

Number: S1 1 K 009588 14 Krž 8
Sarajevo, 30 January 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel composed of Judge Senadin Begtašević, as the Panel Presiding, and judges Dragomir Vukoje and Hilmo Vučinić, as members of the Panel, with the participation of legal advisor Medina Džerahović, as the record-taker, in the criminal matter against the accused Zemir Kovačević charged with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a), (c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 180 and Article 29 of the same Code, deciding upon the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina No. T 20 0 KT RZ 0002173 11 of 3 September 2014 and the appeal filed by the accused's defense counsel, Mr. Bajro Avdić, of 29 September 2014, from the Judgment of this Court No. S1 1 K 009588 12 Kri of 21 May 2014, after the public session held in the presence of the Prosecutor of the BiH Prosecutor's Office, Ms. Dika Omerović, the accused and his defense attorney, Mr. Bajro Avdić, on 30 January 2015, handed down the following:

J U D G M E N T

dismissing as ill-founded the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina, **granting in part** the appeal filed by counsel for the accused Zemir Kovačević, and **revising in its sentencing part** the Trial Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 009588 12 Kri of 21 May 2014 by crediting towards the imposed prison sentence the time the accused spent in custody, running from 28 December 2010 onwards, pursuant to Article 50(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia, which was adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia¹.

The Judgment of the Court of Bosnia and Herzegovina No. S1 1 K 009588 12 Kri of 21 May 2014 shall remain unrevised in its remaining part.

¹ The Decree with the force of law concerning the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia which was adopted as the republic law effective at the time of imminent danger of war, or the state of war (Official Gazette of the RBiH, No. 6/92) and the Law on Confirmation of Decrees with the Force of Law (Official Gazette of the RBiH, No. 13/94); Hereinafter: the adopted CC SFRY.

REASONING

I. PROCEDURAL HISTORY

A. FIRST- INSTANCE JUDGMENT

1. Under the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 009588 12 Kri of 21 May 2014 the accused Zemir Kovačević was found guilty of committing, by the acts comprehensively described in Sections 1 and 2 of the Judgment enactment clause, the criminal offense of War Crimes against the Civilian Population in violation of Article 142(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY), as read with Articles 11 and 22 of the same Code, and, by the application of Article 285 of the CPC BiH and Articles 38 and 41 of the CC SFRY, sentenced to imprisonment for a term of 10 (ten) years. Pursuant to Article 50(1) and (2) of the CC SFRY, the time the accused spent in pre-trial custody running from 28 October 2011 onwards was credited towards the imposed prison sentence, while pursuant to Article 188(4) of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of the criminal proceedings and the scheduled amount, which will be in whole paid from within the Court's budget appropriations. Pursuant to Article 198(2) and (3) of the CPC BiH, the injured parties were instructed to file their claims under property law in a civil action.

2. Under the same Judgment, the accused was pursuant to Article 284(1)(c) of the CPC BiH, acquitted of the charges that, by the acts described in the acquitting part of the Judgment, he would have committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) and (f), as read with Article 29 and Article 180(1) of the CC BiH. Pursuant to Article 189(1) of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of the criminal proceedings and the scheduled amount, which will be in whole paid from within the Court's budget appropriations. Pursuant to Article 198(3) of the CPC BiH, the injured parties were instructed to file their claims under property law in a civil action.

B. THE APPEALS AND RESPONSES TO THE APPEALS

3. The referenced Judgment was timely appealed by the prosecutor of the Prosecutor's Office of BiH and the accused's defense attorney, Mr. Avdo Bajrić.

4. The Prosecutor's Office of BiH filed its appeal on the ground of the decision on sentence under Article 300(1) of the CPC BiH, with a motion that the Appellate Panel of War Crimes Section of the Court of BiH grant the appeal as well-founded in whole, alter the contested Judgment, and impose on the accused Zemir Kovačević a prison sentence lengthier than that imposed for the committed criminal offense of War Crimes against the Civilian Population.

5. The accused's counsel filed an appeal on all appellate grounds, namely for essential violations of the criminal procedure provisions, violations of the criminal code, incorrectly and incompletely established facts, and the decision on sentence, with a proposal that the Appellate Panel grant the appeal as well-founded in whole, and alter the contested Judgment in its convicting part by acquitting the accused Zimir Kovačević of the charges, or by revoking the contested Judgment in whole, and ordering a new hearing before the Appellate Panel.

6. The Prosecution of BiH and the defense submitted their respective responses to the appeals, with proposals that the appeal filed by the adverse party be dismissed as ill-founded.

7. At the Panel's public session held on 30 January 2015, in terms of Article 304 of the CPC BiH, the parties and the defense attorney stood by their respective appellate grievances and proposals filed in writing, as well as their responses to the respective appeals.

8. Having reviewed the contested Judgment within the appellate complaints and arguments, the Appellate Division Panel (the Appellate Panel/Panel) decided as stated in the enactment clause for the reasons that follow.

II. GENERAL CONSIDERATIONS

9. Before elaborating on each appellate grievance, the Third-Instance Panel notes the appellant's obligation, under Article 295(1)b) and c) of the CPC BiH, to state in each appeal both the legal grounds to challenge the verdict and the reasoning to support the well-foundedness of the appellate grievance.

10. Since the Third-Instance Panel, pursuant to Article 306 of the CPC BiH, reviews the verdict only within the bounds of the appeal, it is the appellant's obligation to draft the appeal in a clear and specific manner, so it can serve as a basis for reviewing the verdict.

11. In that regard, the appellant must specify the grounds of appeal based on which to challenge the verdict, specify which part of the verdict, evidence or court procedure the appeal challenges, and state a clear and a well-argued reasoning with which to support the appeals grievance.

12. Raising grounds of appeal in a general across-the-board manner only, as well as pointing to alleged irregularities during the second-instance proceedings without specifying which grounds of appeal the appellant invokes, does not constitute a sufficient basis for

reviewing the second-instance verdict.² It is for these legally defined reasons that the Third-Instance Panel refused as ill-founded the unreasoned and unclear appeals grievances.

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

A. STANDARDS OF REVIEW

13. A Judgment may, pursuant to Article 296 of the CPC of BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297.³

14. With respect to the gravity and importance of the procedure violations, the CPC BiH distinguishes between the violations which, if found to exist, create an irrefutable presumption that they have adversely affected the validity of the verdict (absolutely essential violations) and the violations where the Court has discretion to evaluate, on a case-to-case basis, whether a found procedure violation affected or could have negatively affected the rendering of a proper verdict (relatively essential violations).

15. Absolutely essential violations of the CPC BiH are specified in Article 297(1)(a) through (k) of the CPC BiH.

16. If the Panel finds any of the substantial violations of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC BiH, revoke the trial judgment, except in the cases provided for in Article 314(1) of the CPC BiH.⁴

² See, ICTY: Appellate Judgment in *Krajišnik*, para. 17, Appellate Judgment in *Martić*, para. 15; Appeals Judgment in *Strugar*, para. 17. A number of Appellate Panels of the Court of BiH have followed such a case law in their decision. Along this line, see Appellate Judgment in *Trbić*, No. X-KRŽ-07/386 of 21 October 2010.

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

⁴ Article 314. **Revision of the First Instance Verdict:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must

17. Unlike absolute violations, relatively essential violations are not specified in the law, but rather exist if the Court, during the main trial or in the rendering of a judgment, did not apply or improperly applied a provision of the law, which affected or could have affected the rendering of a lawful and proper judgment.

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

B. SUB-GROUND ONE: ARTICLE 297(1) OF THE CPC BiH – THE RIGHT TO A DEFENSE UNDER ARTICLE 297(1)(D) OF THE CPC BiH⁵ WAS NOT VIOLATED BY THE TRIAL JUDGMENT

19. The defense advanced several complaints within the appellate ground of essential violations of the criminal procedure provisions. A review of their contents results in the assertion that the Trial Judgment made several forms of essential violations of the criminal procedure provisions which, in whole, resulted in a violation of the accused's right to a defense. Some of the referenced complaints were interweaved with and presented within the appellate ground of incorrectly and incompletely established facts, or were qualified as a criminal code violation. Therefore, this Panel will address these grievances further in the reasoning depending on the order in which they were presented in the appeal.

(a) The appeal indicates that the Trial Panel violated the accused's right to a defense because not all evidence available to the Prosecution, which could have been in favor of the accused Zemir Kovačević, was either submitted or disclosed to the defense

20. Counsel submits that, during the main trial, the defense requested the prosecution to submit to them all the statements given by the witnesses during the previous period. The prosecution, however, responded that they did not possess the statements at issue, or

be rendered when the law is properly applied, according to the state of the facts and in the case of violations as per Article 297, Paragraph 1, Item f) g) and j) of this Code.

⁵ The relevant part of Article 297(1)(d) of the CPC BiH reads 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.“

that they could not submit all the statements pertaining to the present case because of the other persons being under the investigation. The defense submits that it also sent identical requests to the District Court in Doboj, the District Prosecutor's Office Doboj, and the CJB Doboj. However, pursuant to the information obtained from the referenced institutions, all the statements and the other documentary evidence were transferred to the Prosecutor's Office of BiH when it took over the case.

21. To prove the forgoing assertions, counsel submits that, during the presentation of the prosecution's further evidence, the defense learned from the attached Order to have an expert evaluation carried out by expert witness Ramiz Dugalić that the prosecution was in possession of a CD pertaining to the case No. KTA-RZ-880/05, that is, the evidence which preceded any statements received by the defense in the present case. The defense was served with a copy of the referenced CD, but there was no justified reason for which it was not delivered to the defense before. According to the appeal, such avoidance raises justified doubts that the prosecution selected the evidence, and, moreover, that it was hiding the evidence from the defense. In addition, Exhibits O-8 and O-9, found after a review of the prosecution's case record, point to the conclusion that the prosecution possessed evidence in favor of the accused, but avoided to submit it to the defense.

22. Not only that non-disclosure of the materials by the prosecution in violation of Article 47 of the CPC BiH ("The Right of a Defense Attorney to Inspect Files and Documentation") results in a violation of the right of the parties to the proceedings to be equally treated before the court ("equality of arms ") pursuant to Article 14 of the CPC BiH, but also in a violation of the related right concerning the defense preparation requirements.⁶

23. Contrary to the foregoing, the prosecution submits in its response to the appeal that all the witnesses' statements which were available to the prosecution, and given by the witnesses over the past period, were submitted to the defense. With regard to the defense's appellate grievance that the prosecution possessed evidence in favor of the accused but avoided to deliver it to the defense, the defense's appeal did not specify the evidence at issue. Therefore, the prosecution considers this appellate grievance as arbitrary, wherefore the defense's assertion, that the evidence is being kept hidden by the prosecution, is ill-founded. This is all the more so because the defense indeed reviewed the whole prosecution's case file concerning the accused Zemir Kovačević, which is why the prosecution does not see how he was deprived of the right to a defense.

Conclusions of the Appellate Panel

24. According to the Appellate Panel, the advanced appellate grievances are ill-founded.

⁶ Article 50 of the CPC BiH („Defense Attorney Actions“).

25. Specifically, the Appellate Panel took into account that the defense's appeal provided no convincing argument for their assertions that the prosecution is in possession of particular evidence in favor of the accused, but it avoids to submit it to the defense. According to the Appellate Panel, such an arbitrary reasoning only remains an unjustified assumption, or an act aimed at achieving the effect of the legal metaphor used before the Hague Tribunal, also known as a "*Fishing expedition*".⁷

26. This conclusion is further supported with the prosecution's allegation from its response to the appeal⁸, where it was properly observed that the defense's appeal does not specify the evidence at issue. Thus, it is obvious that the advanced appellate grievance is arbitrary, and that its scope remains at the speculative level. The Appellate Panel therefore does not see from the material aspect how the rule of Article 47 of the CPC BiH could have been violated⁹ and thereby the accused's right to a defense itself.

27. The appellate reference to the fact that Exhibits O-8 and O-9 were found after the review of the prosecutorial case file, aimed at supporting the appellate grievance that the prosecution avoids to deliver the evidence to the defense, is *eo ipso* ill-founded. The appellate grievance, that the defense's Exhibit O-8 was used as evidence in relation to the Mirko Radanović's murder, is arbitrary considering that in para. 281 of the Judgment (p. 96), the Trial Panel explained the reasons for its finding that the referenced person was killed by unidentified members of armed groups. Therefore, pursuant to the tendered evidence, the Trial Panel corrected the factual description of the enactment clause of the Judgment convicting part, but certainly not to the prejudice of the accused.

28. In addition, the appellate grievances, that the Trial Panel did not use the defense's Exhibit O-9, which would have resulted, according to Zemir Kovačević's statement, in Kovačević's acquittal of the charges for Petar Zečević's murder, are ill-founded. With such a conclusion, the Appellate Panel holds that, after evaluating all tendered pieces of evidence, individually and in combination, and of their contents, as well as the quantity and the mutual consistency of its decisive facts, the Trial Panel found that the accused Zemir Kovačević, as a direct perpetrator who had shot from a fire weapon, deprived Petar Zečević of his life.

⁷ "A speculative request for information, without any realistic expectations regarding the request outcome or its relevance to the proceedings."

⁸ Prosecutor's Office of BiH, No. T20 0 KTRZ 0002173 11, Response to the accused's appeal of 8 October 2014, p. 1.

⁹ **Article 47(1) of the CPC BiH:** „During an investigation, the defense attorney has a right to inspect the files and obtained items that are in favour of the suspect. This right can be denied to the defense attorney if the disclosure of the files and items in question would endanger the purpose of the investigation. (2) Notwithstanding Paragraph 1 of this Article, the Prosecutor shall submit with a request for ordering custody to the preliminary proceedings judge or preliminary hearing judge evidence relevant for assessment of lawfulness of custody also for the purpose of informing the defence attorney. (3) After the indictment is issued the suspect, accused or defence attorney have a right to inspect all files and evidence. (4) Upon obtaining any new piece of evidence or any information or facts that can serve as evidence at a trial, the judge or the Panel, as well as the Prosecutor, shall be bound to submit them for inspection to the defense attorney, suspect or the accused. (5) In cases referred to in Paragraphs 3 and 4 of this Article, the defense attorney, suspect or the accused may make copies of all files or documents.“

29. The Appellate Panel therefore concludes that, at this level of consideration, the Trial Judgment reached its findings of fact by fully applying Article 281(2) of the CPC BiH.¹⁰ As an example, it suffices to indicate that, in its para. 251, the contested Judgment correlated the consistent evidence of the eye-witnesses to the critical event – Milja Zečević and Saša Milošević with the objective Findings and Opinion of forensic medical expert, Dr. Željko Karan, which confirmed their evidence in relation to the mechanism of infliction of violent and lethal injuries upon Petar Zečević (and Jovan Zečević), with projectiles fired from a hand-held fire weapon.

b) The defense's appellate grievance that the objective identity between the Trial Judgment and the Indictment was violated, namely that the Indictment was exceeded

30. The appeal points to the prosecution's allegation in the Indictment, that the incriminating acts were committed "*during the armed conflict in BiH*", which the Trial Panel omitted from the Judgment enactment clause considering the Trial Panel's finding that the prosecution did not prove the existence of an armed conflict in BiH. With such a finding, the Trial Panel violated the objective identity between the Judgment and the Indictment to the prejudice of the accused.

31. In further elaborating on its appellate grievances, the accused's defense submitted that since, according to the Trial Panel's finding the prosecution did not prove the existence of an armed conflict in BiH as an element substantial for the existence of the criminal offense of War Crimes against Civilians, the Panel should have rendered a judgment of acquittal, as the same Court did in *Momčilo Mandić*. In addition, according to the appeal, the Indictment alleged that Zemir Kovačević committed the acts charged against him as a member of the Intervention Platoon of the 1st Bosanski Brod Brigade, which was transformed into the 101st Bosanski Brod Brigade of the HVO Bosanski Brod although the Trial Panel found that neither the 1st Bosanski Brod Brigade nor the intervention platoon existed during March 1992, which was the reason for which this Panel corrected the enactment clause and concluded that, initially, the accused was a member of an armed group, and in that capacity committed the acts described in Section 1 of the convicting part of the Judgment, and that, later on, the referenced group first became the Intervention Platoon of the 1st Bosanski Brod Brigade, and subsequently the 101st Bosanski Brod Brigade of the HVO Bosanski Brod.

32. The appeal highlighted that the (accused's) right to a defense was violated by the foregoing Trial Panel's interventions into the factual description of the Judgment enactment clause because the Court may adjudicate only based on the Indictment allegations, while the result of Trial Panel's acting in the described manner is that the

¹⁰ **Article 281(2) of the CPC BiH:** "The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved."

accused does not know whether he defends himself against the Indictment, or a possible judgment.

Conclusions of the Appellate Panel

33. The Appellate Panel concludes that a judgment can only refer to the person accused and only to the offense which is the subject of charges contained in a confirmed indictment, or in an indictment amended or extended at the main trial. It clearly ensues from the foregoing that an identity must exist between the judgment and the indictment, which is apparent from the fact that the court shall render its decision only in relation to the charges pressed against the accused. Thus, the subjective identity implies that the judgment concerns the accused person, while the objective identity is manifested through the consistence between the indictment factual description and the judgment enactment clause.

34. For the foregoing reason, this part of the Judgment will address only the grievances concerning the outbreak of the armed conflict, while the issue of its existence as such and its nature will be presented within the context of the defense's appellate grievance advanced within the criminal code violation.

35. In the concrete case, the Court did not exceed the indictment framework since it found the accused guilty of the criminal offense whose all required elements are contained in the Indictment itself. The Appellate Panel recalls that, when it comes to the identity between the judgment and the indictment, it implies the identity of the acts charged against the accused, or the factual description itself, rather than individual factual precisions made by the Court, which are generally based on the tendered evidence (the witnesses' evidence). Therefore, the fact that, instead of the Indictment allegation that the incriminating acts were committed "*during the armed conflict in BiH,*" the Trial Panel found that they were committed "*during the armed conflict in the territory of this Municipality*" (the Municipality of Bosanski Brod), does not imply either a violation of identity of the contested Judgment, or the right to a defense, as the appeal persistently tried to present.

36. The Appellate Panel holds that the Trial Panel's finding in para. 99 of the contested Judgment regarding the outbreak of the armed conflict is correct. It is apparent from both the referenced and the following paragraphs of the Judgment that the Trial Panel remains within the factual description framework presented in Count 1 of the Indictment (cumulative satisfaction of the elements requisite for the existence of an armed conflict; the time and the place as the general elements of the criminal offense; the *nexus* between the act of commission and the resulting consequences; indication of the protected group, etc.), which by their contents form the substance exclusively related to the Municipality of Bosanski Brod, and its belonging settlement of Sijekovac, rather than to the whole BiH territory. This was the main reason for which the indictment allegation was omitted from the Judgment's relevant part. Therefore, the Trial Panel made this intervention exclusively for the purpose of precision, rather than of changing the state of facts as presented in the Indictment.

37. The advanced grievance includes the issue concerning the width of the territory where the armed conflict broke out, namely the issue of whether the existence of this conflict should be exclusively connected to the BiH territory in whole (in the appeal's view), or to its part(s) (in the Trial Judgment's view). Along this line, the Appellate Panel reviewed the hitherto case law of international courts¹¹, as well as this Court's case law, with a view of verifying the correctness of the Trial Panel's findings.

38. Thus, e.g., in the ICTY's case *v. Dragoljub Kunarac et al.*,¹² there is a finding that an armed conflict broke out in the town of Foča on 8 April 1992, following the same sequence of events as in the other municipalities. In the Court of BiH's case *v. the convicted Milorad Trbić*¹³, the final Judgment found Trbić guilty of committing the crime of genocide in the narrower geographic area which overlaps with the Zvornik Brigade's zone of operative responsibility. Therefore, in the two referenced cases and other cases concerning the issue of serious violations of the provisions of international law, the existence of an armed conflict is not being exclusively linked to the whole BiH territory, but rather to its parts, exactly in the manner as was properly done in the Trial Judgment rendered in the present case. This was also done in the Judgment of the Court of BiH rendered in *Momčilo Mandić*¹⁴ to which the defense's appeal referred on the contrary, which is related to the outbreak of the armed conflict in the city of Sarajevo,¹⁵ as the prosecution correctly observed in its response to the appeal.

39. The appellate grievances that the Trial Panel made an essential violation by its finding that the accused was a member of an armed group rather than of the Intervention Platoon of the 1st Bosanski Brod Brigade as charged against him in the Indictment, are also ill-founded. The intervention into the factual description of the Judgment enactment clause does not, in any case, depart from the basic assumption that, at the critical time, the accused was a member of a certain armed formation which, truly, had not still been declared as a military formation, and as such incorporated into military structures, which will indeed occur considering the exceptionally prompted dynamics of the events at that particular period, that is, only several days after the incident at issue had occurred.¹⁶ Accordingly, the factual description was corrected in accordance with the results of the

¹¹ The Judgment of the International Court of Justice rendered in the dispute upon the BiH's action filed against the SRJ for Genocide (*de iure* title: The Application of the Convention and Prevention and Punishability of Genocide) of 26 February 2007 confirmed (as previously adjudicated by the Hague Tribunal), that certain fractions of the VRS committed genocide in Srebrenica in July 1995, but at the same time dismissed the allegations that genocide was committed *in the whole BiH territory*.

¹² ICTY's case No. IT-96-23&IT-96-23/1-A, Prosecutor *v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Appeals Chamber Judgment of 12 June 2002, para. 20.

¹³ Court of BiH, case No. S1 1K017791 14 Krž (ref. to X-KRŽ-07/386), Appellate Panel, Second-Instance Judgment, 19 January 2015.

¹⁴ Court of BiH, case No. X-KRŽ-05/58 (ref. to X-KR-05/58 of 18 July 2007), Appellate Panel Judgment of 1 September 2009, acquitting the accused, pursuant to Article 284c) of the CPC BiH, of the charges that: "*During the armed conflict between the armed forces of the Republic of Bosnia and Herzegovina and the forces of the Serb Republic of Bosnia and Herzegovina in the city of Sarajevo...*".

¹⁵ The Prosecutor's Office of BiH, No. T20 0 KTRZ 0002173 11, Response to the appeal filed by the accused Zemir Kovačević, 8 October 2014, the fifth paragraph from the top of page 2.

¹⁶ See, para. 183 of the Trial Judgment.

tendered evidence, and for the purpose of a more comprehensive explanation and identification of an armed Croat-Muslim group, wherein the Court did not disturb the parts of the Indictment related to the substantial elements of the offense. Thus, there are neither new charges nor any exceeding of the Indictment to the prejudice of the accused, as the accused's defense tried to unjustifiably indicate in its appeal.

40. With such a conclusion concerning the findings of fact, the Appellate Panel takes into account the Trial Panel's obligation to make only the findings relevant for the proving of the accused's guilt. The Trial Judgment properly and coherently applied such methodological approach to the findings of fact concerning the essential elements of the criminal offense at issue, which will be addressed further in the Judgment below.

41. Specifically, it is just a matter of more detailed indication of the general element of the criminal offense and the accused's capacity during the commission of the act starting from the evidence credited by the Trial Panel. In doing so, the Trial Panel modified the factual description, but did not, as indicated above, exceed the scope of the description which would have constituted a new indictment with further negative consequences for the accused's guaranteed right to a defense. Anyway, that the defense was aware of the fact that, at the critical time, the armed conflict was limited to the area of the Bosanski Brod municipality, and that there was an armed group which had indeed had the designations of a military formation, but was not officially founded and incorporated in the military structures, is obvious from the fact that almost all the prosecution witnesses resolutely testified about it.

42. In view of all the foregoing, the Appellate Panel concluded that the defense's appellate grievances advanced under Article 297(1)(j) and (d) of the CPC BiH are ill-founded, and dismissed them.

C. SUB-COUNT TWO: ARTICLE 297(2) OF THE CPC BiH – THE TRIAL JUDGMENT DID NOT VIOLATE ARTICLE 297(2) OF THE CPC BiH

(a) The appeal indicates that the contested Judgment violated the principle of *in dubio pro reo*

43. According to the defense, Zemir Kovačević, as the accused in the present case, is a person to whom the provision concerning the principle of *in dubio pro reo* is related, wherefore the burden of proving his guilt beyond a reasonable doubt rests on the prosecution. The defense, however, indicates that this legal provision was drastically violated to the detriment of the accused, which will be addressed in the part of the appeal analyzing the reasons concerning violations of the criminal code and incorrectly and incompletely established facts.

Conclusion of the Appellate Panel

44. Despite the defense's great efforts to undermine the Trial Judgment's final findings of the accused Kovačević's guilt, the Appellate Panel concludes that, in addressing the foregoing premise of the principle of *in dubio pro reo*, the quality of the foregoing appellate grievances does not raise any doubts into the facts to the prejudice of the accused, namely the facts constituting the elements of the criminal offense, or the facts on which the application of certain provisions of the criminal code depends, for the Court to be able at all to start addressing the options contained in the latter part of the premise, pursuant to which, in a situation when there is a likelihood that the facts in favor of the accused exist, the Court shall render a judgment in favor of the accused.

45. Specifically, the defense's appeal addresses the theoretical aspect of the above referenced phrase, its meaning and optional application in the systems of both the Anglo-Saxon law and the BiH criminal law. However, once the defense has already placed its focus on the theoretic meaning, it made no reference to the concrete Judgment and the application of the term with regard to the correctness of the established facts.

46. The principle of *in dubio pro reo* to which the appeal referred, which stands in favor of the accused, comprises two rules. The first rule concerns the facts standing to the prejudice of the accused. These facts, which are significant and legally relevant facts, must be established with complete certainty. In the Appellate Panel's view, the Trial Panel did exactly that after a comprehensive analysis and evaluation of the evidence tendered at the main trial, with the application of the standard of proof beyond a reasonable doubt. As to the application of the latter rule comprising this principle, concerning the facts standing in favor of the accused, the Appellate Panel concludes that, in the concrete case, the accused's defense presented nothing to indicate that these facts should be considered as probable.

47. In relation to general considerations concerning the evaluation of evidence, both the Appellate Panel and the Trial Panel took into account that, in proving the accused's guilt, the burden of proof (*onus*) rests with the prosecutor. The prosecution proved beyond a reasonable doubt all the key allegations of the charges under the convicting part of the Judgment, wherein the decisive findings of facts from the Judgment convicting part, in terms of the quality of evidence tendered by the prosecution, are not based solely on indicia, but rather on the existence of many pieces of direct evidence, primarily the evidence of both the eye-witnesses and the survived closest relatives of the victims of the committed crimes.

48. Even when the contested Judgment refers to indicia, it does so by presenting evidence in relation to a multitude of different circumstances, which in combination configure the existence of concrete facts on which the accused's guilt depends. Specifically, the Appellate Panel was mindful of the position pursuant to which "*a combination of these circumstances would usually exist only because the accused did*

*what is alleged against him.*¹⁷ Therefore, in the light of the advanced appellate grievances, the Appellate Panel could not conclude that there is also any reasonably possible conclusion on the basis of the same evidence other than that reached by the Trial Panel, which would imply that a certain fact probably did not exist at all.

49. With such a conclusion, the Appellate Panel takes into account that the Trial Panel examined all tendered evidence and comprehensively evaluated it, individually and in combination, confronted the defense's evidence with the prosecution's evidence, and, on the basis of facts established in such manner, rendered its decision on the accused's guilt of the acts described in Sections 1 and 2 of the convicting part of the Judgment.

50. In view of all the foregoing, the Appellate Panel considers as ill-founded the appellate grievances concerning the correctness of the Trial Panel's procedural and legal actions in the case by which the criminal procedure provisions under Article 297 of the CPC BiH were essentially violated to the prejudice of the accused, wherefore it dismissed them as ill-founded in whole.

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

A. STANDARDS OF REVIEW

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

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

53. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

54. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence

¹⁷ ICTY, Appeals Judgment in *Delalić*, para. 458.

relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly erroneous.”

55. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.¹⁸ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel’s factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

B. SUB-GROUND ONE: ARMED CONFLICT AND THE ACCUSED ZEMIR KOVAČEVIĆ’S AFFILIATION TO ONE OF THE PARTIES TO THE CONFLICT

56. The defense’s appeal indicates that the Trial Panel erroneously evaluated the evidence and the circumstances on whose basis it found that an armed conflict existed in the Municipality of Bosanski Brod in March 1992, and that, along this line, it did not take into account the issue of disinformation which formed part of the political propaganda in the referenced period.

57. Starting from the qualification of the events at issue presented in Section 1 of the enactment clause, the appeal indicated that the Trial Panel incorrectly established the facts and improperly applied substantive law, because no armed conflict existed in the Municipality of Bosanski Brod, and *eo ipso* no requirement for the application of Article 2(1) of Additional Protocol II to the Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949 was satisfied, as a blanket regulation supplementing the criminal offense under Article 142 of the CC SFRY.

58. The appeal indicated that in view of the objective situation in the field, as presented in the Findings and Opinion of expert witness Mesud Šandilija which were not taken into account by the Trail Panel in this segment despite the fact that it is a reconstruction of the military and the historical facts provable from this temporal distance on the basis of the historic science methodology, no armed conflict existed in the Municipality Bosanski Brod during March 1992, but rather sporadic incidents, characterized as internal unrests due to the political situation in Bosnia and Herzegovina during the referenced period. In support of such a conclusion, counsel also points to the act of proclamation of imminent war danger, which occurred no sooner than on 9 April 1992. This is also obvious from the fact

¹⁸ M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits of 22 April 2005, para. 36.

that the Trial Panel omitted from the Judgment enactment clause the phrase “*during the armed conflict*” as used in the Indictment.

59. The defense’s appeal indicated that the proved existence of the armed conflict in the Municipality of Bosanski Brod need to be analyzed only in the context of the March 1992 events, with no connections with April 1992, when BiH was recognized at the international level, when the imminent war danger was proclaimed and the JNA proclaimed as a hostile power in the BiH territory. In addition, the Trial Panel erroneously found in relation to the essential facts that the “*armed group*” was transformed into the Intervention Platoon of the 1st Bosanski Brod Brigade, but offered not even a single piece of evidence on the basis of which such a finding was made. The Trial Panel rather based its findings on anachronisms, that is, on attributing to the previous period the facts pertaining to the subsequent period, which is unacceptable from the aspect of the finding of facts in the criminal proceedings.

Conclusions of the Appellate Panel

60. Having considered the foregoing appellate grievances, the Appellate Panel concluded that, through the presentation of contextual contents of the events taking place in the Municipality of Bosanski Brod during March, as comprehensively done on its pages 14-30¹⁹ by the use of exclusion method, the appeal tried to deny that, by their character, those events qualify as an armed conflict in order to place them in the month that followed. In such a manner, the appeal did exactly what it objected to the Trial Judgment, namely it indicated that the Trial Panel used anachronisms. In addition, the appeal intentionally used the incomplete quotation of the part of the enactment clause omitted by the Trial Panel, which is related to “BiH”. In this Panel’s view, the appeal is doing so in order to change the overall sense of the specification made in the contested Judgment.

61. In fact, by denying the existence of an armed conflict in the Municipality of Bosanski Brod in March 1992, and by correlating it exclusively with the fact that the armed conflict in the whole BiH territory broke out in April of the same year, the appeal tries to deny the criminal offense at issue its general element related to the component of the place and time of the act commission, as contained in both the Indictment and the decisive facts correctly accepted in the Judgment enactment clause.

¹⁹ In contesting the Trial Panel’s finding, pursuant to which the factual situation and the events in the Municipality of Bosanski Brod, as a part of BiH within the March 1992 period satisfy the requirements for the existence of armed conflict during this period also in the referenced Municipality territory, the appeal gives a review of the overall developments from the political and security aspect, from the separation in the two confronting parties (the Muslim-Croat party on the one hand and the Serb party on the other hand), from the establishment of crisis staffs, interventions of the state bodies aimed at easing political tensions and trying to return civilian life contents through dealing with economic and syndical issues, to the presentation of the Presidency of the SRBiH’s assessment that the events in Bosanski Brod continued to be antagonisms with primarily political dimension, with concluding such an elaboration that the definitive confirmation of the transition into the state of armed conflict in the whole BiH’s territory, which was publicly announced by the Presidency on 8 April with the issuance of the decisions with the force of law declaring the state of imminent war danger, etc.

62. The basic requirement for the existence of a war crime offense is that an act is committed during an armed conflict. For the prosecution of criminal offenses in terms of customary international law, it must be proved that the character of the conflict is either international (the provisions concerning serious violations), or non-international (for the purposes of Additional Protocol II). An armed conflict is defined as international if it takes place between two or more states (ICTY, *Tadić*, the Appeals Chamber Judgment, para. 84), while a non-international armed conflict is defined as a protracted armed violence between the authorities and organized armed groups, or between non-governmental armed groups within a state. However, since the Indictment charged the accused Zimir Kovačević with the acts committed in violation of Articles 3 and 33 of the Geneva Conventions of 12 August 1949, and since common Article 3 is applicable to both international and non-international armed conflicts, this Panel holds that it suffices to simply prove the existence of an armed conflict regardless of its character of an international or non-international conflict.²⁰

63. In dealing with this issue, the Trial Panel referred to exactly the presented legal framework. As stated above, given the fact that it did not find that the armed conflict existed during March 1992 in the territories of other BiH municipalities, the Trial Panel omitted from the factual description of the Judgment enactment clause the phrase “during the armed conflict in BiH”. However, starting from the existent factual situation in the real time in the Municipality of Bosanski Brod, which formed part of the BiH territory during March and April 1992, the Trial Panel found that an armed conflict indeed existed in the referenced Municipality (para. 99.), whereby the general element of the criminal offense at issue was also satisfied.

64. Thus, in its paras. 103-111, the Trial Judgment presents the chronology of the events preceding the outbreak of the armed conflict in the Municipality of Bosanski Brod, which was undisputable for the appeal, and which concerns the self-organization of the local population on national grounds and polarization in the two opposing blocks which, each being organized as a territorial defense, controlled the territory they considered as their own; the construction of barricades, arming, the establishment of the crisis staff for the defense of Bosanski Brod, etc., which was all accompanied by the process of progressive raising of political tensions. The defense’s appeal highlights exactly this reference, believing that political tensions did not escalate to such an extent to become an armed conflict. According to the appeal, there were just “sporadic incidents whose character was that of internal disturbances” (p. 28). Not only that the defense’s appeal points to the Mesud Šadinlija’s expert evaluation, but also to the conclusion of the Presidency of the SRBiH, which estimated that there were only politically-related antagonisms, with reference to the articles of the “Oslobođenje” daily newspapers that the developments in the referenced area were “fed with abundant disinformation.”

²⁰ ICTR, *Akayesu*, Appeals Chamber, para. 438; ICTY, *Čelebići*, Appeals Chamber Judgment, para. 150.

65. According to the Appellate Panel, the referenced appeal's intention unjustifiably qualifies the described events as incidents in order to deprive them of the character of armed conflict with all negative repercussions of such intent for the existence of the crime at issue.

66. Contrary to this fragmented and unilateral view of the event at issue, dependent on the defense's needs, the contents of the abundant evidence presented by the Trial Judgment on pages 56-60,²¹ show not only the dynamic progression of the critical events escalating into an armed conflict already since 3 March 1992 onwards, including the day of the described crimes commission on 26 March 1992, but also their overall evaluation which raises no doubts whatsoever regarding the accuracy of the Judgment final findings about this and the other issues disputable for the defense.²²

67. In addition, the Trial Judgment properly viewed the fact of the armed conflict existence as a legal issue rather than as the issue of political and military facts viewed in the historical context, as erroneously presented in the appeal. This was the reason why the Trial Panel made its own finding, in para. 134 of the Judgment, independently from the results of the forensic evaluations made by both the Prosecution's forensic expert Ramiz Dugalić and the defense's forensic expert Mesud Šedinlija (as it was obligated to do), after it had evaluated all tendered evidence, and legally qualified the facts established on that evidence as indicated above.

68. The Trial Panel took a proper methodological approach by starting from the definition of an armed conflict as established by the ICTY in its Decision concerning jurisdiction in *Tadić*, para. 70, and by applying the standard for the existence of such a conflict – *the intensity of conflict and organization of the parties to the conflict*.²³

69. In this Panel's view, a review of the available evidence contents raises no doubts in the correctness of the facts found by the Trial Panel, according to which nine Serb civilians were killed during the incident that took place on 26 March 1992 in the settlement of Sijekovac, Municipality of Bosanski Brod. The foregoing was preceded by the outbreak of a conflict, whose intensity is confirmed by the fact established on the basis of the tendered evidence contents, namely that, during several hours, fire was exchanged from automatic

²¹ Smajo Havić gave evidence about the division of Bosanski Brod; Petar Milošević and Zdravko Trifunović gave evidence about the population self-organization; Ibrahim Dugalić gave evidence about the military and the police station; Nikola Jovičić and Bilić Josip gave evidence about self-armed groups in the Local Community; Ivan Brizić, who was the Crisis Staff President, testified that "the armed conflict in its true sense", started on 3 March 1992, after the breakthrough of the Serb infantry supported with shelling, on which occasion 14 persons got wounded; that on 3-4 March, a direct armed conflict broke out between the police and armed citizens on the barricade, who tried to take over the control of the crossings over the bridge on the Sava river (Exhibit T-183). It is obvious from the same document that, during the attack launched against the Serb TO posts in Brodsko Polje, members of the HOS and ZNG forces used six recoilless guns from the TO warehouse in the refinery. That the conflicts were carried out on a larger scale by the use of automatic weapons and artillery fire, as a result of which 200-300 shells fell on the town, a number of persons got injured and many buildings were damaged, is obvious from para. 125, with references to the relevant evidence being provided in footnotes.

²² The Panel found that an armed conflict existed in the Municipality of Bosanski Brod in March 1992 (para.135).

²³ Paras. 137-138 of the Trial Judgment.

weapons, artillery and a certain number of recoilless guns.²⁴ As properly found in para. 143 of the Trial Judgment, the length of armed violence points to its continuity, either in fightings between armed groups or in individual attacks on the civilian population and their property, repeated with different intensity not only during March 1992, but also subsequently, during April of the same year. Ultimately, as found in para. 129 of the Trial Judgment, the Prosecution's documentary evidence (Exhibit T-95), shows that the R BiH Presidency unequivocally stated at its sessions held on 16-28 March 1992, that "armed conflicts are developing" in the territory belonging to the Municipality of Bosanski Brod.

70. The foregoing, in addition to the facts that members of an armed group, including the accused, arrived in Sijekovac, who were armed with automatic rifles, in uniforms marked with obvious military designations; that they arrived in an organized manner in a green van;²⁵ that their arrival was preceded by the Serb population going to the Croat-Muslim Crisis Staff upon an invitation to surrender their weapons²⁶, including all other established facts and the factual circumstances that structured the overall event, point to the conclusion beyond a doubt that it was a designed military action carried out by the Muslim-Croat armed forces, whose members were the accused and unidentified HOS members, who had arrived from Croatia. Something like that certainly cannot be attributed to an incident, or any other excess behavior, as unjustifiably and repeatedly indicated in the appeal.

71. The above presented facts, properly and completely established by the Trial Panel, point to the existence of at least those minimum factors which must be satisfied as required pursuant to customary international law, and which include both: (i) the intensity of the armed conflict, and (ii) the organization of the armed group²⁷ which launched the attack on the civilian population in the settlement of Sijekovac.

72. With regard to the intensity of the armed conflict, the Trial Judgment based its finding about large-scale conflicts that took place on 23 and 24 March 1992 on the facts established on the basis of tendered evidence. The Judgment found that 200-300 shells fell on the town, that two persons were killed and a number of buildings damaged, etc. (para. 125.). In addition, in addressing the events preceding the foregoing, the Judgment referred to the testimony of Ivan Brzić, who correlated the beginning of the war with 3 March 1992, when fourteen persons were wounded in a fire exchange. Witness Sead Mašić stated that a heavy shelling from the East direction lasted throughout the night (para. 119). It should be also added that the confronted local population in the Municipality of Bosanski Brod had had support, namely the Serb Territorial Defense was supported by

²⁴Para. 124 of the Trial Judgment: "Members of the HOS and ZNG took six recoilless guns out of the Territorial Defense (TO) warehouse located in the oil refinery to use them at the football stadium in Tulek against the Serb TO".

²⁵Evidence of Zdravko Trifunović, see para. 208 of the Trial Judgment.

²⁶ Testimony of Jelica Zečević of 9 January 2013.

²⁷ Trial Judgment, paras. 138, 140-145. See also, *Haradinaj et al.*, where the Trial Panel took a flexible approach in considering whether the requirement of "organization" was satisfied in determining if there was any armed conflict, particularly in relation to the existence of "the command structure"(paras. 60, 89).

the JNA, while the Croat and Muslim Territorial Defense were supported by the HOS and the ZNG from Croatia.

73. The Appellate Panel recalls the Court of BiH's case law in determining whether an act is to a sufficient extent linked to the armed conflict, wherein the following factors were addressed:

- is the perpetrator participant in the fight,
- is the victim a participant in the fight,
- is the victim a member of the hostile party,
- is the act in function of furtherance of the ultimate goal of the military campaign etc.²⁸

74. The facts of the case indicate that, in many parts of its Judgment, the Trial Panel found that these requirements existed, including the fact concerning the accused's capacity, concretely his position as a member of the armed group²⁹, and that he committed the referenced criminal acts against certain civilian victims exactly due to the existence of this armed conflict. Not only that the referenced civilian victims took no active part in these hostilities, but they took no part therein whatsoever.³⁰

75. Accordingly, the Trial Panel found beyond a doubt that the essential fact of the existing armed conflict, and consequently of the general element of the criminal offense under Article 142(1) of the CC SFRY indeed existed. Along this line, the Trial Panel properly established not only the victims' civilian status but also the accused's status as a member of the armed group that launched the attack on the critical occasion, as described in the convicting part of the Judgment.

C. SUB-GROUND TWO: SECTION 1 OF THE ENACTMENT CLAUSE OF THE JUDGMENT CONVICTING PART – THE ACCUSED IS GUILTY OF THE ATTACK ON CIVILIANS AND THE KILLINGS OF SERB CIVILIANS

76. In relation to the alleged fact-related deficiencies of the Trial Judgment, the appeal claims that the crimes described in the convicting part of the Judgment were not committed by the accused but rather by members of the HOS, who had arrived from Croatia. In addition, the appeal refers to the accused's alibi in relation to the events that

²⁸ *Damjanović et al.*, Trial Judgment, p. 13; *Vrdoljak*, Trial Judgment, p. 16; *Mandić*, Trial Judgment, p. 124; *Pinčić*, Appeals Judgment, p. 24-25.

²⁹ Para. 155 of the Trial Judgment. That the accused Zemir Kovačević was armed at the critical time was confirmed by witness Drago Čerić, who saw him at the barricade, while witness Nedeljko Duronjić saw him wearing a uniform and a white belt. The foregoing was also confirmed by witnesses M, Saša Milošević, Branislav Zečević and Zdravko Trifunović.

³⁰ See paras. 199, 200, 201, 202 and the related paras. 85-87.

took place in the Traktorska Street, starting from the referenced event's chronology and the contradictions in the eye-witnesses' evidence concerning the event-related essential facts.

77. That the perpetrators of the criminal acts referred to in this Section of the Judgment enactment clause were members of the Croatian military formations, specifically members of the HOS, the appeal indicates by referring to both the consistent evidence of all the witnesses who testified about these facts and the documentary evidence. According to the appeal, however, the Trial Panel did not take into account the defense's evidence (O-10), which undoubtedly shows that the Prkačin's group, namely members of the HOS had killed the persons in the Traktorska Street. The appeal further stated that, although the witnesses' evidence showed that the negotiations concerning the surrender of weapons were conducted, as found in the Trial Judgment, the Trial Panel nevertheless found that there was an armed conflict.

78. The appeal again repeated that the referenced facts do not indicate that it was an attack because no attack-related requirements were satisfied, but rather that the character of the described events is that of an incident. That it was not an attack is also confirmed by the finding of the contested Judgment in para. 203, that the evidence does not contain any basis for the conclusion that the settlement was surrounded, wherefore that was omitted from the judgment enactment clause. The appeal believes that, in rendering the contested Judgment, the Trial Panel took a partial view of the evidence of the eye-witnesses to the events in Sijekovac that took place on 26 March 1992, and used only certain facts from their evidence to corroborate its finding.

79. The Trial Judgment also erroneously established the facts regarding the uniformed persons present in the Traktorska Street, the perpetrators of the criminal acts, the time when the shooting started in the Traktorska Street and its duration, the dynamics itself of the events and the movement of the prosecution witnesses who gave evidence. Specifically, a careful analysis of these facts confirms Zemir Kovačević's alibi, namely that he was not present at the critical site at the critical time, and that the evidence of the witnesses on which the Trial Panel based its judgment and who incriminate Zemir Kovačević, was based on the witness Branislav Zečević's leading testimony, which is unreliable, wherefore a judgment of conviction should not have been rendered on such basis.

80. The appeal highlights that, according to the witnesses' statements, the event of 26 March 1992 was simultaneously taking place in the Traktorska Street and in front of Zdravko Trifunović's house. However, in paras. 208, 209 and 210 of its judgment, the Trial Panel made an erroneous finding regarding the chronology of the events because it did not carefully analyze the relevant witnesses' evidence. Thus, para. 208 of the Judgment included a part of Zdravko Trifunović's statement that he had seen unidentified and uniformed persons, while immediately in para. 209 of the Judgment, that Zdravko Trifunović saw Zemir Kovačević in front of his house, which occurred after this witness had seen the green van and unidentified uniformed persons. The appeal also refers to the

evidence of witness Halid Sejdić indicating that the Trial Panel erred in finding that Zemir Kovačević was also in the group of persons transported by Halid Sejdić along with Medo Čaušević. The defense submitted that, due the emphasis added to this finding, the Judgment intentionally omits parts of the evidence given by witness Halid Sejdić, who stated that he had not seen Zemir Kovačević on the referenced day. According to the appeal, exactly the facts related to the place and the time where Zdravko Trifunović saw Zemir Kovačević are crucial from the aspect of the accused's alibi, but the Trial Panel did not properly evaluate them in the context of the chronology of the events in the Traktorska Street, which resulted in the judgment incorrect findings.

81. The appeal also indicates that the Trial Panel did not take into account the facts from the evidence of witness Branislav Zečević, when he stated that, on the referenced day, he saw Zemir Kovačević for the first time at the plateau in front of the local community office at around 18:00 hrs, and that it took him around 1-1.5 hrs to get from the courtyard to Slavonski Brod and return to Sijekovac. These facts are relevant in the context of chronology of the events development in the Traktorska Street and the accused's alibi. Thus, the evidence of witnesses Y, Marinko Opačić and Jelica Zečević is consistent about the fact that they were brought back to the basement. The appeal indicated that the Trial Panel did not evaluate these witnesses' evidence in the context of the event at issue, namely that the women and children did not even see the killings since they had been held in the basement, and thereby, as counsel concludes, undermined the evidence of the witnesses on which the Trial Panel based both its findings concerning the disputed event, and the judgment of conviction.

82. The appeal indicates that, in view of the evidence of witnesses Jelica Zečević, Marinko Opačić, witness Y and Exhibit O-2, the dynamics of development of the event itself in the courtyard differs from that described in the evidence given by witnesses M, Milja Zečević and Saša Milošević, considering that, pursuant to the first three witnesses, all the killings were committed during the period between the second return of the women and children to the basement and the new coming out of the basement, when they headed off toward Niko Tomas's house. According to the defense, the Trial Panel should have dealt with doubts concerning the referenced situation with the contradicting witnesses' evidence regarding the killings by the application of the principle of *in dubio pro reo*, namely it should have accepted the evidence of the witnesses who stated that they had not seen the killings, rather than the evidence of the witnesses who stated that they had seen the killings at issue. Thus, the contradiction between the evidence of witness Marica Radanović and witness Saša Milošević's and witness Y's evidence was by itself sufficient to raise doubts into reliability of her evidence concerning the identification of Zemir Kovačević and his presence in the Traktorska Street at the critical time.

83. The appeal completely contests the credibility of witness M, indicating that not only that it is inadmissible in part, as found by the Trial Panel, but rather in all its segments where he incriminated Zemir Kovačević. This is because, by referring to the murder of Mirko Radanović, the witness showed his explicit motivation and unreliability, that is, he showed that he is not a credible witness. The defense therefore believes that the finding in

para. 222 of the Judgment should not have been based on the witness M's evidence. The appeal further pointed to the unreliability of the evidence given by witness Milja Zečević, which does not satisfy the standard of proof beyond a reasonable doubt, due to the contradictions between the statements she gave during the investigation and the main trial testimony.

84. The Trial Panel also did not take into account the circumstances raising doubts that witness Saša Milošević had at all known Zemir Kovačević, but rather views the fact of Zemir Kovačević's identification from the aspect of the witnesses' statement that he had had a "white belt", a camouflage uniform and a black cap. However, counsel submits that the very fact of white belt is an unbreakable link on the basis of which the conclusion was drawn about the leading nature of Branislav Zečević's evidence in relation to the evidence of witnesses M and Saša Milošević addressing the same issue. In addition, at the time when witness Branislav Zečević saw Zemir Kovačević at the plateau in front of the local community office, all events in the Traktorska Street had already ended.

85. The appeal indicated that the principle of *in dubio pro reo* was also not applied with regard to the issue of whether the persons present in the front yard had head masks, because the witnesses gave contradictory evidence about this important fact.

86. The defense claims that the main trial testimony of witness Milja Zečević does not, in any way, mean the clarification of her statement given during the investigation, where she supposed that Zemir had killed her husband because someone called Zemir by his name, but that it rather supplements it in a contradictory manner. That it is a supplement rather than a clarification is again apparent from Exhibit O-11, p. 5, where in responding to the question "*if she can describe Zemir's physical appearance at the time*", witness Milja Zečević stated that she "*cannot (describe him)*". Therefore, contrary to the Judgment finding, the defense submits that on the basis of the fact, that she had heard someone calling "*Zemir!*" under aggravated circumstances, the witness cannot describe the physical appearance of that "*Zemir*". It can be rather only concluded that the referenced witness based the identification on her assumptions and belief that she had heard a certain opinion, rather than on the visual identification of a certain person, wherefore this fact could not have been established beyond a reasonable doubt.

87. The appeal further highlights that, when it comes to Petar Zečević's murder, there are doubts into the witness Milja Zečević's evidence, particularly with regard to the means with which Petar was killed, namely by „a pistol or a rifle”, which justifiably raised the issue of whether the witness at all saw the referenced person's murder. Counsel also submits that there are inconsistencies in the evidence regarding the part of the body in which the victim was shot. In support of the foregoing, counsel refers to the evidence of witness Mladenka Milošević, from which it ensues that the person who had killed Petar is unidentified, but it was not Zemir Kovačević, whom she identified as the person who had appeared in front of the basement.

88. In addition, the appeal claims that the Trial Panel incorrectly established the facts and erroneously found that, after Branislav Zečević had seen Zemir Kovačević at around 18:00 hrs in front of the Culture Center, the accused went to Zečević's front yard, killed Jovo Zečević and Petar Zečević, because the evidence, on the basis of which the Trial Panel rendered the judgment of conviction, is unreliable, contradictory and fabricated. Along this line, the appeal pointed to the inconsistencies between the evidence of Milja Zečević and Saša Milošević regarding the murder of Jovan Zečević.

Conclusions of the Appellate Panel

89. The Appellate Panel holds that the presented grievances are ill-founded. Specifically, the Trial Panel correctly found that the accused Kovačević indeed committed the killings in the described manner, and accorded inhuman treatment to Serb civilians in the place of Sijekovac, Municipality of Bosanski Brod, which was found on the basis of evidence of the Prosecution witnesses, who had been also subjected to the attack and inhumane treatment, and some of their spouses and/or relatives even killed.

90. Along this line, the appeal's attempts to find the basis for its assertion, that there was no armed conflict, also in the fact that the Serb local population were invited to surrender weapons (first by being invited to the Crisis Staff and subsequently by invitations of Nijaz Čaušević aka Medo via megaphone in the Traktorska Street³¹), still lack the sufficient probative and logical justifiability. Specifically, for an individual criminal act to be considered a war crime it need not coincide with the armed conflict in terms of the time and the place of its commission because it can be committed out of direct combat.³² The Appellate Panel hereby recalls that the Appeals Chamber in *Tadić* also dismissed the argument pursuant to which "*the concept of armed conflict only encompasses the specific time and place of actual hostilities.*"³³

91. In the concrete case, the Trial Judgment found the accused, who had acted with members of an armed group whom he knew, guilty of participation in an armed attack against the Serb civilian population in the settlement of Sijekovac, more specifically of the incriminating events that took place in the Traktorska Street, or the part of the Municipality of Bosanski Brod, which at that particular moment was not directly affected by the military activities of the hostile parties, but was directly linked to the armed conflict ongoing in that Municipality, of which the accused was certainly aware, and about which the Trial Judgment presented completely convincing findings, supported with arguments, as also upheld by the Appellate Panel.

³¹ See the testimony of Zečević Branislav, Trial Judgment, para. 204.

³² See, the Court of BiH, *Vrdoljak*, Trial Judgment, p. 15 with reference to the ICTY cases (*Tadić, Blaškić and Kunarac*), and the cases of ICTR (*Rutaganda*); Court of BiH, *Sipić*, Trial Judgment, p. 7; *Palija*, Trial Judgment, p. 30.

³³ *Tadić*, Appeals Chamber Judgment, *supra* note 4, para. 66. In addition, the Appeals Chamber found that international humanitarian law does not require that the whole territory of a state be encompassed by a non-international armed conflict, and that the existence of conflict proved on the basis of evidence can be localized in the territories where 'severe combats within the conflict can be stretched outside the viewed period of time.' V. G. Boas, ..., *idem*, p. 236.

92. Starting from the indisputable fact, that a unit of the HOS forces, which had arrived from Croatia under Ante Prkačin's command, participated in the attack launched against the civilian population in Sijekovac, in addition to unidentified members of the Croatian military formations, the appeal attempts to present the crime perpetrators as members of the referenced unit and thereby to exculpate the accused.

93. The contested Judgment found on the basis of the contents of the prosecution Exhibit T-172 that a HOS unit led by Ante Prkačin had taken part in the attack on Sijekovac, about which witnesses Nikola Jovičić, Teodor Barnjak, Dušan Kušljčić and Petar Čerić gave evidence, to which fact the appeal also referred. However, in analyzing the subject of charges, the Trial Judgment correctly and unequivocally found that, in addition to the HOS unit, the accused as a member of the referenced armed group also took part in the killings, inhuman treatment and plundering of the property of the Serb population, as described in the enactment clause of the convicting part of the Judgment (which the appeal omitted from this point of view).

94. In finding so, the Trial Panel was mindful of witness Jovičić's evidence that, in addition to the HOS forces, participants in the attack also included members of the Muslim-Croat armed group from Sijekovac, whose member was also the accused (para. 213.); witnesses Milja Zečević, Jelica Zečević, M, Y, Marinko Opačić, Saša Milošević, Milica Radanović identified Zemir Kovačević, Nijaz Čaušević, Dino Dobožčić and Zemir's youngest brother from among armed local Muslims and Croats, having seen them at different moments (para. 222.). In addition, the examined witnesses, or the eye-witnesses to the events, specified that *some* of the HVO and HOS soldiers, not all of them, wore masks/balaclavas on their heads, which factual detail they did not mention in relation to members of the group of armed Muslims and Croats, who were also locals as the witnesses themselves, wherefore they were logically able to identify them.

95. In view of the foregoing, the Appellate Panel dismissed as ill-founded the appellate grievance that the perpetrators of the crime at issue were exclusively members of the HOS, rather than members of the armed group, which also comprised the accused Zemir Kovačević.

96. As to the appellate grievances pursuant to which international humanitarian law does not know the phrase of an *armed group* which is used in the Trial Judgment, but rather the phrase *organized armed group*, the Appellate Panel holds that, on its p. 52, the Trial Judgment properly quoted the definition of armed conflict, including its determinant linked to the existence of *organized armed groups*, in the manner as it is accepted under customary international law. The fact that, further in its reasoning, the Trial Judgment omitted the determinant '*organized*' from its different parts, while indicating instead only the phrase '*armed group*,' creates no ambiguities, as the appeal attempted to present. On

the contrary, this Panel holds that this was rather done in order to avoid any unnecessary text repetitions.³⁴

97. The Appellate Panel also observes that the teleological approach in international humanitarian law exists in its intrinsic purpose by which the widest possible protection will be offered to persons taking no active part in the hostilities.³⁵ Given the available evidence, exactly such a situation exists in the present case, considering that the Trial Judgment found beyond a doubt that the victims of the armed attack in Sijekovac were civilians from the Serb families Zečević, Milošević, Radanović, Trifunović, Sedlić and Kušljic (para. 201).

1. The accused's alibi

98. The Appellate Panel examined the justifiability of the appellate grievances essentially reduced to the following: (1) the accused Zemir Kovačević did not take part in the killings, inhumane treatment and pillaging of the Serb civilians' property as described in Sections 1 and 2 of the enactment clause of the convicting part of the Judgment; (2) in relation to the chronology of the events that took place on 26 March 1992, the Trial Judgment finds that the event was simultaneously taking place in the Traktorska Street and in front of the Zdravko Trifunović's house, and (3) that the Findings of the forensic medicine expert, Dr. Željko Karan, contradict both the witnesses' evidence and the documentation objectively relevant to the cause of death of the injured party Jovan Zečević.

99. The presented appellate hypotheses are starting from the general evaluation that the prosecution witnesses' evidence was based on the leading testimonies (particularly that of Branislav Zečević); that they are mutually contradictory; that their testimonies can be considered as unreliable despite being credited by the Trial Panel (thus, e.g., in her previous statements, witness Ljubica Sedlić did not mention the name of Zemir Kovačević, but she mentioned it at the man trial, and the Trial Panel accepted that part of such a testimony).

100. Contrary to the appellate grievances regarding the accused Zemir Kovačević's presence and identity, this Panel also accepts as credible and consistent in their substantial parts the evidence of witnesses M, Željko Milošević, Branislav Zečević and Zdravko Trifunović, who individually gave account of the critical event as they had seen it in their own manner. These witnesses stated that during the criminal acts committed on the referenced day in the family Zečević's or Trifunović's courtyard, and subsequently in

³⁴ In general, this is also done by the mere wording of the definition of armed conflict: *An armed conflict shall exist whenever there is a resort to armed force between states, or protracted armed violence between the state authorities and organized armed groups or between such groups within a State.* (emphasis added by the AP).

³⁵ Gideon Boas, James L. Bischoff, Natalie L. Reid, *Forms of Responsibility in International Criminal Law, International Criminal Law Practitioner Series*, Volume I, Cambridge University Press, 2007, p. 228.

the Niko Tomas's house, they saw the accused wearing a camouflage uniform, a black cap and a white belt, armed with an automatic rifle and a pistol.

101. The appellate grievance that the Findings of forensic expert Dr. Željko Karan contradict both the documentary evidence and the witnesses' testimonies related to the cause of death of the injured party Jovan Zečević, is also ill-founded. The forensic expert resolutely stated that the injured party had had multiple head bones fractures, most likely caused by projectile activity resulting in the brain destruction, and consequently in this person's death. Having concluded that the individual results of Dr. Karan's forensic findings were credible and correct, namely that Jovan Zečević and Petar Zečević were killed by fire arms, and that the cause of Jovan Zečević's death were the head injuries, the Trial Panel correlated this piece of evidence of objective relevance with the corroborating evidence of witnesses Milja Zečević and Saša Milošević, as the eye-witnesses to the event who consistently stated that the injured party Jovan Zečević had been shot in his head on the critical occasion.³⁶

102. The defense's appellate attempts to undermine the foregoing Trial Panel's findings of facts by referring to the witness Milja Zečević's evidence and indicating that it does not satisfy the standard of proof beyond a reasonable doubt due to the contradictions in the statements she gave during the investigation and at the main trial, which render her evidence unreliable, lack the required probative strength. The Appellate Panel holds that certain inconsistencies in this witness's statements concerning the means by which Petar Zečević was killed (either a pistol or a rifle) are not crucial. In the statements given in the CJB Dobož on 10 November 2006 and 7 March 2011, the witness indeed stated that Petar had been killed from a pistol; in the statement given in the Prosecutor's Office on 15 December 2011, the witness stated that Petar had been killed from a rifle, while at the main trial, she stated that he was killed from a fire weapon. All the foregoing did not affect the credibility of her testimony, or the fact that this witness indeed eye-witnessed Petar Zečević's murder, which is also upheld by this Panel.

103. In considering the referenced appellate grievance, the Appellate Panel was mindful of several issues. First, the Trial Judgment, whose accuracy with regard to the established facts is also contested by the appeal, found in its para. 241 that while the criminal acts were taking place in the courtyard of the family Zečević or Trifunović, and subsequently in the Niko Tomas's house, as witnesses M, Željko Milošević, Branislav Zečević and Zdravko Trifunović testified, the accused was seen wearing a camouflage uniform, black cap, a white belt and being armed with an *automatic rifle and a pistol*.

104. The fact related to the accused's side arms, categorized as hand-held fire arms, does not bring into question the credibility of the witness Milja Zečević's evidence. Considering the referenced witnesses' consistent statements that the accused Zemir Kovačević had carried both a pistol and an automatic rifle on the critical occasion, and

³⁶ Trial Judgment, para. 251.

considering an extremely stressful situation which it had undoubtedly been for this witness, in addition to the fact that the witness is a woman, and that as a rule women are not accustomed to distinguish the types of arms³⁷, it is quite normal that she gave different answers concerning this fact, depending on the focus of her attention at the given moment. Ultimately, the appellate grievances do not bring into question the essential fact that the victims were killed by fire arms, as properly found in the Trial Judgment.

105. Contrary to the appellate indications that the witness Milja Zečević's statements were contradicting, the Appellate Panel accepts as correct the Trial Panel's findings that the evidence of this witness, as a direct eye-witness to the event, satisfies the standard of proof beyond a reasonable doubt in relation to the facts related to her testimony. This witness resolutely stated at the main trial that she had not only heard the accused being called by his name, but also that she had personally seen him, stating with certainty that it was exactly him.³⁸ In responding to the prosecutor's question as to how she identified the accused, this witness stated: "*Easily. Because we are neighbors. Someone called him Zemir, and I watched him... killing, in my arms, yes. I did. That's that. I do not fear the truth.*" This witness's testimony is further supplemented with Saša Milošević's statement that the accused had addressed the injured party Jovan Zečević with the following words: "What's up, you old rabbit?" and thereupon killed him.

106. Along this line, the Appellate Panel also observes that the appeal indicated no reason whatsoever for which witness Milja would falsely incriminate this accused, that is, for which her testimony would be subjective. This is so particularly because this witness explicitly indicates that the accused Zemir Kovačević did not kill her other two sons – Milan Zečević and Vaso Zečević.³⁹

107. That the accused Zemir Kovačević was indeed present at the time and the place as described in Section 1 of the contested Judgment enactment clause confirm the consistent testimonies of witnesses Milja Zečević, witness M, Ljubica Sedlić, Zdravko Trifunović, Marica Radanović, Jelica Zečević, and witness Y. The Trial Judgment provided convincing

³⁷ At the hearing held on 22 August 2012, the witness stated: "Well, they had rifles, a pistol, they had all sorts of things, as far as I could..., as they say, at that moment."

³⁸ During cross-examination, the witness stated the following: "*He is ill. Mother, don't let him take me. I don't give him in! Zemir grabbed him from my hand. He killed him. How he killed him, and with what... anyway with some weapon, but what kind of weapon it was, I do not know that...*"

³⁹ **Prosecutor:** Did you, did you know where your other sons were. You gave the explanation about Branislav. Where Milan and Vaso were?

Witness: Yes.

Prosecutor: Where were they? What happened to them?

Witness: They were in the courtyard, both killed. I do not know who killed them. I said that I do not know that. That is, I cannot do harm to anyone.

...

Prosecutor: Do you know who hit Dragan?

Witness: I don't. I do not know that.

Prosecutor: OK. Have you subsequently learned how Luka and his sons got killed?

Witness: I did not.

Prosecutor: You neither saw nor heard anything at the time.

Witness: No. No. No. No.

explanations of the reasons for which it credited these witnesses. As the eye-witnesses to the critical event, these witnesses gave evidence which is categorized as direct evidence. Not only that these witnesses' evidence is consistent with regard to the essential facts and the factual circumstances under which the event, which is the subject of charges under Count 1, took place, but it is also convincing in its character, raises no doubts and contains no contradictions on which the appeal unjustifiably insisted.

108. Specifically, it ensues from the eye-witnesses' consistent evidence that, in the afternoon hours of 26 March 1992, Milja Zečević, her husband Jovan Zečević and sons Petar, Milan and Vaso Zečević, her daughter-in-law Jelica Zečević, Neđeljka Vasić, Vid Radanović, Marica Radanović, Mirko Radanović, witness Y, Mladenka Milošević, Luka Milošević, children Marinko Opačić, Dragan Milošević, Saša Milošević, witness "M" and Ljubica Zečević took shelter in the basement of Milan Zečević's house.⁴⁰

109. In view of the foregoing, the Appellate Panel considers as ill-founded the appellate grievances that these witnesses' evidence points to a different conclusion, namely that the women and children did not even see the killings because they had been in the basement. Having analyzed the part of witness Trifunović's evidence concerning his abduction from the house, the Panel concluded that this witness, along with his wife and brothers, had been brought to Niko Tomas's house, and subsequently to the Center in Sijekovac before the survived members of the families Zečević, Milošević, Radanović and others arrived there, namely that Zdravko Trifunović was not present either at Niko Tomas's house or the local community office at the same time with the group of citizens from the Traktorska Street, including Milja Zečević and others, but that he had undoubtedly arrived there before them. The foregoing is also confirmed by the part of his evidence where he stated that no sooner than when he had been at the Fahrudin Dugalić's house did Mladenka with her son Saša, Branislav's daughter-in-law Jelica, Vera Trifunović with her daughters Sandra and Sofija, and grandmother Petra Miličić arrive there. The foregoing is also confirmed by Jelica Zečević's evidence⁴¹. Correlation between the witness Trifunović's evidence with that of Branislav Zečević consistently shows that Zdravko Trifunović and Branislav Zečević were at the same time present at the Dom (Culture Center),⁴² and thereafter went together to the Fahrudin Dugalić's house.

110. This Panel cannot draw any different conclusion based on the appeal's grievances that the Trial Panel did not take into account the fact that a different chronology of the events in the Traktorska Street ensues from witness Branislav Zečević's evidence, and that the accused could not have in any way participated in the referenced events at that moment. The appeal tried to prove, on the basis of the facts that on the critical day the

⁴⁰ Trial Judgment, paras. 87 and 205.

⁴¹ Witness Jelica Zečević confirmed in her evidence that she had seen Zdravko Trifunović and his relative Branislav at Fahrudin Dugalić's house.

⁴² Witness Zdravko Trifunović stated that, upon arriving with his family in front of the local community office, he saw Branislav Zečević's car, and thereupon Branislav himself, who told him that he had transported the wounded Dino

referenced witness saw the accused Zemir Kovačević for the first at the plateau in front of the local community office at around 18:00 hrs, after his return from Bosanski Brod while the witnesses testified that the shooting had started at around 16:00-16:30 hrs and that the killings followed very soon thereafter, that the critical event had already ended at the moment when witness Branislav Zečević saw the accused in front of the Dom building. According to the defense, the moment when the witness sees the accused tying a white belt and cursing while going away⁴³, and considering that the white belt is, in fact, the subject of the accused's identification, indicates that some other person with a white belt was the perpetrator of the killings at issue.

111. Contrary to the foregoing, the Appellate Panel has no dilemmas about the Trial Panel's finding that witness Branislav Zečević saw the exact moment when the accused had gone to the Traktorska Street, whereupon he killed Petar and Jovan Zečević. Two facts are important along this line: (1) the time determinant, and (2) the identification of the accused as the perpetrator. Specifically, the referenced witness specifically stated that it had been already dark when he returned from Bosanski Brod. Even though they could not precisely determine for how long they had been there between the moment when the shooting and the invitation via megaphone started, the moment when armed soldiers-members of the HVO and the HOS started taking them outside and when the killings were committed, the witnesses imprisoned at the basement of the Milan Zečević's house clearly stated that dusk was thickening, or night was falling. Thus, witness Jelica Zečević stated that soldiers were waiting "*...for the night to fall so that they can force us out and kill us*". "*I do not know what the time was. Dusk was thickening, night was falling. Then the order came that we should get outside, with our hands lifted up.*" Witness M stated: "*At that moment, when I got outside, I could see some things quite well because of the burning barns and houses set on fire.*"⁴⁴

112. Therefore, it is quite clearly concluded that the time of commission of the described criminal acts corresponds with witness Branislav Zečević's statement that he saw the accused while dusk was thickening, from which the Trial Judgment correctly found that this is the moment when the accused was going to the Traktorska Street, and that his words "*I am going there to f... their mother!*", exactly indicated the horrible event that followed up. Witness Saša Milošević stated that, as far as he could observe, the shooting had lasted for about 40 minutes, and that Petar and Jovan were killed in the end, no sooner than when the armed soldiers took them away two by two in a column.

113. Even if the defense's theory was accepted (that the killings at issue had been already committed at the moment when Branislav Zečević saw the accused), there is a

Dobojčić from his courtyard, and that on his way back he was not allowed to go home, but rather directed him to the local community office where he waited for further developments.

⁴³ Exhibit T- 6 A photograph depicting Branislav Zečević showing the place where the local community office and the Crisis Staff were seated, as well as the site where he saw the accused Kovačević.

⁴⁴ Witness Saša Milošević also stated: "... With the hands lifted up, so it was dark when we went outside one by one in a column."

quite sufficient number of eye-witnesses who testified that they had indeed identified the accused Zemir Kovačević. While stating that the women and children could not have seen the critical event, the defense disregards the fact that each witness clearly described what he/she had personally seen, that is, each of them experienced their own personal tragedy and saw a memorable segment of the horrible event, which in combination create a unity in terms of the time and the space, as properly presented in the contested Judgment. Specifically, there are no contradictions in the evidence of the witnesses who had seen the killings.

114. Quite logically, witness Milja Zečević did not see the killings of her two other sons because, according to the other witnesses, including witness Saša Milošević, they had been singled out and taken to the other side. This was also confirmed by witness Jelica Zečević, who described the moment when they had killed her husband Milan. She did not see the killings of Petar Zečević and Jovan Zečević, because she had been personally ill-treated by an armed soldier, who subsequently shot her husband dead from a fire weapon in front of her eyes, but just after their killings she learned from her mother-in-law Milja Zečević that it was exactly the accused who killed them. Exactly such statements, which the appeal attempted to use in favor of its own grievances that the witness did not see the accused at the referenced moments, give credibility to her evidence, and confirm the Trial Judgment's findings that each witness individually sees certain segments of the events depending on their own personal tragedy and the place where he/she stood. Witness Saša Milošević described the killings of Vaso Zečević and Mirko Prodanović. This witness stated that they were ultimately ordered to march in a column two by two, and comprehensively described the moment when Zemir Kovačević had first shot Jovo Zečević, and thereupon Petar Zečević, which the contested Judgment correctly rendered as reliable.⁴⁵

115. The Appellate Panel concludes that the witness M's evidence was used as corroborative evidence confirming the other witnesses' statements, wherefore there are no

⁴⁵ **Witness:** „... We marched in the column two by two. We were ordered to go towards the main road. At that moment, Zemir Kovačević approached us. There were I, (my) mother, Milja Zečević and her husband Jovo. Zemir approaches Jovo and yells at him, using the words „What's up, you old rabbit, speed up“. He (Jovo) responded something like don't, and Zemir pulled out a pistol and shot him in his head.

Prosecutor: Tell me, did you see Petar Zečević at the time?

Witness: Yes. I also saw Petar Zečević. He marched in front of us. All that was taking place 2-3 meters away.

Prosecutor: Tell me, what happened with him?

Witness: Zemir approaches him and also hits him with a rifle but, somewhere in the area of his head, and shoulders, and fires at him. I cannot state precisely if he fired from a pistol or a rifle, since he had had both the pistol and the rifle.

Prosecutor: Can you describe his uniform?

Witness: Camouflage uniform, black beret, white belt. A white belt.

Prosecutor: And tell me, did he have any weapons, you stated?

Witness: An automatic rifle and a pistol.

Prosecutor: Can you remember where his pistol was?

Witness: The pistol was at his belt, namely there was a holster on the belt.

Prosecutor: Tell me, at that moment, what further happens with Jovo? You stated that he had fired at him. Did you see him firing at anyone else?

Witness: I did not see. So, first at Jovo, then at Petar. And we were passing by, that is, we had already started off upwards...

doubts into the authenticity of his testimony in relation to this segment. Witness M also stated that unidentified soldiers-members of the HOS had beaten men, and thereupon killed Milan and Vaso. The witness described the precise place where he had seen the Petar Zečević's dead body and the other body he subsequently learned was Jovan Zečević's.

116. No other conclusion can be drawn from the appeal's references to the witness A-1's statement that it was no sooner than in the Niko Tomas's courtyard that he saw Zemir Kovačević, and that, having heard what witness A-1 told him, which he had learned from Maric, Zemir stated: "*Fools, what they had done*", which would imply that no sooner than that moment did the accused learn what had happened in the Traktorska Street. However, none of the examined witnesses confirmed this part of his evidence, not even witness M, who stated that, even though he had known the accused well from before, he did not remember seeing him at any moment in the courtyard of Niko Tomas's house. Therefore, this Panel also upholds the Trial Panel's position that the referenced evidence was fabricated in order to help the accused. Witness Y indeed stated that he saw the accused after they had been brought to Niko Tomas's house, as the appeal highlighted, but that he saw him hitting Vide Radanović with a rifle butt, that Radanović asked him "*Why Zemir?*", and that the accused responded that he (Radanović) should have also stayed down there with his son, implying the slain Mirko Radanović. However, the witness did not specify the place where this incident had occurred, in the courtyard or in the house, because in this overall chaos, in addition to enormous fear for his own life, he did not notice certain details. Thus, this witness also confirmed that the accused was very much aware of what had previously happened, and that he did not learn that from the witness A-1.

117. The Appellate Panel also holds that the fact that witnesses Milja Zečević, Jelica Zečević, M and A-1 did not see the accused on the way towards Niko Tomas's house is not a decisive fact in building his alibi, considering that abundant evidence shows that, on the critical occasion, Zemir Kovačević was indeed present in the courtyard of the Zečević's house and committed the described criminal acts. Ultimately, Niko Tomas's house was located only about 100-150 m away from the family Zečević's courtyard.

2. Inhuman acts

118. The Trial Panel properly credited the evidence of witness M and Zdravko Trifunović, who testified about the inhuman acts to which the accused had subjected them. Therefore, the appellate grievances, that their evidence on whose basis the Trial Panel found proved the inhuman treatment is fabricated and untrue, are unacceptable because this Panel also concludes that witness M consistently described what he had personally heard, seen and survived on the referenced day, and thereby confirmed the statement he gave during the investigation.⁴⁶ At the main trial, this witness almost identically repeated

⁴⁶ Defense's Exhibit O-1.

what he had stated during the investigation, that is, he gave credible evidence about what he had survived. The Appellate Panel has no dilemmas that it was the accused who had left witness M to sit at Niko Tomas's house and wait for him "in order to have a chat with him", and thereupon pointed his gun in the witness's kidney, which in the given circumstances caused fear and mental pain in the witness after the committed killings. In this regard, the appellate grievances that the accused's escort of the injured party to a toilette at the Culture Center and asking medicals to treat his ear indicate that the accused helped the injured party to receive medical treatment, does not have the requisite logical and probative basis. Specifically, taking into account all the accused's activities and conduct on the referenced day, it is quite clear that the incriminating acts committed against the witness M indeed fit into his pattern of conduct, and undoubtedly constitute inhuman acts.

119. Nothing in the appeal brought into question the evidence of the witness-injured party Zdravko Trifunović either. This witness clearly and unequivocally testified that, on the critical day, he heard Nijaz Čaušević inviting them to surrender and telling them that no harm would be done to them, which he, his family and neighbors indeed did and went outside into the courtyard, where the witness recognized Zemir Kovačević, Nijaz Čaušević, Suljo Kovačević and Meša Bajrović. They all wore uniforms. Zemir approached him and pointed an automatic rifle at the back of his head⁴⁷. The Trial Judgment properly found that the essential parts of witness Trifunović's evidence were confirmed by witness Halid Sejdić⁴⁸. This Panel also holds that the appeals' efforts to discredit this witness by alleging that the witness stated that Zemir Kovačević had attended a meeting on 24 March 1992, which contradicts the witness Nenad Milošević's statement that the accused's brother Selver Kovačević had been present on the referenced occasion, lack the requisite quality to be able to bring into question the completely clear and convincing testimony of witness Zdravko Trifunović. This witness's evidence regarding the (1) identification of or the accused's physical appearance on the referenced day, (2) the shooting, the arrival and presence of armed members of the Croatian military formations, some of whom were masked, and (3) the presence at the Culture Center (Dom), going to and staying at the Fahrudin Dugalić's house, was confirmed, *inter alia*, by witnesses M, Saša Milošević, Branislav Zečević, Željko Milošević, Jelica Zečević and others.

120. Such Appellate Panel's conclusion also cannot be affected by the detail overvalued by the appeal, namely that witness Trifunović fabricated the fact that, already at Fahrudin Dugalić's house, Branislav Zečević learned from his mother Milja that Zemir had killed his father, which is a result of his exceptional motivation to incriminate the accused at any

⁴⁷ At the main trial, the witness clearly described the event at issue: „Zemir wore a camouflage uniform, and had an automatic rifle. He approached me directly at the gate, and put his rifle on the back of my head, and in this manner took me to the main (road), not to the main (road), but to the railway tracks, on the road towards Sijekovac. So, we went out one by one, and they followed us. I was the first in the line. I was marching first with my hands lifted up like this, and Zemir held that rifle pointed at me. We were followed by my wife, and my brothers, one after another. Since I could not see them, I do not know who stayed in the courtyard and who went on with us.“

⁴⁸ Trial Judgment, para 210.

costs. Along this line, the Trial Panel provided a clear and completely acceptable response that witnesses Jelica Zečević, Branislav Zečević and Zdravko Trifunović identically confirmed the manner in which Branislav learned that his brothers and his father had been killed, namely he learned this exactly from his mother. The Trial Panel properly found that the fact that witness Branislav Zečević stated that he had learned the foregoing no sooner than at the village of Gornji Smrtići, is essentially irrelevant. What is relevant in the Appellate Panel's view is that it is correct that witness Zečević learned the referenced facts from his mother, wherefore quite logically witness Trifunović's perception is that all this happened upon her arrival at the family Dugalić's house, because it was just after the killings had been committed.

121. Therefore, the Appellate Panel upholds the contested Judgment's factual findings that, upon leaving the house, witness Zdravko Trifunović realized that the shooting was also coming from the opposite side, and since Kovačević stood behind him and his wife and brothers with his pistol pointed at their backs, this meant that they formed a live shield for the accused Kovačević and the other present persons. The witness certainly felt fear for his own life and the lives of his family members who were with him. Thus, the accused's acts undoubtedly satisfied all the elements of the criminal acts constituting inhuman acts under Article 142(1) of the CC SFRY.

122. The Trial Panel also correctly found that the described acts apparent from forcing the civilians – women, children, the elderly and sick people out of the basement, and forcing them under threat of arms to lie down face to the ground, while kicking and punching them all over their bodies, and threatening them that they would be killed, that women would be raped, as well as their taking to Niko Tomas's house, and intimidating them at the Culture Center, constitute inhumane acts against civilians during an armed attack, pursuant to the recognized case law, in which the accused Zemir Kovačević also personally took part.

123. In addition, the same conclusion applies to the accused's *mens rea*, namely that it was proved beyond a doubt that the accused had intent to inhumanely treat the civilians targeted under the armed attack in the manner as described in the Trial Judgment enactment clause, as well as that, in acting along with unidentified members of armed groups, the accused took part in the killings of the mentioned civilians, including the minor Dragan Milošević, and that the accused personally killed Petar Zečević and Jovan Zečević from a fire weapon.

**D. SUB-GROUND TWO: SECTION 2 OF THE ENACTMENT CLAUSE OF THE JUDGMENT CONVICTING
PART – THE ACCUSED IS GUILTY OF PILLAGING SERB PROPERTY**

124. The defense's appeal also contested the Trial Judgment findings that the accused is guilty of the acts of the property pillaging described in Section 1 of the Judgment

enactment clause. Along this line, the appeal stated that the Trial Panel did not take into account that Teodor Barnjak did not know the person named Zemir Kovačević, nor did he specify the person who told him that the accused had been one of the participants, which was, contrary to the contested Judgment findings, insufficient for his identification. Witness Kosta Pivaš confirmed that he did not know Zemir Kovačević. According to the defense, the correlation of the foregoing with the fact that the Panel did not properly evaluate Exhibit T-116 and Exhibit T-117, and that the deceased Petar Arivuković's evidence was not corroborated with any other pieces of evidence, clearly points to the conclusion that, on the basis of the referenced evidence, the Trial Panel should not have convicted the accused Zemir Kovačević beyond a reasonable doubt under the referenced Count of the Indictment.

125. The Appellate Panel holds that the advanced grievances are ill-founded.

126. In concretizing the referenced criminal act, the Trial Panel primarily and correctly referred to the ICTY's case law, which defines the criminal offense of pillaging as "intentional and unlawful seizure of the property", which, pursuant to Article 3(e) of the Statute, can be committed against private or public property. This Panel also holds that this is a general term encompassing not only a large-scale seizure of property, but also appropriations committed by individual soldiers in order to obtain their own personal property gain; therefore, pillaging implies all forms of unlawful appropriation of property in an armed conflict which, pursuant to international law, results in individual criminal responsibility, including the acts traditionally described as plunder (Trial Judgment, paras. 311 and 312).

127. What is indisputable is that, following the criminal event committed in Sijekovac on 26 March 1992, Serb houses were searched and pillaged in the manner that the units (intervention platoon) had entered the village of Donja Močila, and that members of these units searched Serb houses for weapons. Once the search was completed, they kept returning to these houses on a daily basis and pillaging them, taking away all they wanted. In addition, all Serb houses had to be unlocked, that is, available for plunder, as clearly and resolutely described by witnesses Stevo Bačić and Petar Arivuković for the examination record.

128. The Appellate Panel holds that, contrary to the appeal's unjustified indications, there are no irregularities with regard to the evaluation of evidence on which the contested Judgment based its findings. Specifically, the appeal unsuccessfully attempts, by isolated analyzing and discrediting each piece of evidence individually, to confirm that the accused was not identified beyond a reasonable doubt, while intentionally omitting to correlate all relevant pieces of evidence, as was correctly done in the contested Judgment.

129. Witness Petar Arivuković testified that, among members of the intervention platoon, he knew Zemir Kovačević, Jasmin Kalenderović, Ejub Dugalić and his son Amir. This witness's statement cannot be contested with the appellate grievances that witnesses Pivaš and Barnjak were originally also from the place of Donje Močile, but stated they had

not known the accused, which would imply the conclusion that witness Arivuković could not have known the accused either. Such defense's assertion is quite illogical, particularly considering that witness Teodor Barnjak resolutely testified that, in late April 1992, Zemir Kovačević, Nijaz Čaušević and Jasmin Kalenderović had arrived in his courtyard. The witness clearly stated that the search was carried out by Zemir Kovačević with a group of uniformed and armed persons, mostly Muslims from Sijekovac. Even if the witness had not identified the accused, there is no logic pursuant to which the witness should have automatically known the accused Kovačević only due to the fact that he had lived in Močile, as incorrectly emphasized by the appeal.

130. The witness Barnjak's authenticity and credibility are also confirmed by the documentary evidence on which the defense insisted, namely Exhibits T-116 and T-117. The Letter from the District Attorney's Office in Slavonski Brod shows that Zemir Kovačević underwent a surgery on 26 April 1992, and was kept in the hospital for further treatment during 27 and 28 April 1992, namely that he was kept at the Department for Anesthetics, Reanimation and Intensive Treatment from 27 to 28 April 1992, as also confirmed by the contents of Exhibit T-117.⁴⁹ The accused was wounded in his neck and the right arm, or the elbow, as a result of the sustained injuries. Considering witness Teodor Barnjak's statement, that Nijaz and Zemir had been wounded during the search of the witness's house, and that they had bandages on their arms, this Panel concluded beyond a reasonable doubt that the accused's injuries do not exclude his presence at the critical time, since there is no evidence proving that, in the war circumstances, the accused had continually stayed at the hospital until his final discharge from the hospital in June, as unjustifiably stressed in the appeal.

131. The Trial Judgment provided completely convicting explanations of the reasons for which it credited the referenced witnesses. The testimonies which they gave as both the eye-witnesses and the injured parties on the critical day qualify as direct evidence. Not only that their testimonies are mutually consistent with regard to the essential facts and the factual circumstances of the occurrence of the event described under Section 2 of the Judgment enactment, but they are also convincing, raise no doubts and cause no contradictions, as the appeal unjustifiably insisted. Their testimonies in whole form a logical unity and leave no space for any conclusion other than it was exactly the accused who committed the incriminations at issue. The Appellate Panel therefore concludes that the contested Judgment's finding presented in its para. 320 is completely justified and proper, and reads as follows:

"Since the evidence of witnesses Teodor Barnjak and Petar Arivuković also shows that, on the critical occasion, various items were seized from them (vehicle, jewelry, valuable items), the Panel finds that Zemir Kovačević, along with members of the Intervention Platoon of the 101st HVO Brigade whom he knew, who had taken part in the pillaging, obtained enormous property gain, and

⁴⁹ Letter Rogatory for mutual legal assistance with the attached Disease history concerning Zemir Kovačević – Exhibit T-117, and Exhibit T-116.

that such accused' acts satisfied the underlying elements of the criminal offense of pillaging in violation of Article 142 of the CC SFRY, and in violation of the rules of international humanitarian law under which pillaging is prohibited.”

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

A. APPLICABLE LAW

1) Appellate grievance that the criminal code was violated due to non-existence of the requirements to apply the rules of international humanitarian law

132. The defense's appellate grievance, that the Trial Panel applied to the criminal offense which is the subject of charges the law which should not have been applied, is based on the absence of requirements for the blanket regulations application, concretely the rules of international humanitarian law, Articles 3 and 33 of the Geneva Convention relative to the Protection of Civilians in Time of War of 12 August 1949, whose violations constitute the underlying element of the criminal offense of War Crimes against the Civilian Population under Article 142(1) of the CC SFRY. The advanced referenced appellate grievance comprises two prongs: (i) the absence of organized armed groups, and (ii) the absence of armed conflict between such groups.

133. The appeal indicates that, in relation to Section 1 of the Judgment convicting part, the Trial Panel found that Zemir Kovačević committed the criminal offenses, referred to in this Section, as a member of the armed group rather than as a member of the Intervention Platoon of the 1st Bosanski Brod Brigade. In addition, the Trial Panel found that armed groups of Serbs, Croats and Muslims were not established and named as formations, that is, they did not constitute any organized armed group, which is one of the requirements to characterize conflicts among such groups as armed conflicts. The defense further submitted that the notion *armed groups* is a notion non-recognized in international humanitarian law since it lacks the determinant *organized*.

134. The defense's advanced further grievance referring to Article 1(2) of Additional Protocol II, indicating that this Protocol shall not apply to the situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, those not being armed conflicts. In elaborating on this theory, the appeal mostly finds the basis related to the nature of the described conflict in the results of the forensic findings the defense's forensic expert, Dr. Mesud Šadinlija (Exhibit O-7, Findings and Opinion of Military Forensic Expert in the criminal case No. S 1 1 K 009588 12 Kri, November 2013). Contrary to the Trial Judgment, the appeal concluded that there was no armed conflict in the Municipality of Bosanski Brod during March 1992, but rather just sporadic incidents characterized as internal disturbances due to the political situation in BiH during March 1992 (the defense's appeal, p. 28.). In developing this appellate

position, the defense finds further arguments in the facts that the Trial Panel omitted from the Judgment enactment clause the phrase '*during the armed conflict in BiH*' which was indicated in the Indictment, and found that the existence of armed conflict in the other BiH municipalities during March was not proved, which should be correlated with the position of the BiH Presidency that the events in Bosanski Brod during March should be viewed in the context of political disturbances.

Conclusions of the Appellate Panel

135. Having reviewed the advanced grievances, the Appellate Panel noted that the appeal essentially repeated the similar arguments which were unsuccessfully advanced by the defense teams of the accused charged with the commission of crimes against international law in the proceedings before The Hague Tribunal.⁵⁰(....)

136. In elaborating on its appellate position while contesting Section 1 of the contested Judgment enactment clause (The attack on civilians and the killings), on page 30 of the appeal, the defense rationalizes the past events and attributes to them unilateral sense, colored with political connotations, indicating that it was the least painful to convict a Bosniak considering that the proving of realistic facts points to the issue of aggression of the Republic of Croatia on BiH; while the other party is satisfied with the fact that the first victims in BiH were Serbs; which is being used as the basis for the response to the question: "Who started the war?", and for the theory of equalization of the crimes committed in the BiH territory. In this regard, the Appellate Panel recalls one of the fundamental principles of international criminal law, that is, the principle of *elimination of political colorization of the case*. The essence of this principle, by which this Panel fully abides, is that, in dealing with the criminal cases concerning violations of international law, a distance should be made from any political considerations originating from the current policy, which are often times emotional and capricious.⁵¹

137. In this regard, also unjustified are the contentions that international humanitarian law is not applicable to the events and the criminal acts committed in March 1992 in Bosanski Brod, and that, accordingly, the Trial Panel misapplied substantial law in Section 1 of the enactment clause of the Judgment convicting part, and thereby also violated the criminal code.⁵²

138. Any opposite conclusion, namely that no armed conflict existed at the time and in the place described in the enactment close of the Judgment convicting part, which is the

⁵⁰ Thus, e.g., in the ICTY's case No. IT-96-23 & IT-96-23/1-A, Prosecutor v. *Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Appeals Chamber Judgment of 12 June 2002, the appellants contention that "the regrettable consequences which may have been borne by non-Serb citizens of the municipality of Foča were not the consequence of an attack directed against the civilian population as such, but rather the unfortunate result of a legitimate military operation. In other words, these were „collateral damages" (para. 73).

⁵¹ See, Prof. Dr. Drago Radulović, *International Criminal Law (Međunarodno krivično pravo, Podgorica, 2000.)*

⁵² Article 298(d) of the CPC BiH: Violations of the Criminal Code shall exist if:

(...) if a law that could not be applied has been applied to the criminal offense that is the subject matter of the charge.

repeated appellate speculation, now being mentioned within the appellate grievance concerning the applicable law, cannot be drawn from its comprehensive analysis of the applicable standards for the existence of an armed conflict from the aspect of: (i) conflict intensity, (ii) the character of its duration, and (iii) organization of the parties to the conflict. Specifically, the appeal unjustifiably offers a negative response to the issue of satisfaction of the referenced standards, and *eo ipso* erroneously concludes that such a situation implies non-applicability of international humanitarian law in the present case.

139. In this regard, the Panel should also refer to the appellate grievance advanced in relation to the circle of identical factual issues concerning the beginning of the armed conflict presented within the essential violations of the criminal procedure provisions (“violation of the objective identity between the judgment and the indictment”). Specifically, the appeal refers to the Trial Panel’s finding that the prosecution did not prove the existence of an armed conflict in BiH, for which reason this temporal fact was omitted from the description of the Judgment enactment clause. The appeal indicated that, having done that, the Trial Panel should have rendered a judgment of acquittal, as it did in *Momčilo Mandić*, because the prosecution did not prove the existence of an armed conflict in BiH, which is the identical situation as in the present case.

140. The Appellate Panel already responded to this appellate grievance in para. 38 herein. The Appellate Panel concluded that the Trial Panel found that neither the 1st Bosanski Brod Brigade nor an intervention platoon existed in March 1992; that Zemir Kovačević was originally a member of an armed group and in such capacity committed the acts referred to in Section 1 of the convicting part of the judgment; and that the referenced group subsequently became the Intervention Platoon of the 1st Bosanski Brod Brigade, and thereupon the 101st Bosanski Brod Brigade of the HVO Bosanski Brod.

141. Having properly examined the factual situation in the field, reviewed the most important military and political events in the Bosanski Brod municipality during March 1992, and analyzed the character of the ongoing armed violence, the Trial Panel correctly found that all the foregoing constituted an armed conflict between organized Serb and Croat-Muslim groups which also affected the civilian population and their property.

142. The Appellate Panel holds that, considering the factual situation in the Bosanski Brod municipality during the critical period of March and April 1992, there was an armed conflict in this territory which had preceded the official proclamation of the armed conflict in the whole BiH territory. Contrary to the appellate grievances, the foregoing implies the application of the provisions of international humanitarian law in this case, which was correctly done by the Trial Panel.

2) Appellate grievance pointing to the criminal code violation because the time the accused spent in pre-trial extradition custody was not credited towards the imposed sentence (Article 298(f) of the CPC BiH)

143. Counsel submitted in the appeal that the Trial Judgment did not credit the time the accused spent in extradition custody, running from 28 December 2010 to 28 October 2011, which is in violation of Article 57 of the CC BiH.

144. The Appellate Panel holds that the foregoing appellate grievance is well-founded. Specifically, the case record shows that, pursuant to an arrest warrant issued by Interpol, the then wanted suspect Zemir Kovačević was arrested on 28 December 2010 in the Kingdom of Sweden and kept in detention until he was extradited to the law enforcement agencies of Bosnia and Herzegovina. Thus, the accused was held in extradition custody until the Court issued its Decision No. S1 1 K 007434 11 Krn of 29 October 2011, when he was ordered in pre-trial custody in this state.

145. In considering the grievance concerning the criminal code violation under Article 298(f) of the CPC BiH, which is related to the issue of correct application of the provisions concerning the issue of custody crediting and sentence serving, and considering the facts established in the case record, the Appellate Panel holds that the Trial Panel erred in crediting to the prison sentence imposed on the accused only the time he spent in custody running from 28 October 2011 onwards, rather than also the time the accused had spent in extradition custody. Therefore, the appellate grievance concerning the violation of the criminal code had to be granted, and the contested Judgment revised in the referenced part after the proper application of the criminal law, by crediting towards the imposed prison sentence also the time the accused spent in the extradition custody in the Kingdom of Sweden, as was done in this Judgment's enactment clause.

VI. GROUND OF APPEAL UNDER ARTICLE 300 OF THE CPC BIH - SENTENCING

A. STANDARDS OF REVIEW

146. Prior to addressing any concrete ground of appeal, the Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

147. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or

that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

148. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

B. THE APPEALS FILED BY THE PROSECUTOR'S OFFICE OF BIH AND THE DEFENSE

149. The prosecution submits that the Trial Panel did not properly evaluate the aggravating circumstances which, despite being proved in the contested judgment reasoning, did not sufficiently affect the length of punishment. In this regard, the prosecution submitted that the punishment imposed on the accused is inadequate considering the judgment's finding that, by the acts taken during the commission of the referenced incriminations, the accused showed ruthlessness in relation to the age, gender and health condition of the injured parties. According to the prosecution, all these circumstances, including the categories of persons against whom the criminal offense was committed, and the fact that while undertaking these acts Zemir Kovačević was aware of all consequences of his acts, should have affected the fashioning of a lengthier punishment.

150. The prosecution also submits that the Trial Panel did not correctly evaluate the circumstances affecting the imposition of a less or more stringent punishment, that the purpose of both general and special deterrence will not be achieved with the imposed sentence, that the absence of the accused's repentance and apology to the victims and his treatment of the closest relatives of the killed victims, his hostility and intolerance towards them, his comments of their statements and even insults to them, should have been considered as aggravating circumstances. The appeal ultimately indicated that the fact that the accused has no prior convictions is inapplicable in relation to the criminal offense of War Crimes against the Civilian Population considering that war crimes are criminal offenses being committed during an armed conflict, and that the perpetrator could not have possibly committed any such offense prior to such conflict. Therefore, such a fact cannot be considered as an extenuating circumstance at all.

151. In this regard, the defense indicated that, in order to avoid repetitions considering Article 38 of the CPC BiH, it completely stood by its arguments provided in relation to incorrectly and incompletely established facts and violations of the criminal code, which also affects the decision on sentence. However, considering the defense's view, that the Trial Panel erroneously evaluated the accused's conduct during the main trial as an aggravating circumstance, counsel considered it important to note that the accused was twice unjustifiably removed from the courtroom, despite the fact that, within the limits of human behavior, he had expressed certain reactions which were irrelevant to affecting the order in the courtroom.

C. CONCLUSIONS OF THE APPELLATE PANEL

152. The Appellate Panel holds that the grievances presented in the two appeals are ill-founded.

153. In considering a decision on sentence within the limits of advanced appellate grievances, the Appellate Panel concluded, within the scope of the circumstances affecting the type and the length of sentence (aggravating and extenuating circumstances), that the Trial Panel had considered and explained the degree of the accused's criminal responsibility being aware of the fact that he acted as both the direct perpetrator and the co-perpetrator in the commission of the criminal offenses described in the enactment clause of the judgment convicting part, as well as of the motive, degree of danger to, or violation of the protected value as apparent from the resulting consequences – the number of victims, the survived physical and mental suffering still enduring by the living families of the crimes' victims, the manner of the crime commission and the circumstances under which it was committed, the accused's personal circumstances (at the time of the crime commission the accused was a young adult), his past life, all pursuant to Article 41 of the CC SFRY.

154. In its judgment, the Trial Panel also particularly addressed the accused's conduct during the proceedings, that is, both his attitude and the hostile behavior towards the prosecution witnesses, some of whom were also direct victims of the committed crimes, or the closest relatives of the killed persons Petar Zečević and Jovan Zečević. The Trial Panel attributed to the foregoing circumstances the relevance of aggravating circumstances, which the prosecution's appeal repeatedly indicated. The referenced appeal indicated that had they been adequately evaluated by the Trial Panel, both the foregoing and the other aggravating circumstances should have been given such a relevance which would result in the imposition of a more stringent sentence than that actually imposed.

155. The prosecution's appellate grievance, that the Trial Panel could not have possibly considered the absence of the accused's prior convictions as an extenuating circumstance considering that the referenced criminal offense could not at all have been committed prior

to that time, is ill-founded because the Trial Panel took into account this extenuating circumstance as a general fact, that is, it did not view it as particular one for the case just assumed here that it was the criminal offense that was repeatedly committed by him. According to the Appellate Panel, the Trial Panel gave a realistic relevance to all the circumstances affecting the length of punishment, wherefore the prosecution's appellate grievance, that the imposed punishment is too low, cannot be accepted. In addition, the referenced appeal did not point to any new facts that would be relevant to the decision on sentence. On the other hand, in considering the defense's appellate grievances, the Appellate Panel concludes that the Trial Panel did not impose too stringent sentence on the accused Zimir Kovačević by sentencing him to 10 (ten) years in prison, which indicates that both these appeals are ill-founded with regard to the imposed sentence.

156. In view of all the foregoing, and considering the legally prescribed limits of punishment for the referenced criminal offense, the purpose of punishment in terms of Article 33 of the CC SFRY, all the circumstances affecting the imposition of a less or more stringent punishment, and particularly the degree of the accused's criminal responsibility, motives for which the act was committed, the degree of danger to, or violation of the protected value, the circumstances under which the act was committed, and the accused's personal circumstances, this Panel holds that the Trial Panel properly imposed on the accused Zimir Kovačević the punishment of 10 (ten) years in prison for the committed criminal offense, as the punishment adequate to all the circumstances and the accused's personality as the perpetrator, and that it will achieve the purpose of punishment, that is, both special and general deterrence.

157. In view of the foregoing, and pursuant to Article 310(1), as read with Article 314(1) of the CPC BiH, it was decided as stated in the Judgment enactment clause.

RECORD-TAKER:
Legal Advisor

Medina Džerahović

PANEL PRESIDENT
J U D G E

Senadin Begtašević

LEGAL REMEDY NOTE: No appeal lies from this Judgment.