimes commission if he/she had taken no part in the action at all. However, even such circumstances were not of decisive importance for the contested decision because the witness could not confirm that the accused Džeko participated in the attack on Trusina and in the execution of 6 captured members of the HVO. Therefore, his testimony is important, in fact, only for the purpose of determining the general context of the incident at issue.

104. In relation to each witness individually, the Defense addressed all other facts concerning their personality features, alcohol addictions, the lack of discipline in the unit, and the fact that they themselves committed various crimes. Like the Trial Panel, this Panel too has concluded that these facts relating to their personal characteristics in the concrete case, the existent several mutually consistent testimonies of the witnesses concerning the decisive fact that the accused Džeko stood in the firing squad and carried out the execution described in Section 1 of the enacting clause of the Verdict, and the objection of the possible motive of these witnesses to falsely put blame on the Accused were not found proved, and that, contrary to the appellate complaints, they do not bring into question the reliability of their evidence regarding the decisive facts pertaining to the charges at issue.

105. Counsel argued that the Trial Panel erroneously interpreted witness E's testimony, that the Trial Panel had adjusted the referenced witness's testimony to the needs of the convicting verdict, and arbitrarily added the conjunction "too" in front of Džoni's name, even though the witness stated that "*to retaliate for Samko's severe wounding*

...*Džoni killed those soldiers firing a burst of fire*”, and thereby presented it as if Džoni did not do this alone. The Appellate Panel concluded that witness E’s testimony did not show that Džoni did it alone. In this Panel’s view, the Defense took the referenced sentence out of the context of this witness’s testimony. If his testimony is analyzed in its entirety, including the cross-examination to which Counsel referred, witness E in fact confirmed his earlier testimonies where he stated that he had watched “*Džoni firing, Džeko, Zolja and others firing...*”. Such a testimony of his is consistent with and supported by the testimonies of all other witnesses. The testimony of witness Milka Drljo, who could not see the act of execution itself since she had stood behind a barn but could make her own assessment, confirmed the shooting came from a number of firearms. All the testimonies of the referenced witnesses also confirmed this fact, namely that several persons, lined up in a firing squad, carried out the execution.

106. Ultimately, the Appellate Panel deems ill-founded the Defense’s complaints pointing to “some other circumstances” the Trial Panel did not consider in rendering its verdict, which also point to the failures relating to the proper establishment of the decisive facts. According to the Defense, the Trial Panel did not explain how the Accused generally knew that members of his unit had gone to Gaj even if he had the intent to join them. The Defense disregarded the fact that many witnesses testified they had communicated via Motorolas (hand-held radios) carried by certain members of the unit, and that a number of witnesses identified exactly the Accused as a person who possessed such Motorola. Also groundless are Counsel’s complaints indicating that the act of execution occurred as a result of retaliation for Samko’s wounding, despite the Trial Panel’s finding that it was carried out spontaneously. Thus, an issue arises as to how the Accused, who had transported the wounded to the improvised medical station, knew that the execution would occur so that he wanted to participate in it, and why would he abandon his good friend and co-combatant and go to the hamlet of Gaj and participate in the execution which he could not have known would occur. In the Panel’s view, all the foregoing complaints in no way bring into doubt either the proper evaluation of the evidence by the Trial Panel, or the state of facts established in Section 1 of the enacting clause of the Verdict. For all the foregoing reasons, this Panel has concluded that the Defense’s complaints did not bring into suspicion the Trial Panel’s findings on the decisive facts related to Section 1 of the enacting clause of the Verdict. Therefore, such complaints were dismissed as ill-founded.

(b) Section 2 of the sentencing part of the Verdict

107. According to the accused Edin Džeko's Counsel, the Trial Panel also incorrectly or incompletely established the decisive facts with regard to the acts of which the accused Edin Džeko was found guilty under Section 2 of the enacting clause of the Verdict. Counsel argued that the Trial Panel erred in finding that the accused Džeko was present near the store in whose immediate vicinity the married couple Ivanković was killed, and that he killed them. The Defense argued that the finding, that the Accused was present near the store where the Ivankovičs were killed, was made on the basis of unreliable testimonies of witnesses Rasema Handanović, E, M and R (who had a motive to falsely testify against the accused Džeko), contrary to the testimony of witness Ramiz Bećiri (who stated on the record made during the investigation phase at the Prosecution, that at the critical time the accused Džeko was not present near the store, which was, according to the appeal, confirmed by the statements of witness U and J-4).

108. Regarding the Accused's presence near the store, Counsel argued that the Trial Panel improperly evaluated the statement witness Ramiz Bećiri gave during the investigation⁴ (where he stated that he had seen the killing of an old man and old woman near the store, but that at that moment Edin Džeko was not present near the store, and thereby could not have committed the referenced murder). Contrary to the Trial Panel's erroneous finding that the accused Džeko killed the married couple Ivanković, Counsel's appeal stated that the murders were committed by witnesses Rasema Handanović and E, on whose testimonies the Trial Panel, in fact, based its finding on the accused Džeko's guilt, and who were motivated to falsely testify against the Accused as they were suspected of committing the same acts. In support of the foregoing, Counsel pointed to witness U-4's statement from the investigation where he identified witnesses Rasema Handanović as a perpetrator of the referenced killing, and also to the testimony of witness Redžo Poturović, who testified that, after the attack on the village of Trusina, witness E bragged that he had "*killed a man, that a woman came out and 'cursed his mother'*", whereupon he "*knocked out her brain...he put a barrel in her mouth and knocked out her brain*". The Defense correlated this witness's testimony with the testimony of witness Marija Miškić, daughter of the killed spouses Ivanković. This witness testified about the

⁴ D-O-152 Examination Record for witness Ramiz Bećiri, BiH Prosecutor's Office, No. KT-RZ-24/110 of 10 January 2012.

position in which she had found her parents after the murder. The Defense concluded that such a description of the bodies' position, as well as the injury on the head of witness's mother, confirmed they were killed by Rasema Handanović, that is, by her and witness E, as ensues from the testimony of witnesses U-4 and Redžo Poturović, rather than by the accused Džeko. The Defense explained the foregoing with the theory pursuant to which the bodies of the killed spouses should have been found in a different position, which does not match the position in which witness Marija Mikšić found them, had the murder of the Ivanković spouses been committed in the way as described by the witnesses Handanović and E. According to the Defense, this additionally suggests that the testimonies of witnesses Rasema Handanović and E are unreliable, and shows their intention to put on the accused Edin Džeko the blame for the killings they themselves committed.

109. In the Appellate Panel's view, the foregoing Defense's complaints are ill-founded.

110. The Appellate Panel has concluded that, on the basis of the consistent testimonies of the witnesses Rasema Handanović, E, M and R, the Trial Panel properly found that, at the critical time, the accused Džeko was present near the store in whose immediate vicinity the spouses Ivanković were killed. In addition to witnesses Rasema Handanović and E (who Counsel believed were directly motivated to shift the blame for the killings of the Ivanković spouses onto the accused Džeko), witnesses M and R (who had had no such motive according to the advanced appellate complaints) also testified that the Accused was present near the store at the time when the Ivanković spouses were killed. Witness M testified that, during the attack on the village of Trusina, "*Bećiri, Gale, Nedžad, Džeko, Koke*", reached together with him the store located at the far end of the village, and picked a lock (by shooting into the key-hole to open it), and that, at this moment, he heard someone shouting "*get out*", that an elderly man who was wounded in his legs, and a woman, came out, and that they heard shots. The witness subsequently saw that the man and woman had been killed. It further ensues from this witness's testimony that, at the time of killing, he was in the store and did not see who had fired the shots. However, contrary to Counsel's assertion, the witness undoubtedly identified the accused Džeko as one of the soldiers from his group, who had arrived there and who was present at the site where the killings occurred. Witness R testified that, after his arrival at the front of the store, just before the spouses Ivanković were killed, he saw there some members of his unit, including Edin Džeko. The witness further described how the Ivankovićs were killed, but since he was inside the store at the time, he could not see who actually did it. According to

this Panel, and the Trial Panel too, the testimonies of these two witnesses, independently from the testimonies of witnesses Rasema Handanović and E, confirmed beyond a doubt that the accused Džeko was present near the store at the time the critical incident occurred.

111. Contrary to the above testimonies stand the testimonies of witnesses Ramiz Bećiri, J-4 and U, to which the Defense's appeal referred, and stated they did not confirm that the accused Džeko was present near the store together with other members of the unit, at the site where the Ivanković spouses were killed. In response to the questions posed to him at the main trial about this fact, witness Bećiri stated he did not remember if the accused Džeko had been present with them near the store, that is, that he thought Džeko had not been there. Witness J-4 described their reaching the store, and stated that he had "found his soldiers" there. Truly, he did not mention that he had seen the accused Džeko at this site. This witness did not deny that Džeko was present there, but rather only stated that "*almost all (his soldiers) had gathered there*". It further ensues from witness J-4's testimony that he did not see who exactly, from among all the present, fired at the spouses who had been previously taken out of the house. Witness U did not testify about the killing of spouses Ivanković, even though the Defense referred to his testimony too. In this Panel's view, such testimonies of witnesses Bećiri and J-4 did not explicitly deny the accused Džeko's presence near the store, contrary to the Defense's complaints. Witness Bećiri stated that he "did not remember", or that "he thought" the accused Džeko was not present. Witness J-4 generally spoke about "almost all" members of the unit who had "gathered" there. The fact that the testimonies of these witnesses do not directly confirm the accused Džeko's presence near the store does not mean that they had denied this very fact. The Appellate Panel has concluded that all the foregoing does not bring into question the reliability of the mutually consistent testimonies of witnesses Rasema Handanović, E, M and R, who had confirmed, without any dilemma, the Accused's presence at the site where the spouses Ivanković had been killed.

112. The Appellate Panel has further concluded that, considering the testimonies of the heard witnesses on the whole, the Trial Panel properly found proved the Prosecution's allegation that the accused Edin Džeko killed the Ivanković spouses. Even though it is true, as the Defense's appeal stated, that the Accused was identified only by witnesses Rasema Handanović and E (whom the Defense indicated as the perpetrators of the referenced murders), the Panel has analyzed their testimonies, correlated them with the

other indirect evidence related to this fact, and concluded that they confirmed, beyond a doubt, the Prosecution's theory, namely that it was exactly the accused Edin Džeko who killed the Ivanković spouses.

113. The Appellate Panel has concluded that witnesses Rasema Handanović and E, as the eye-witnesses to the killing of Ilija and Anđa Ivanković, identically described the referenced murder. Witness Rasema Handanović stated that an older married couple had been forced out from the house by one of the members of the unit present at the site, and that the accused Džeko "*first fired at the older man, whereupon the women started crying, leaned over him, and then he shot her too*", and thereby killed them both. The woman witness testified that first "*the man*" was shot in his abdomen and chest, and assumed that the old woman was shot in her back because she had "*leaned over the man*".

114. Describing the referenced murder, witness E stated that the accused Džeko had forced the injured party Ilija Ivanković in front of the door, threw him on the ground and shot him. Thereupon a woman rushed out from the house, started screaming and "*lied down over the man, on her knees, over him...*", saying "*my Ilija, my Ilija...*". Thereupon the accused Džeko approached her, stood over her head, telling her "shut up, don't shout, etc." and shot her in her head".

115. Witnesses M and R, who were also present near the store, as found by the Trial Panel, did not see the act of murder itself. However, witness U-4, another eye-witness to the referenced murder, was heard at the trial. Even though he could not identify the perpetrator of the murder he had watched from the distance of around 70 meters, he described the course of the murder. Like the Trial Panel, this Panel has also concluded that witness U-4's testimony corroborates the testimonies of witnesses Handanović and E. The witness identically described the critical incident regarding the decisive facts. Witness U-4 stated that first Ilija Ivanković had been killed, and thereupon his wife, Anđa Ivanković. She had started "keening", and saying "*poor me, they killed my Ilija, kill me too*", and then she was killed too. The Defense's appeal, understandably, accentuated witness U-4's statement given at the State Investigation and Protection Agency (SIPA)⁵. The witness stated at the time that the murder at issue had been committed by a woman soldier, so the Defense implied that the referenced murder was committed by Rasema Handanović. However, considering witness U-4's testimonies in their entirety, in addition to the

statements he gave at the BiH Prosecutor's Office⁶, and his evidence at the main trial⁷, it can be concluded that, truly, he continually mentioned a woman-soldier who had been present there. The witness, however, kept saying he was not certain if she was exactly the person who had committed the murder, but rather that there was a possibility that she fired, and possibly someone else was with her.

116. The Appellate Panel has concluded, like the Trial Panel, that even though witness U-4, who had eye-witnessed the murder of Ilija and Anđa Ivanković, could not identify the perpetrator of the murder of spouses Ivanković, he confirmed the testimonies of witnesses Rasema Handanović and E regarding the decisive facts, which were proved as reliable testimonies. Therefore, the Defense's theory, that the witnesses Handanović and E possibly had a motive to falsely put the blame on the accused Džeko, because witness Handanović killed Ilija Ivanković and subsequently witness E killed Anđa Ivanković, had no grounds also in the testimony of witness E viewed in its entirety. The Panel concluded that no piece of adduced evidence whatsoever confirmed such a theory. None of the heard witnesses confirmed with certainty that witness Handanović had fired at the spouses, and particularly, no one identified witness E as a perpetrator of the referenced murder. Considering that there were several eye-witnesses to the incident, that some other person rather than the Accused fired, and particularly that a "woman soldier" committed the murder, that is, witness Handanović who was the only woman among around 10 men present at the referenced site, some of those present would have certainly noticed this important fact. The Panel has concluded, along this line, that the Trial Panel's arguments are proper because it found, after analyzing the differences between witness U-4's statements, that this witness would have surely and undoubtedly confirmed the fact that the murder he had watched was indeed committed by a woman, had it been actually true. Considering the witness's explanations regarding the existing inconsistencies in his testimonies, which are logical and convincing, according to both this Panel and the Trial Panel, the Defense's appellate complaints related to the Prosecution's unlawful actions and the abuse of Official Note containing the first statement this witness gave to the SIPA, are ill-founded. Even though it is true that, at the main trial, the witness testified he did not remember saying certain things to the Prosecution, as the appeal stated, he consistently stood by his statement that he was not certain about who exactly had fired at the Ivanković

⁵ SIPA, Official Note of 19 February 2010.

⁶ Exhibit T-108 Witness U-4 Examination Record, No. T20 0 KTRZ 0002954 12 of 14 June 2012.

spouses, more specifically, that there was a possibility that this was done by someone from the group of soldiers among whom a woman-soldier had also been present, but that he could not confirm it was exactly her. The witness stood by his assertion that he did not see who exactly fired at the Ivanković spouses.

117. The Defense argued that witnesses Handanović and E were motivated to give false evidence. The appeal remained incomplete in relation to the reason why would a group of 10 present men, members of the unit present at the site, be motivated to shift the blame exactly onto the accused Edin Džeko. The mere fact that he is tall and corpulent is not sufficiently convincing for this Panel so as to bring into doubt the reliability of the mutually consistent testimonies of witnesses Handanović and E.

118. The Appellate Panel has considered if there was any need to accept Nedžad Šahić's statement, which was verified by a notary, and enclosed with the Defense's appeal. In other words, the Appellate Panel has evaluated whether this person's hearing in the capacity of a witness, as the appeal proposed given the contents of the statement, would result in drawing a different conclusion on the decisive facts. Considering the appellate reasoning, the Appellate Panel has not brought into question the proper view of the Defense that this person's evidence in the capacity of a witness could be a new piece of evidence by its character, which despite due diligence and caution could not be presented at the main trial because the Defense learned about this witness, or the eye-witness to the incident described in Section 2 of the enacting clause of the Verdict, no sooner than the completion of main trial. However, the Appellate Panel has concluded that the referenced statement's contents, even if the witness's hearing were accepted and presented as evidence in these criminal proceedings, considered individually and in combination with the other evidence, would not result in different findings regarding the decisive facts. Even though the witness stated he had eye-witnessed the murder of the Ivanković spouses, the Panel has concluded that his statement does not bring into question the reliability of the mutually consistent testimonies of the witnesses who identified the accused Džeko as a person who had committed the referenced murders. As it ensues from the statement at issue, in support of the foregoing stands the fact that the person who had given the statement does not know the Accused at all. Therefore, an issue arises as to how he can assert that the accused Edin Džeko was a person who committed the murder he watched

⁷ Record from the main trial in the case No. S1 1 K 010294 12 Krl of 26 November 2013.

if he does not know at all who the accused Edin Džeko is? Specifically, identifying an alleged perpetrator of the murder only based on the fact that this person spoke with a “Sandžak-origin accent”, and whose nickname the witness allegedly learned subsequently, cannot bring into doubt the reliability of the testimonies of the witnesses who identically described the act of murder itself, and who identified the accused Edin Džeko as a perpetrator thereof.

119. In the Appellate Panel’s view, the Defense’s appellate grievances analyzing the witnesses’ evidence about the position of the Ivanković spouses’ bodies, the type of weapons with which the murder was committed and which weapon was in the possession of the Accused, suggesting that the state of facts was incorrectly established with regard to Section 2 of the enacting clause of the convicting part of the Verdict, are ill-founded.

120. Contrary to the Defense’s appellate argument, the Appellate Panel has concluded that the Trial Panel’s contested Verdict analyzed the witnesses’ evidence related to the position of bodies of the Ivanković spouses. This analysis showed that this evidence did not bring into doubt the reliability of testimonies of the witnesses who had described the referenced murders, and identified the accused Edin Džeko as a perpetrator thereof. Specifically, in addition to the eye-witnesses to the murder (Rasema Handanović, E and U-4), who testified about the way in which it occurred and about the position in which the bodies of the Ivanković spouses were found, Milka Drljo, Mara Drljo, Cecilija Šimunović and Marija Miškić also gave their evidence. However, contrary to the Defense’s submission that their evidence, particularly the evidence of witness Marija Miškić, daughter of the killed spouses Ivanković, suggests the evidence of witnesses Rasema Handanović and E were unreliable, the Appellate Panel has concluded that the reliability of the evidence of witnesses Handanović and E was not brought into question by the testimony of witness Marija Miškić.

121. As to the position of bodies of the slain Ilija and Anđa Ivanković, the Defense concluded on the basis of Marija Miškić’s and Milka Drljo’s evidence that the body of Anđa Ivanković was leaned against a corner of the house, while Ilija Ivanković’s body was inside the house. This is not in compliance with the description of the way in which the murder was committed provided by witnesses Rasema Handanović and E in their evidence. The Appellate Panel has analyzed the referenced evidence, and concluded that the Trial Panel properly evaluated the evidence of witnesses Marija Miškić and Milka Drljo, and properly found that it does not follow from their testimonies too that the bodies were outside

the house. Witness Marija Miškić explained that, when she spoke about the body “in the hallway”, she did not imply a hallway inside the house, but a sort of subsequently built passage. In addition, none of the eye-witnesses to the referenced incident, not even the witnesses the Defense referred to when proving their submissions, stated that any of the Ivanković spouses had been killed inside the house. Witness Cecilija Šimunović testified that the bodies of those killed were (found) outside the house. In this Panel’s view, the type of injury on the head of killed Anđa Ivanković, that is, the fact that “a half of her head” was missing, according to her daughter who had seen the body after 3 days, also does not bring into question the evidence of witnesses Handanović and E. This is so because they stated that the accused Džeko had fired at Anđa Ivanković’s “back”, and witness U-4 confirmed that a shot came from “behind her back”. This does not mean that a round could not hit the victim in her head and cause the damage as described by witness Marija Miškić.

122. Like the Trial Panel, this Panel does not hold either that the type of rifle the Accused possessed during the attack on the village of Trusina is a decisive fact by its character when it comes to the proper establishment of the state of facts by the Trial Panel in the contested Verdict. Several witnesses confirmed that the Accused possessed a rifle “M-16”, with a feature to fire in rounds, and that certain eye-witnesses to the murder of the Ivanković spouses testified that they had heard a short burst of fire. However, notwithstanding the type of weapon with which the Accused was issued, this Panel considers that the type of weapon with which the murder was committed is irrelevant, as it was established beyond a doubt that the Accused had killed the Ivanković spouses, and that, at the same time, neither the Prosecution nor the Defense adduced any piece of evidence to determine the type of weapon by which the lethal injuries to the aggrieved parties were caused. Even a semi-automatic rifle, with no option for firing in rounds, may create with the eye-witnesses an impression of a short burst of fire if several bullets were fired in a row. Therefore, this Panel has concluded, like the Trial Panel, that in a situation where it was established beyond a doubt, on the basis of the other pieces of evidence, that the Accused was a perpetrator of the referenced criminal offense, the issue of the type of weapon with which he was issued is not a fact that could bring into doubt the proper establishment of the state of facts in relation to this section of the enacting clause of the Verdict.

C. APPELLATE GROUND UNDER ARTICLE 298 OF THE CPC OF BIH - VIOLATIONS
OF THE CRIMINAL CODE

1. Prosecution's Appeal

123. The Prosecution argued that, in relation to the offense that is the subject of charges in the convicting part of the contested Verdict, the Trial Panel applied the law which should not have been applied, and that therefore an essential violation of the criminal procedure provisions under Article 298(1)(d) of the CPC BiH was made. The appeal stated that the Trial Panel's contested Verdict did address the issue of application of the substantive law, but it erred in noting in this respect that "the Constitutional Court has departed from the case law of the European Court, which has held that the application of the more lenient law to the perpetrator shall be reviewed on a case-to-case basis, that the Constitutional Court of BiH clearly found in its decisions that in all cases where both laws (CC BiH and CC SFRY) provide for the same criminal offense, the CC of SFRY shall apply to the perpetrator, and since the view of the Constitutional Court of BiH is binding on the Court of BiH too, the Trial Panel found the Accused guilty pursuant to the provisions of the CC SFRY." The Prosecution argued that the Trial Panel should have essentially addressed the issue of substantive law application in relation to the accused Edin Džeko, and should have provided reasons for its finding that a particular law (the adopted CC SFRY) is in the concrete case more lenient to the perpetrator. This is so because, contrary to the Trial Panel's finding that, pursuant to the Constitutional Court's view, the application of the adopted CC SFRY is mandatory in all cases of this kind, the Prosecution maintains that such an obligation to provide reasons related to the application of substantive law also ensues from the decisions of the Constitutional Court of BiH. Specifically, the Prosecution's appeal stated that the Constitutional Court of BiH rendered a separate decision in each concrete case where the issue of application of the more lenient law was raised. In the case that the foregoing Trial Panel's note in the contested Verdict were well-founded, the Constitutional Court of BiH did not do so, but rather rendered a decision on admissibility and merits binding the Court of BiH to apply the adopted CC SRY in all cases where decisions were made pursuant to Articles 173 and 175 of the CC BiH. In view of the foregoing, the Prosecution's appeal stated that mere mentioning the provisions of the CC BiH and the ECHR is not a sufficient ground to find the Accused guilty pursuant to the

provisions of the adopted CC SFRY. This is why the Prosecution argued that, in the contested Verdict, the criminal code under Article 298(1)(d) of the CPC of BiH was violated.

124. According to the Appellate Panel, the referenced complaint is ill-founded.

125. Contrary to the Prosecution's appellate complaints, the Trial Panel's contested Verdict considered the issue of substantive law application in relation to the accused Edin Džeko, primarily starting from the principle of legality provided for in Article 3 of the CC BiH and the principle of time constraints regarding the applicability of the criminal code provided for in Article 4 of the CC BiH, Article 7(1) of the ECHR and Article 15(1) of the ICCPR. One of the fundamental principles that ensues from the referenced provisions is that the law that was in force at the time when the offense was committed (*tempus regit actum*) shall apply to the perpetrator of the criminal offense. As the Trial Panel found, this principle may be departed from only in the interest of the Accused, that is, the subsequent law may apply only if it is more lenient to the perpetrator.

126. Considering which law is more lenient to the perpetrator in the concrete case, the Trial Panel referred to the position the Constitutional Court of BiH has held in a number of cases where the Accused were found guilty of the criminal offenses provided for in both the previous law (adopted CC SFRY), and the subsequently adopted law (CC BiH), more specifically, the criminal offenses of Genocide, War Crimes against Civilians and War Crimes against Prisoners of War, and where the Constitutional Court, contrary to the Court of BiH's view, found that the adopted CC SFRY was more lenient to the perpetrator. The Prosecution's appeal properly stated that the Constitutional Court of BiH rendered no decision on admissibility and merits binding the Court of BiH to apply the adopted CC SFRY to all cases concerning the referenced criminal offenses, and that the obligation to review on a case-to case basis which law is more lenient to the perpetrator remains. However, the Prosecution's appeal unreasonably stated that the Trial Panel did not abide by this obligation. It ensues from the reasoning of the contested Verdict that the Trial Panel found that, in the concrete case, the adopted CC SFRY was more lenient to the Accused because, after the death penalty was abolished, this law provides for a more lenient punishment for the referenced criminal offenses, both regarding a minimum sentence (prison sentence for a term of at least 10 years, in relation to a minimum 5-year prison sentence prescribed under the CC SFRY), and the statutorily prescribed maximum sentences (long term imprisonment of 45 years as opposed to 15 or 20 years in

prison). For the referenced reasons, this Panel has concluded that the Trial Panel's decision regarding the application of the criminal code is proper.

D. APPELLATE GROUND UNDER ARTICLE 300 OF THE CPC BiH - DECISION ON THE CRIMINAL SANCTION

1. Prosecution's Appeal

127. The Prosecution's appeal stated that, in meting out the sentence for the accused Edin Džeko, the Trial Panel did not sufficiently evaluate all the aggravating circumstances on the part of the Accused, while at the same time, too much significance was given to the mitigating circumstances. The Prosecution's appeal thus stated that the Trial Panel did not give appropriate significance to the facts such as the age of the killed individuals, and that some of the killed persons referred to in Section 1 of the enacting clause of the Verdict were only several years older than the accused Edin Džeko, while two killed persons were old enough to be the Accused's parents. The Prosecution further argued that, even though the Trial Panel explained in the part of the contested Verdict pertaining to the decision on sentence that the way in which the crime was committed and the gravity of violation of the protected value were considered as the aggravating circumstances, it obviously disregarded the fact that the Accused participated in the killing of six captured members of the HVO, in addition to two elderly civilians, and that those killings occurred in the immediate vicinity of members of their families and neighbors.

128. The Prosecution's appeal stated that the Trial Panel considered, as the mitigating circumstances in the concrete case, the facts that at the time when he committed the offense the Accused was young (age 21), and that he is a father of two minors, but that they are not as important as the Trial Panel found them to be. This is so because the fact of the Accused's age loses its importance considering that he had spent a significant period of time at frontlines already before committing the incriminating acts at issue. In addition, the fact that the Accused is a father of two minors should not be evaluated as a mitigating circumstance considering his participation in the execution of the HVO members described in Section 1 of the enacting clause of the Verdict, including that of Željko Blažević, whose wife had stood in the immediate vicinity of the site where the

referenced incident occurred, and held their minor child in her arms.

2. The appeal filed by the Defense for the Accused

129. Even though the Defense's appeal did not contest the Verdict on this appellate ground, this Panel has reviewed it from this aspect too, considering the contents of Article 308 of the CPC BiH. This Article provides as follows: "*An appeal filed in favor of the accused due to the state of the facts being erroneously or incompletely established, or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment and forfeiture of the property gain.*"

3. Conclusion of the Appellate Panel

130. The Appellate Panel has concluded that, in meting out individual sentences for the offenses of which the Accused was found guilty under Section 1 of the enacting clause of the Verdict (War Crimes against Prisoners of War under Article 144 of the CC SFRY, as read with Article 22 of the CC SFRY), and Section 2 of the enacting clause of the Verdict (War Crimes against Civilians under Article 142 of the CC SFRY), the Trial Panel properly evaluated all the circumstances that may affect imposing a more or less lenient sentence, including all the mitigating and aggravating circumstances, and properly fashioned the punishment for each referenced criminal offense individually.

131. The Appellate Panel has concluded, however, that the imposed compound sentence of 12 (twelve) years, as reasonably indicated in the Prosecution's appeal, is too lenient, that as such it is appropriate neither to the gravity nor the consequences of the referenced criminal offenses, and that thus the purpose of punishment cannot be achieved. In this regard, the Appellate Panel has considered the legal provisions pertaining to the fashioning of sentence for the offenses committed in concurrence, or Article 48 of the CC SFRY. The Article provides as follows: "*If one offender by one deed or several deeds has committed several criminal acts, and if he is tried for all of the acts at the same time, the court shall first assess the punishment for each of the acts, and then proceed with the determination of the integrated punishment for all the acts taken together. The court shall impose the integrated punishment by the following rules: (1)....(3) if the court has decided upon punishments of imprisonment for the combined criminal acts, the integrated punishment shall consist of an aggravation of the most severe punishment assessed,*

but the aggravated punishment may not be as high as the total of all incurred punishments, and may not exceed a period of 15 (fifteen) years' imprisonment...". The Appellate Panel also took into account the provision relating to the purpose of punishment provided for in Article 33 of the CC SFRY, and concluded that the compound prison sentence for a term of 13 (thirteen) years is the only adequate criminal sanction for the criminal offenses of which the accused Edin Džeko was found guilty, and that from the aspect of both special and general deterrence, this sanction is justified and necessary for achieving the purpose thereof.

132. In view of the foregoing explanation, the Defense's appellate complaints on the ground of the appeal's extended effect are ill-founded.

133. For all the above presented reasons, the appeal filed by the Accused's Defense in relation to the convicting part of the Verdict was dismissed as ill-founded, the Prosecution's appeal honored in part, the Trial Verdict revised in the part concerning the decision on sanction pursuant to Article 314 of the CPC BiH, and the decision made as stated in the enacting clause of the Verdict.

II. APPELLATE GROUNDS RELATING TO THE ACQUITTAL

A. APPELLATE GROUND UNDER ARTICLE 299 OF THE CPC BIH - INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

1. Section 5 of the enacting clause of the acquitting part of the Verdict

134. The Prosecution argued that the state of facts under this section of the enacting clause of the Verdict was incorrectly established because the Trial Panel erred in finding that the accused Edin Džeko was just a "mere observer" of the unlawful deprivation of liberty of the persons identified in this section, namely that the Accused's acts were not unlawful as they were taken against members of the opposing party, and in abiding by an obviously lawful order. Contrary to such Trial Panel's finding, the Prosecution argued that the very acts of deprivation of liberty and detention of the persons identified in this Count

of the Indictment were unlawful; that the Accused was aware that the detention of persons who had been in their apartments was unlawful; that clearly, all the acts related to the unlawful detention of the referenced persons could not have been committed by a single person even though he had not held in his hand a list of persons to be arrested; that for this reason, members of the *Zulfikar* SPD HSC ARBiH, including the Accused himself, were engaged, in addition to members of the military police, to carry out this action, and that, having given significant and individual contribution to the commission of the act of unlawful arrest and detention, all these persons together committed the criminal offense at issue.

135. In the Appellate Panel's view, the referenced appellate complaints are ill-founded.

136. This Count of the Indictment charged the Accused with participating in the unlawful arrest and detention of the persons identified in this Count. The Appellate Panel has held, however, that the Trial Panel's finding, that the Accused's guilt for the specified acts was not proved beyond a doubt, was proper.

137. The Appellate Panel has first noted that the referenced Prosecution's complaint addressed the Accused's participation in the acts of unlawful deprivation of liberty and unlawful detention as if these two acts formed a single action, even though each of these two acts has its essential features which need to be proved in order to establish one's guilt. Therefore, unlawful detention does not equal unlawful deprivation of liberty, and the factual description of the Indictment, thereby also the enacting clause of the Verdict, did not address the way in which each of these acts was allegedly committed.

138. In addition, the Prosecution's appellate complaints were not successful in contesting the Trial Panel's finding that, even though a certain role of the Accused in the acts described in Section 5.a) of the enacting clause of the Verdict was proved, he is also guilty of unlawful deprivation of liberty and unlawful detention of the injured parties in a cellar-dugout in Donja Jablanica. As it ensues from the contested Verdict, the Trial Panel found, beyond a doubt, that the Accused had taken part in the escort of the injured parties, more precisely, that he had driven a vehicle by which the arrested men were transported to the place of Donja Jablanica. However, even the Prosecution's appeal failed to prove the Accused was guilty of the referenced acts.

139. In the Panel's view, the Trial Panel properly found, on the basis of evidence given by the heard witnesses and the other adduced evidence, that the apprehension action

described in Section 5.a) of the enacting clause of the Verdict had been carried out upon an order, and that members of the *Zulfikar* unit were engaged as support to members of the military police to carry out a successful action. The Appellate Panel has held that the Trial Panel properly found that the adduced evidence showed that the Accused had participated in the referenced action as a private, and that he had, in fact, assisted members of the military police. The Trial Panel refused the Accused's statement that he had participated in the arrest of only three members of the HVO. Based on the evidence given by the injured parties in relation to the circumstances described in this Section, the Trial Panel found proved that the Accused participated in the arrest of all persons identified in this Count of the Indictment by their names. In this regard, the accused Džeko testified, the witnesses-injured parties confirmed and the Trial Panel properly found that there was indeed a list of persons to be deprived of liberty, that during the arrest it was in possession of military police officers, and that it was drafted by the Accused's superiors.

140. The Trial Panel further properly found that the persons arrested were members of the other warring party, but that during the evidentiary proceedings or in its appeal the Prosecution failed to present any fact or evidence of why the Accused could have concluded that the deprivation of liberty was unlawful. It ensues from the adduced evidence, as properly found by the Trial Panel, that the Accused acted upon a task he was obligated to carry out, and that in carrying out the referenced action of arresting the HVO members he neither gave nor did the Prosecution show he could give any orders. Truly, the Prosecution's appeal stated that the Accused was not even charged with issuing any orders, but rather with the individual responsibility in carrying out the unlawful arrest of the injured parties, together with other participants in the referenced action, that is, he was charged for acting as an accomplice. However, the Prosecution should have proved, along this line, that the Accused was aware of the unlawful nature of the action at issue. In view of the foregoing, the Appellate Panel has held that the Trial Panel properly found that the Prosecution did not prove beyond a reasonable doubt that the accused Edin Džeko is guilty of the unlawful arrest of the injured parties Mirko Zelenika, Marko Zelenika, Miroslav Soko, Marinko Ljolje, Ivo Jurić, Jure Jurić, Vinko Ljubac, Vlado Ćurić and Mate Biloš.

141. This Count of the Indictment also charged the Accused with unlawful detention of the referenced persons at a cellar-dugout in Donja Jablanica. In this regard, the Appellate Panel has first noted that the factual description of the Indictment did not state that the Accused took part in the detention of the injured parties, and that particularly, it did not

specify the way in which he did so. None of the injured parties mentioned the accused Džeko as a person who had detained them at the cellar-dugout in Donja Jablanica. On the contrary, the injured parties consistently testified that the Accused and the other participants in the arrest had brought them to the “Rogić’s houses” compound, that the ARBiH command personnel were present there, that is, the accused Džeko’s superiors too, and that, as most injured parties ascertained, “*someone from among the command personnel*” or “*some of the soldiers who had brought them to Donja Jablanica*”, without identifying the accused Džeko as that specific soldier, had said that “*they should be placed in a hole.*” Witness Vinko Ljubas explicitly stated he could not remember what the Accused’s role was while they were being escorted to the dugout. Witness J-3 also confirmed the foregoing.

142. In view of the foregoing, the Appellate Panel has concluded that the Prosecution’s appellate complaints raised no doubt concerning the Trial Panel’s finding that it was unproved that the accused Edin Džeko committed the offenses as described in this Count. Therefore, in relation to this Count of the Indictment, the Trial Panel rendered a proper acquitting Verdict pursuant to the principle of *in dubio pro reo*, which forms part of Article 3 of the CPC BiH.

2. Section 5.b) of the enacting clause of the acquitting part of the Verdict

143. The Prosecution argued that the state of facts in relation to section 5.b) of the enacting clause of the acquitting part of the Verdict was erroneously established because of the Trial Panel’s finding that a convicting verdict could not be based solely on the testimony of one witness, the injured party Miroslav Skoko. The appeal stated that the Trial Panel gave no credence to the evidence of Miroslav Skoko, who had identified Nezir Vila as an eye-witness to the referenced incidents, considering that witness Vila, who had been examined upon the proposal of the Accused’s Defense, did not confirm Skoko’s assertions. Witness Miroslav Soko testified that Nezir Vila was a refugee whom he had received in his house, and that, at the critical time, when the accused Džeko arrested him together with Nedžad Hodžić, strongly punching and kicking him on his head and all over his body, it was exactly Nezir Vila who had tried to help him. The Prosecution, however, argued that the foregoing testimony of witness Skoko could not be brought into suspicion

by the evidence of witness Vila as there was no reason whatsoever for which witness Soko would not state what had indeed happened.

144. Contrary to the Prosecution's complaint, the Appellate Panel has concluded that the Trial Panel's conclusion, that it was unproved that the Accused committed the referenced offenses, was drawn after a diligent evaluation of all pieces of adduced evidence, individually and in combination. The Prosecution's appeal unreasonably stated that the Trial Panel acquitted the Accused of the charges for the referenced offenses exclusively finding that a convicting verdict could not be based on the statement of a single witness-injured party. Contrary to such an appellate assertion, the Trial Panel explained, in para. 359 of the Verdict, that considering that "*the evidence of the injured party is the only evidence on which this Count of the Indictment is based, it should be carefully considered and evaluated, starting from the very first information he gave about the incident and the perpetrator, to his testimony at the main trial...*". Therefore, the Trial Panel did not eliminate the witness's evidence and concluded it could not be the basis for the convicting verdict exclusively because the Prosecution offered no other pieces of evidence relating to this Count of the Indictment, but rather evaluated and analyzed this testimony, and ultimately found it unreliable, and gave no credence to it. Furthermore, the Trial Panel did not find that the evidence of witness Miroslav Soko could not be given credence only because it is contrary to witness Nezir Vila's evidence, but because it was not corroborated with the other adduced evidence, namely, because the witness himself testified several times about the circumstances of his arrest, but differently regarding the decisive facts.

145. The Trial Panel first evaluated the evidence the injured party Miroslav Skoko gave in the other cases, where⁸ he never mentioned he had received any blows as described in this Count of the Indictment. The witness's explanation of the reasons for which he did not mention the full name of Edin Džeko, as one of the persons present at his arrest is understandable and acceptable to the Appellate Panel, as it was to the Trial Panel too. This was so because witness Skoko gave statements in other cases against other accused persons, and focused on the events related specifically to those persons. While asserting in his earlier statements that "he was arrested by members of Zuka's unit", witness Skoko never mentioned anywhere that those soldiers had abused him, or particularly that he was heavily punched and kicked in his head, which he would have

undoubtedly remembered. Therefore, the Trial Panel found, the witness would have certainly mentioned this fact of his own initiative, even if not directly asked about it.

146. In addition, the Trial Panel properly took into account that no other witness, from among those arrested and transported to the “Rogić’s houses” together with Miroslav Skoko in the same vehicle, mentioned that any injuries were visible on the injured party Miroslav Skoko. Thus, the blows described in this Count of the Indictment would have surely left some traces on the injured party’s body (his head unprotected with any clothing). Furthermore, the medical documentation relating to the injured party Miroslav Skoko also contains information about the injuries he sustained during his captivity at Jablanica, but not the injuries he allegedly sustained when arrested on 8 September 1993.

147. Ultimately, the Trial Panel correlated all the foregoing with the testimony of witness Nezir Vila. According to the injured party Miroslav Skoko, witness Vila eye-witnessed the referenced incident, and even tried to protect him. Witness Vila, however, testified at the main trial, and denied he had even been at the house during the arrest of witness Miroslav Skoko. Witness Vila stated that his wife had informed him about the incident at issue, and told him that there had been no problems on the referenced occasion.

148. All the foregoing on the whole, rather than a single evidence of witness Nezir Vila, amount to the circumstances by which the credibility of witness Miroslav Skoko’s evidence was brought into question. As this is the only piece of evidence incriminating the Accused for the acts described in this Count, the Appellate Panel has therefore concluded that the Trial Panel’s finding, that the charges at issue remained unproved, was proper, and acquitted the Accused of the charges in relation to this Count of the Indictment.

3. Section 5. c) of the enacting clause of the acquitting part of the Verdict

149. The Prosecution argued that the Trial Panel erroneously established the state of facts relating to the charges described in this Count by finding unproved that the Accused had indeed committed the described criminal-legal acts. The Prosecution further argued that, contrary to the Trial Panel’s finding unproved that “after the Croat civilians had been unlawfully arrested.... in front of Muslim citizens... the Accused shouted “*look at the*

⁸ The witness’s two statements given during the investigation conducted against Zijad Kurtović and his testimony from the main trial in the criminal case conducted against Zijad Kurtović.

Ustashas...”, the testimonies of witnesses Miroslav Skoko, J-3, Marinko Ljoljo and Vinko Ljubas had proved exactly the referenced charges, and that therefore the state of facts, in this part, was erroneously established.

150. Contrary to the Prosecution’s complaints, the Appellate Panel has concluded that the Trial Panel properly found, upon examining the adduced evidence, that none of the witnesses-injured parties confirmed that the accused Edin Džeko addressed the Muslim citizens by the words “*Look at the Ustashas*”, despite being in a group of soldiers who had escorted the arrested Croat civilians, or who had transported the captives on the car body through the town of Jablanica, as proved beyond a doubt. The Prosecution’s appeal properly paraphrased the witness’s statements, and stated that Miroslav Skoko felt uncomfortable for hearing the citizens’ shouting “*Ustashas*”; that the injured party-witness J-3 stated that the Accused had driven a vehicle on whose body he and the other arrested men were transported; that citizens shouted after them “*Ustashas*”, that from the car cabin they heard the words “*Look at the Ustashas*”; however, the witness could not identify the soldier, of the four of them in the car cabin, that had shouted “*Look at the Ustashas*”, and particularly, he could not remember that the soldier was exactly the accused Edin Džeko. Also, witness Marinko Ljoljo testified that he and the other arrested men had been transported through Jablanica on the car body, and saw people’s different reactions, from wondering and fear to the reactions such as “*They took away the Ustashas*”, and swears and curses. Witness Ljoljo, however, also did not confirm the Indictment allegations that the accused Džeko had shouted “*Look at the Ustashas*”. Ultimately, witness Vinko Ljubas also confirmed that, while passing through the town, they had felt uncomfortable, that they were called names and vulgar words. Witness Ljubas also did not confirm the Indictment allegations that such a conduct of citizens was “provoked” by the accused Džeko’s shouting “*Look at the Ustashas*”. On the contrary, the witness stated that, while they were driving, he observed no communication ongoing between the soldiers and citizens.

151. In view of the foregoing, the Appellate Panel has concluded that the Prosecution’s appellate complaints raised no doubt into the Trial Panel’s finding that it was unproved that the Accused had indeed committed the offenses at issue. Therefore, these complaints were considered as ill-founded and dismissed as such.

4. Section 6 of the enacting clause of the acquitting part of the Verdict

152. The Prosecution argued that the Trial Panel erroneously established the state of facts in relation to this section of the enacting clause of the Verdict too. The appeal stated that the Trial Panel referred to the statement witness J-2's had given to the Ministry of Defense, Security and Information Service of the Croat Republic of Herceg-Bosna, without mentioning the accused Edin Džeko as a person who had ordered his abuse. According to the Prosecution, the referenced statement is insignificant considering that the witness J-2 identified the Accused at the main trial as a perpetrator of the incriminating acts, and thereby fully confirmed the statement he had given to the Prosecution during the investigation phase. In the Prosecution's view, the erroneously established state of facts also ensues from the fact that the Trial Panel had compared the witness J-2's testimony with that of witness Marko Rozić, and improperly found that they contradicted each other. Contrary to the Trial Panel's finding, the Prosecution's appeal stated that witness Marko Rozić fully confirmed the testimony of witness J-2, namely that the Accused had not abused witness J-2, but rather one "Deba", while witness J-2 was determined in describing the way in which the Accused had ordered his abuse.

153. In the Appellate Panel's view, the foregoing complaints are ill-founded.

154. Contrary to the above appellate complaints, the Appellate Panel has concluded that the Trial Panel properly found it was not proved beyond a reasonable doubt that the accused Edin Džeko was present when the witness J-2 was abused, or that he had personally ordered his abuse by the words "*kill him, kill him*".

155. Truly, the Trial Panel drew the foregoing conclusion also by referring to the statement the witness J-2 gave to the Security and Informative Service of the Croat Republic of Herzeg Bosnia. The Prosecution, however, unreasonably argued this statement was irrelevant exclusively for the fact that, at the main trial, the witness confirmed his assertions from the statement given to the Prosecution during the investigation. The Defense adduced the referenced statement as evidence in the case record. In rendering its Verdict, the Trial Panel properly evaluated the statement, individually and in combination with the other evidence, and in this Panel's view properly found that this statement, evaluated in combination with the other evidence, also raised doubts into the credibility of witness J-2's testimony given at the main trial, as well as into the statements

he gave during the investigation, incriminating the Accused.

156. The Trial Panel found that witness J-2 was undoubtedly physically abused in the way as described in Section 6 of the enacting clause of the acquitting part of the Verdict. The participants in the abuse and the person who ordered the abuse however, remain disputable. The fact that the injured party-witness J-2 testified that the Accused was somewhat shorter than him, black-haired and wore a hat, raised serious doubts into the identification of the Accused as a person who had ordered the abuse. This was not confirmed by the consistent testimonies of the other witnesses that the Accused's hair at the time was a bit longer, that he wore a hair-holder, and that they had never seen him wearing a hat. In addition to the fact that the Accused is a markedly tall man, these testimonies fully confirmed the evidence of the Accused himself. The Accused stated his hair was long, a pageboy-hairstyle, and that he wore a hair-holder, but never a hat, because he loved his hair.

157. Ultimately, the Prosecution's appeal unreasonably stated that witness Marko Rozić's testimony fully confirmed the assertions of witness J-2, because this witness did not identify the person who ordered the abuse, and had no information about this decisive fact. Witness Rozić only confirmed the undisputed parts of the incident at issue. Witness Rozić testified he had seen "*Deba dragging witness J-2 by his hair and pushing his head into a barrel*". This witness, however, did not mention seeing the Accused at this site at all on the critical occasion, or hearing that anyone, particularly the accused Džeko, shouted "*kill him, kill him*", which action was charged against the Accused under the Indictment.

158. In view of all the foregoing, this Panel has concluded that the Prosecution's complaints were unsuccessful in removing the doubt into the identity of person who had ordered the abuse of witness J-2. Since any suspicion into the facts constituting the essential elements of a criminal offense, or on which the application of certain provisions of the criminal legislation depends, shall be resolved in favor of the Accused, the Appellate Panel has concluded that the Trial Panel properly acted by acquitting the Accused of the charges for the acts described in this section of the acquitting part of the Verdict.

B. APPELLATE GROUND UNDER ARTICLE 298 OF THE CPC BiH – VIOLATIONS OF THE CRIMINAL CODE

1. Sections 1 and 2 of the enacting clause of the acquitting part of the Trial Verdict

159. The Prosecution argued that the Trial Panel violated the criminal code in Sections 1 and 2 of the enacting clause of the acquittal for finding that common Article 3 of the Geneva Conventions did not apply to the charges factually described therein, wherefore it find that one of the essential elements of the criminal offense of War Crimes against Civilians did not exist, as a result of which the Accused was acquitted of the charges for these acts. The Prosecution's appeal stated that the Trial Panel erred in finding that there was no reason to apply common Article 3 of the Geneva Conventions considering that the Accused was not charged with causing severe mental suffering and violation of human dignity by plunder, and considering that the Prosecution did not prove any such consequences during the main trial. Contrary to the foregoing Trial Panel's view, the Prosecution's appeal pointed to the positions the ICTY has taken in *Naletilić and Martinović*, noting that plunder is "*willful and unlawful appropriation of property, and as enshrined in Article 3.e) of the Statute may affect both private and public property...*", and that "*plunder as a crime...has been committed when the general requirements of Article 3 of the Statute, including the seriousness of the violation – if private or public property was appropriated unlawfully or willfully*", and in *Blaškić*, finding that "*plunder should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including these acts traditionally described as 'pillage'.*" Pursuant to the referenced ICTY's views, the Prosecution argued that the plunder of property does not imply the causing of serious mental suffering or outrages on human dignity, as erroneously found by the Trial Panel, wherefore common Article 3 of the Geneva Conventions does not apply. According to the Prosecution, this is the reason why Article 298(a) of the CPC BiH was violated. The Prosecution argued that the Trial Panel erred in finding that the crime charged against the Accused was not a criminal offense.

160. The Prosecution argued that the Trial Panel violated the criminal code also in relation to the charges described in Sections 3 and 4 of the acquitting part of the Verdict because it found that the factual description of the acts described in the referenced sections,

charged against the Accused, had no such result so as to be qualified as unlawful acts (causing serious suffering and violence to personal integrity of the injured parties), in terms of common Article 3 of the Convention. Within this context, the Prosecution argued that the unlawful acts under the referenced Counts of the Indictment amount to inhuman treatment which, as a result, require neither severe suffering nor violence to life and person (referring to the *Blaškić* Judgment). Referring to the *Kordić and Čerkez* Judgment, the Prosecution also added that there is a significant distinction between “inhuman treatment” and willful causing of great suffering or severe violence to body or health.

161. The Appellate Panel has held that the foregoing complaints are ill-founded.

162. The Prosecution’s complaints related to the acquittal in Sections 1 and 2 of the Verdict, in fact, addressed the issue of what plunder is in itself, and how the international case law defined it. The Prosecution, however, provided no convincing reasons for such complaints so as to successfully challenge the Trial Panel’s finding that plunder, as described in the Prosecution’s Indictment, does not amount to a violation of common Article 3 of the Geneva Conventions.

163. Undisputedly, the plunder of the population property in certain circumstances may be an act of commission of the criminal offense of War Crimes against Civilians, and as such, it is provided for in Article 173(1)(f) of the CC BiH. In the concrete case, however, the Trial Panel examined common Article 3 of the Geneva Conventions, that is, whether the act of property plunder may be subsumed under the prohibitions provided for in the referenced Article, or more precisely, whether the main guarantees this provision provided for the protected individuals, *hors de combat*, also imply the protection of those persons against plunder, with the elements of the act charged against the accused Džeko.

164. With regard to the foregoing, the Trial Panel found that common Article 3 of the Geneva Conventions, in its relevant part, provides for one’s obligation to accord human treatment to the protected categories of persons. Along this line, it provides the following:

“...Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria...”

165. For a violation of common Article 3 of the Geneva Conventions to exist in the light of the above referenced provision, it is necessary that the act of commission

charged against the Accused amounts to inhuman treatment. Therefore, it was necessary to examine whether the plunder, committed in the way as the Prosecution's Indictment described, is inhuman treatment by its nature, which is how the act charged against the Accused might fall under the scope of protection of common Article 3 of the Geneva Conventions, which was not accepted by the Trial Panel in the concrete case. The Trial Panel properly found, which the Prosecution's appellate grievances did not challenge, that the act of plunder, as described and charged against the accused Edin Džeko, is not by its nature a gross assault on human dignity, which would result in the severe suffering of the victims, or at least such a result of the act was not described in the factual description of the Indictment.

166. Even when stating that plunder did not imply causing severe mental suffering or violence to personal dignity, the Prosecution's appeal does not explain why the referenced act would or should have been enshrined in common Article 3 of the Geneva Conventions, that is, why should the protection of protected persons against plunder enter the sphere of the basic guarantees provided under the referenced provisions. The Appellate Panel has compared the vague nature of the advanced appellate complaint with the comprehensive line of arguments the Trial Panel provided in the contested Verdict for its finding that the Accused's acts, as described in the prosecution charges, did not in their nature amount to violations of common Article 3 of the Geneva Conventions. The Appellate Panel has held that these Prosecution's objections failed to raise doubts into this part of Trial Panel's finding, and therefore dismissed them as ill-founded.

167. The Appellate Panel has held equally ill-founded the Prosecutions' complaints challenging the Trial Panel's findings that the acts described in Sections 3 and 4 of the enacting clause of the acquittal contained no elements of violations of common Article 3, and thereby no violation of the blanket norm as an underlying element of the criminal offense of War Crimes against Civilians. Therefore, the Appellate Panel rendered the acquitting verdict in relation to these acts too.

168. All the arguments of the referenced Prosecution's complaint aim at analyzing the differences between inhuman treatment and torture, that is, inhuman treatment and willful causing of great suffering or severe violations to body and health. However, there was no indication whatsoever as to why the acts charged against the accused Edin Džeko under these Counts of the Indictment would be characterized as a violation of common Article 3 of the Geneva Conventions, which is the essential element of the crime the Trial

Panel did not find in the description of these acts. Contrary to such a vague complaint, the Trial Panel's provided in its Verdict a detailed line of arguments and reasons for finding that the Accused's acts did not satisfy the essential element of the criminal offense of War Crimes against Civilians, which is apparent from violations of international law. Since the Prosecution's vague complaints failed to challenge the Trial Panel's findings, the Appellate Panel has concluded that the complaints advanced along this line must be dismissed as ill-founded.

169. For the foregoing reasons, the Appellate Panel has concluded that the acquitting part of Trial Verdict was unreasonably challenged by the Prosecution's appeal on the grounds of incorrectly and incompletely established state of facts and on the grounds of a violation of the criminal code.

RECORD-TAKER

Nevena Aličehajić

PANEL PRESIDENT

JUDGE

Mirko Božović

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