Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Docket No. S1 1 K 011128 15 Krž 16

Delivered on: 2 June 2015

Sent out on: 23 July 2015

Before the Court Panel composed of: **Judge Mirko Božović, Presiding**
Judge Mirza Jusufović, Panel member
Judge Redžib Begić, Panel member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v. the accused

Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić

SECOND-INSTANCE JUDGMENT

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

Defense Counsel for the Accused Predrag Milisavljević: Attorney Dragiša Mihajlović
Defense Counsel for the Accused Miloš Pantelić: Attorney Nenad Rubež
Defense Counsel for the Accused Ljubomir Tasić: Attorney Mirsada Beganović-Žutić

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Number: S1 1 K 011128 15 Krž 16
Sarajevo, 2 June 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting as a Panel of the Appellate Division of Section I for War Crimes, comprising Judge Mirko Božović, as the Judge Presiding, and judges Mirza Jusufović and Redžib Begić, as the Panel members, with the participation of Legal Advisor Denis Podžić, as a record taker, in the criminal case versus the accused Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić, charged with the criminal offense of Crimes against Humanity under Article 172(1)h) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 29 of the CC BiH, deciding on the appeal filed by the BiH Prosecutor's Office; the appeal filed by Defense Counsel for the accused Predrag Milisavljević, Attorney Dragiša Mihajlović; and the appeal filed by Defense Counsel for the accused Miloš Pantelić, Attorney Nenad Rubež; all of them from the Judgment delivered by the Court of BiH, No. S1 1 K 011128 12 Krl of 28 October 2014, following a session of the Appellate Panel in terms of Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), in the presence of the Prosecutor of the BiH Prosecutor's Office, Dževad Muratbegović, the accused Predrag Milisavljević and his Defense Counsel, Attorney Dragiša Mihajlović; the accused Miloš Pantelić and his Defense Counsel, Attorney Nenad Rubež; and the accused Ljubomir Tasić and his Defense Counsel, Attorney Mirsada Beganović-Žutić; on 2 June 2015 issued the Judgment as follows.

J U D G M E N T

Refusing, in their entirety, as ill-founded, the appeals filed by the BiH Prosecutor's Office and Defense Counsel for the accused Predrag Milisavljević, from the Judgment delivered by the Court of Bosnia and Herzegovina No. S1 1 K 011128 12 Krl of 28 October 2014, whereas the appeal filed by Defense Counsel for the accused Miloš Pantelić **is hereby partly granted**, so the Judgment of the Court of BiH No. S1 1 K 011128 12 Krl of 28 October 2014 **is hereby modified** in its sentencing decision, so that

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the accused Miloš Pantelić, concerning the criminal offense of Crimes against Humanity under Article 172(1)h) of the CC BiH, as read with Article 29 of the same Code, for which he was found guilty by the Trial Judgment, pursuant to the foregoing statutory provisions and in application of Articles 39, 42 and 48 of the CC BiH, **is now sentenced** to **15 (fifteen) years** of imprisonment, to which, under Article 56(1) of the CC BiH, the time he spent in pre-trial custody, from 22 June 2012 to 31 May 2013, and from 28 October 2014 onwards, shall be credited,

while in the remaining part the Judgment is hereby upheld.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. The Trial Judgment of the Court of BiH, No. S1 1 K 011128 12 Krl of 28 October 2014, found the accused Predrag Milisavljević and Miloš Pantelić guilty of committing, by the acts described under Section 1 of the Operative Part of the Judgment, the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraph a) of the CC BiH, all in conjunction with Article 29 of the CC BiH, for which they were each sentenced to 20 (twenty) years of imprisonment. Pursuant to Article 56 of the CC BiH, the time spent in pre-trial custody was credited towards the sentence, specifically for Predrag Milisavljević the period from 22 June 2012 onwards, and the accused Miloš Pantelić the period from 22 June 2012 to 31 May 2013.

2. Pursuant to Article 284)c) of the CPC BiH, the same Judgment acquitted the accused Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić of the charges that:

- the accused Predrag Milisavljević, by the acts described under Sections 2, 3 and 8 of the Operative Part of the Judgment, committed the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraphs f), g), d) and e) of the CC BiH, in conjunction with Article 29 of the CC BiH, all in conjunction with Article 180(1) of the CC BiH;

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- the accused Miloš Pantelić, by the acts described under Sections 4, 5, 6, 7 and 8 of the Operative Part of the Judgment, committed the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraphs e), f), h), k), d) and e) of the CC BiH, in conjunction with Article 29 of the CC BiH, all in conjunction with Article 180(1) of the CC BiH;

- the accused Ljubomir Tasić, by the acts described under Section 8 of the Operative Part of the Judgment, committed the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraphs d) and e) of the CC BiH, in conjunction with Article 29 of the CC BiH, all in conjunction with Article 180(1) of the CC BiH.

3. Also, the accused Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić are relieved of the obligation to cover the costs of criminal proceedings, specifically the accused Predrag Milisavljević and Miloš Pantelić under Article 188(4) of the CPC BiH, and the accused Ljubomir Tasić under Article 189(1) of the CPC BiH. Pursuant to Article 198(2) of the CPC BiH, the aggrieved parties are advised to pursue their property compensation claims under civil law.

4. Appeals from the Judgment were timely filed by the Prosecutor and Defense Counsel for the accused Predrag Milisavljević, Attorney Dragiša Mihajlović, and Defense Counsel for the accused Miloš Pantelić, Attorney Nenad Rubež.

5. The Prosecutor field his appeal on the grounds of error in fact concerning the acquitting part of the Judgment, specifically in relation to the accused Miloš Pantelić for the actions described under Sections 4, 5, 6, 7 and 8 of the Operative Part of the Judgment, and in relation to the accused Predrag Milisavljević and Ljubomir Tasić for the actions described in Section 8 of the Operative Part of the Judgment. The Prosecutor filed his appeal also because of the decision on criminal sanction in relation to the accused Predrag Milisavljević and Miloš Pantelić, proposing at the end of the appeal that the Appellate Panel grant the appeal, rescind the challenged Judgment in the above specified part and order a retrial, or modify the challenged Judgment in its convicting part by imposing lengthier sentences on the accused Predrag Milisavljević and Miloš Pantelić.

6. Defense Counsel for the accused Predrag Milisavljević, Attorney Dragiša Mihajlović,

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filed his appeal on the grounds of essential violation of criminal procedure provisions, miscarriage of law, error in fact and decision on criminal sanction, as well as property compensation claim, moving the Appellate Panel to grant the appeal and modify the Trial Judgment in its convicting part, and acquit the accused Milisavljević of the charges that he committed the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraph a) of the CC BiH, all in conjunction with Article 29 of the CC BiH, or overturn the Trial Judgment and order a retrial, and issue a decision to terminate custody in relation to the accused Milisavljević.

7. Defense Counsel for the accused Miloš Pantelić, Attorney Nenad Rubež, filed his appeal on the grounds of essential violations of criminal procedure provisions and error in fact, moving the Appellate Panel to overturn the challenged Judgment and hold a retrial, and re-adduce the already adduced evidence by re-hearing witnesses Ljubisav Gladanac, Milovan Simić and Jovan Božić, and ultimately deliver an acquittal.

8. Responses to the Prosecutor's appeal were submitted by defense counsel for the accused Predrag Milisavljević, Miloš Pantelić and Ljubomir Tasić, moving the Appellate Panel to deny the Prosecutor's appeal as ill-founded.

9. Also, the Prosecution submitted a response to the appeals filed by Defense Counsel for the accused Predrag Milisavljević and Nenad Rubež, moving the Appellate Panel to deny them as ill-founded.

10. Pursuant to Article 304 of the CPC BiH, on 2 June 2015 the Appellate Panel held a hearing attended by the Prosecutor, Dževad Muratbegović, the accused Predrag Milisavljević and his Defense Counsel, Attorney Dragiša Mihajlović, the accused Miloš Pantelić and his Defense Counsel, Attorney Nenad Rubež, and the accused Ljubomir Tasić and his defense counsel, Attorney Mirsada Beganović-Žutić.

11. Pursuant to Article 306 of the CPC BiH, the Appellate Panel reviewed the Judgment within the boundaries set by the appeals and reviewed the case records, and ultimately decided as stated in the Operative Part above for the reasons that follow.

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II. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

A. APPEAL BY DEFENSE COUNSEL FOR THE ACCUSED PREDRAG MILISAVLJEVIĆ

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

12. Article 297(1)k) of the CPC BiH stipulates that an essential violation of the provisions of criminal procedure exists if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts.

13. Defense Counsel for the accused Predrag Milisavljević has, in the framework of his Appellate grievance that the Trial Judgment made an essential violation of criminal procedure provisions under Article 297(1)k) of the CPC BiH, stated that the Operative Part of the Judgment, in the section finding the accused guilty, *inter alia* reads as follows: *"during the period from April to late June 1992, within a widespread and systematic attack of the Republika Srpska army and police and paramilitary formations … the accused Milisavljević, first as a member of the SJB Višegrad reserve unit, in a period from 4 April 1992 to 18 May 1992, and then as a member of the Višegrad Brigade, VP 7158, in a period from 18 May 1992 to 25 February 1994 …, committed a persecution of the Bosniak population in the territory of the Višegrad municipality on ethnic and religious grounds by killings… "*, which is, under Section 1 of the Operative Part of the Judgment, followed by a detailed description of the actions he allegedly undertook, on 15 June 1992.

14. Given the time of perpetration of the crime the accused was found guilty of (15 June 1992), Defense Counsel hypothetically asked exactly which actions the accused committed from April to 18 May 1992, as a member of the Višegrad police reserve unit, and when and how, over the mentioned period, he committed the persecution of the Bosniak civilian population in the territory of the Municipality of Višegrad, exactly whom he had killed and what were the widespread and systematic attacks that were launched during that period by the RS army and police, as well as paramilitary formations, arguing

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that due to such a formulation the operative part of the Judgment is incomprehensible and internally contradictory.

15. As regards the mentioned appeals grievance, following the case record review, the Appellate Panel noticed that the indictment/amended indictment was drafted in a manner that the factual substratum first provided an introductory part, which, given the circumstances characterizing the accused's incriminating actions, or their equivalence, and the legal qualification of the offense, pertains to all counts of the indictment, followed by a description of the accused's specific actions broken by particular counts of the indictment. Thus the preamble contains information on the accused's participation in police or military structures throughout the period pertaining to the time of perpetration under each count of the indictment. In that regard, one should note that, besides the action the Judgment found him guilty of, the indictment also charged the accused Milisavljević with three more criminal actions, two of which have the following time of perpetration: *"at the night of 13 May 1992"*, or *"at the night between 13 and 14 May 1992"*, which is when the accused was a member of the reserve unit of the Višegrad Public Security Station. Given the acts he was found guilty of, the time period indicated in the introductory part should have been corrected, yet that had no impact on the validity of the challenged decision which accurately indicated the action at hand, and that the action was committed during the indicated period during which there was an ongoing widespread and systematic attack, in the framework of which the act was committed.

16. The Appellate Panel also notes that the Trial Panel has intervened in the factual substratum, of the preamble, as well as of the counts of the indictment under which the accused was found guilty, having adjusted the factual substratum to the evidentiary proceeding results, or the Trial Panel's findings, and in that context finds that the Defense was right when it argued that one can infer from the Operative Part of the Judgment that the accused Milisavljević committed the acts he was found guilty of also at the time when he was a member of the Višegrad Public Security Station reserve unit, specifically from 4 April 1992 to 18 May 1992.

17. However, although according to the Appellate Panel, in line with the findings of the Trial Panel, it would have been advisable to leave out of the Operative Part the redundant part of the wording: *"first as member of the Višegrad Public Security Station reserve unit during the period from 4 April 1992 to 18 May 1992"*, the Appellate Panel

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holds that the mentioned omission does not make the Operative Part incomprehensible, since Section 1 of the Operative Part of the Judgment accurately states the time of commission of the act the accused was found guilty of – *”on 15 June 1992.”*

18. According to this Panel, the Operative Part of the Judgment would be incomprehensible if the time of commission were not stated at all or were stated in a manner to leave a doubt in a reasonable observer regarding the certainty of the essential element of the offense, in which case there would exist an essential criminal procedure violation. However, since in the given case the time of commission of the offense the accused has been found guilty of was specifically defined, which was not disputed by any of the parties from the factual point of view regarding the events at the *Paklenik* pit, the Appellate Panel, bearing in mind all the above, found this Defense Counsel’s objection to be ill-founded.

19. Defense Counsel claims that it was reliably established during the evidentiary proceedings that the accused Milisavljević was a member of the VP 7158 from 18 May 1992 to 15 July 1995, not 25 February 1994, as erroneously stated by the first-instance court.

20. Although the issue whether the accused stopped being a member of military structures on 15 July 1995 or 25 February 1994 is perhaps not particularly relevant to the case at hand, since it has been established beyond a doubt that the accused Milisavljević was a member of the Višegrad Brigade - VP 7158 at the time of commission of the offense he was found guilty of, the Appellate Panel finds ill-founded Defense Counsel’s argument that the adduced evidence indicates in a reliable manner that the accused Milisavljević was a member VP 7158 until 15 July 1995.

21. It clearly ensues from a piece of documentary evidence adduced by the Defense – a copy of the military booklet issued to the name of Predrag Milisavljević, that the accused was a member of the V.P. (military post) Višegrad from 18 May 1992 to 25 February 1994. It is true that after the mentioned period there is a period from 8 June 1995 to 13 July 1995, but no specific military post where the accused was stationed is indicated in relation to the latter period. Also, according to the military records of the General Administration Department of the Municipality of Višegrad of 5 July 2012, the accused Milisavljević was a member of VP 7158 from 18 May 1992 to 25 February 1994, while

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no military post number was indicated for the other periods of time mentioned in this document.

22. Therefore, the Appellate Panel finds ill-founded Defense Counsel’s argument that during the proceedings it was established beyond a doubt that the accused Milisavljević was engaged at the VP 7158 until 15 July 1995, believing that such an argument may only be assumed, regarding which the Trial Panel drew a proper conclusion as to the date of cessation of his military engagement at the VP 7158, which renders this Defense’s argument ill-founded as well.

23. Defense Counsel further said that the operative part of the convicting part of the Judgment reads as follows: *”… where able-bodied Bosniak civilians …”*, objecting that the term Bosniak did not exist in 1992. In that regard, Defense Counsel said he did not dispute that Bosniak is a term that, *inter alia*, embodies a unity of religion and faith, but the grounds of discrimination at the time of commission against a group of people cannot be defined as a religious ground, which would include an allegation that on that occasion the victims were Bosniaks, since the very notion of Bosniak did not exist at the time covered by the indictment.

24. It is true, as Defense argues, that the term Bosniaks was not generally accepted at the time of commission of the criminal offense; however in this specific case the Appellate Panel, equally as the Trial Panel, allows the terminology used in the indictment, and the challenged Judgment. The term Bosniak is a historical, ethnic and culturological notion that, *inter alia*, includes a unity of faith/religion, so this Panel allows that the ground of discrimination against a group of Bosniaks in this case may be defined as a religious ground. Ethnic or national and religious grounds are closely connected and embodied within the term of Bosniak.

25. Bearing in mind the foregoing reasoning, the Appellate Panel upholds the existence of discrimination on ethnic and religious grounds in this case, and accordingly finds Defense Counsel’s objection in that regard to be ill-founded.

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

26. *Article 297(1)i) of the CPC BiH stipulates that essential violation of criminal procedure provisions exists if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code.*

27. Defense Counsel said within this appeals grievance that the court should not have based its decision on the evidence adduced by the court[1], because witness Ferid Spahić's statements of 5 December 1992 and 4 November 1992 were not read out at the hearing, nor did the witness comment on the circumstances mentioned in those statements, nor did the Defense have any opportunity to cross-examine the witness with regard to the substance of his statements.

28. The Appellate Panel finds ill-founded those defense arguments too. Witness Ferid Spahić's statements of 5 December 1992 and 4 November 1992 were first mentioned by the Defense during the cross examination of witness Ferid Spahić regarding his giving of statements related to the event in question, of which the accused Milisavljević was found guilty. Bearing in mind that the Defense did not have original copies of those statements, the court obtained them *ex officio*, while witness Spahić, having been summoned by the court, confirmed at the hearing that it was his signature at the bottom of each page of those statements.

29. Since the witness confirmed the authenticity of the statements, the Appellate Panel, just like the Trial Panel, finds there was no need to read them aloud, so the objection raised by Defense Counsel for the principal accused that the Defense was denied the opportunity to cross examine the witness on the content of those statements is completely ill-founded.

30. According to the transcript of the hearing held on 13 May 2014, having adduced its own evidence the Trial Panel provided the defense teams with the opportunity to add or

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[1] Record of examination for witness Ferid Spahić, 5 December 1992 (S-1), Witness Ferid Spahić's statement, handwriten, of 4 November 1992 (S-2), Official Note on Photo Face Recognition No. 2586/02 of 31 October 2002 (S-3), and Witness Ferid Spahić's statement No. 01/98 of 5 January 1998, taken by FPN student Amir Halilović (S-4).

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supplement the adduced evidence, if necessary, re-summon witness Spahić and examine him about possible discrepancies they noticed in relation to the statements heard by the court. However, at the very next hearing, held on 27 May 2014, the Trial Panel noted that the court, with regard to additional evidence, only received a motion from the Defense for the third-accused person, while defense teams for the principal and second accused did not submit any new evidence proposals, after which the Panel properly concluded that defense teams for the principal and second accused did not have additional evidentiary proposals.

31. Bearing in mind all the aforementioned, the objection raised by Defense Counsel for the principal accused that his defense team was denied the right to cross-examine witness Spahić with regard to the contents of the mentioned statements, was found to be ill-founded.

32. Also, in the opinion of the Appellate Panel, the Trial Panel gave a proper explanation when it comes to the relevance of the evidence adduced by the court. In that regard, the Defense argued that no court decision can be based on any statement that was not taken in line with the current rules.

33. The fact is that the evidence adduced by the court, above all the mentioned statements of witness Spahić (S-1 i S-2), cannot be considered statements given during investigation in terms of Article 273(1) of the CPC BiH, since at the time of giving those statements the witness enjoyed the status of a common citizen, which is to say that prior to giving the statements he had not been properly warned and advised. However, bearing in mind that the witness confirmed the authenticity of those statements, including that it was his signature at the bottom of all pages, by which he also confirmed the authenticity of those statements of his, according to the Appellate Panel there was no obstacle for the Trial Panel to take them into consideration, naturally if it deemed them relevant to the case at hand. It should be borne in mind, as already noted, that during the proceedings the Defense was provided with an opportunity to examine the witness with regard to the content of those statements and point to possible discrepancies in relation to witness Spahić's other statements.

34. With regard to the above, contrary to the Defense's arguments that the Trial Panel did not specify in relation to which evidence exactly the statements in question were

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considered, the Appellate Panel finds that it clearly ensues from the context of the Trial Judgment reasoning that they corroborate what witness Spahić said at the hearing and during the investigation, which is to say they corroborate the Trial Panel's findings regarding the established facts in the convicting part of the Judgment. It should be noted that it clearly follows from the reasoning of the challenged Judgment that those statements were not considered to be decisive evidence on which to base the Trial Panel's decision, but, on the contrary, that those represent but control evidence affirming and upholding previously established facts based on other adduced evidence.

35. Conversely, regarding the official note on face recognition from photographs (Court Exhibit S-3), it was not signed by an authorized person nor was there any face recognition record attached concerning the photos presented to witness Spahić. Accordingly, the Trial Panel, in the Appellate Panel's opinion, drew a proper conclusion regarding the validity of this piece of evidence, as well as regarding the Court Exhibit marked as ''S-4'' – statements given by witness Spahić on 5 January 1998, taken by FPN student Amir Halilović, not by an authorized person in charge of taking statements. When it comes to this statement, as it follows from the trial hearing transcript made on 13 May 2014, witness Spahić said it was not his signature at the bottom of the statement, nor was he aware of any circumstances related to the giving of that statement, in which context the Trial Panel properly found that those two pieces of evidence adduced by the court cannot be deemed relevant, so it properly decided not to consider them at all.

36. Defense Counsel for the principal accused objected that the court did not at all consider certain Defense evidence, specifically the evidence given by witnesses Milan Ilić, Miodrag Kovačević, Srpko Baranac, Goran Miličević and Dragoslav Raković, then also some documentary evidence, news articles from the *Dnevni avaz* daily of 15 June 2012 and 21 June 2012, PS Višegrad receipt of 20 March 2014, and chief pathologist's report of 30 July 2002.

37. With reference to this objection, having reviewed the mentioned Defense evidence, the Appellate Panel first of all notes that Article 15 of the CPC BiH provides for the principle of free evaluation of evidence, which is limited solely by the principle of the legality of evidence, which means that the evaluation of evidence is free from any formal legal rules that would *a priori* determine the value of particular pieces of evidence. Accordingly, the Appellate Panel stresses the Court has the obligation to consider

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and evaluate all adduced evidence, but not the obligation to consider the evidence that is not relevant to the decision. In that regard, the adduced evidence, to which the Defense refers, according to the Appellate Panel's findings, could in no way affect the validity of the established state of facts and could not change the conclusions the Trial Panel reached based on the evidence whose evaluation was provided in the Judgment. Therefore, the Appellate Panel concluded that in its Judgment the Trial Panel properly took into account only the evidence that is of crucial importance for the decision, which is why this objection lodged by the Defense has been dismissed as ill-founded.

38. Regarding Defense Counsel's objection that the prerequisites for reading out the investigative statement given by witness Derviša Aličehajić were not satisfied and that the Defense was denied the right to cross-examine the witness, the Appellate Panel finds that the Trial Panel provided a well-founded reasoning regarding the decision to read out this witness' statement in accordance with Article 273(2) of the CPC BiH, given that the certified expert witness, specialist in neuropsychiatry, said in his finding and opinion that the witness was in a such a mental state that she was not capable of adequately participating in court proceedings and that her appearance before the court would result in disproportionate difficulties. Bearing that in mind, it is completely logical that defense teams were not in a position to cross-examine the witness; Article 273(2) of the CPC BiH clearly provides for such an exemption from the rule, which has been found to apply to this case as well. In that regard, according to the trial transcript of 10 December 2013, it should be noted that defense teams were provided with the opportunity during the trial to ask the questions they would have asked the witness during cross-examination.

39. Finally, regarding witness Ferid Spahić's possible statement of 11 September 1992, Defense Counsel for the principal accused objected that the court did not consider the statement which the witness signed, which he confirmed at the hearing before the court. The Appellate Panel however, finds that those allegations by the Defense were not correct, since witness Spahić, at the hearing held on 11 December 2012, said that it was not his signature at the bottom of the statement in question, while witness Midhat Šehović, who allegedly took this statement from Ferid Spahić, said at the hearing that the name Ferid Spahić meant nothing to him, that he did not remember any such person, nor that any such person had given a statement regarding the events in Višegrad and the killings at the *Paklenik* pit, nor does he remember that in 1995 Ferid Spahić signed the typed out statement. Bearing that in mind, the Appellate Panel finds that the Trial

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Panel correctly found that the statement in question cannot be deemed proper evidence, relevant to decision-making, which is why this objection lodged by the Defense was also dismissed as ill-founded.

B. APPEAL FILED BY DEFENSE COUNSEL FOR THE ACCUSED MILOŠ PANTELIĆ

40. Regarding the objections raised on appeal by Defense Counsel for the second accused Miloš Pantelić, pertaining to essential violations of criminal procedure provisions, the Appellate Panel first of all notes that most of the objections raised on this appeals ground were identical to those raised by Defense Counsel for the accused Milisavljević, which is why in that part the Appellate Panel will not repeat its analysis thereof, but it is to be considered that the previous reasoning given with regard to identical objections also applies in relation to the objections lodged by Defense Counsel for the second accused.

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

41. Defense Counsel for the accused Miloš Pantelić raised the objection that the Operative Part of the Trial Judgment was incomprehensible, given that its convicting part states a rather indefinite period regarding the *actus reus* of the crime, at first *"during a period from April to late June 1992",* and then *"on 15 June 1992."* Defense Counsel argues that the court added the previous period to the date of 15 June 1992 for the sole purpose of making possible the qualification under Article 172(1) of the CC BiH; however, since the accused Pantelić was acquitted of the charges for the actions that took place before 15 June 1992, according to defense counsel that means there are no multiple offenses, and consequently there can be no qualification of Crimes against Humanity under Article 172(1) of the CC BiH.

42. Regarding the objection raised, the Appellate Panel first of all notes that it has already provided its reasoning when it comes to the structures of the indictment and the Operative Part of the Trial Judgment, as well as with regard to the time of commission of the crime the accused were found guilty of. In that regard, this Panel finds completely ill-founded Defense Counsel's objection that the qualification of Crimes against Humanity

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had to be taken out on the grounds that the accused Pantelić was acquitted of all charges for the actions prior to 15 June 1992, which is why there can be no multiple offenses. In that regard, Defense Counsel refers to Article 172(2) of the CC BiH which, *inter alia*, stipulates that an "*attack directed against any civilian population* means a course of conduct involving the multiple perpetration of acts referred to in paragraph 1 of this Article…"

43. However, with regard to the foregoing objection, the Appellate Panel finds that Defense Counsel erred in linking the number of offenses committed by the accused with the qualification of Crimes against Humanity, since the criminal offense of Crimes against Humanity is considered to be committed even if only one such offense was committed by the accused, providing that it constitutes part of a widespread or systematic attack aimed against any civilian population. In that regard, it should be noted that the notion of "widespread" attack implies an attack that is by its nature a comprehensive one, resulting in a large number of victims. A crime may be widespread or committed on a wide scale due to the cumulative effect of a series of inhumane acts or due to a *single effect of a single offense committed on an extremely large scale*. It should be noted that the Trial Panel found in the challenged Judgment the existence of all general elements of this criminal offense, which is to say it has drawn a proper conclusion that there is a *nexus* between the offense the accused Pantelić has been sentenced for and the established attack on the civilian population, which by its characteristics was widespread and systematic, which means the Trial Panel found proven both elements of the attack in the cumulative sense, which was ultimately also never disputed by the Defense's appeal.

44. The Appellate Panel points that only the "attack", not the individual acts of the accused, must be widespread and systematic, which means it suffices that the acts of the accused constituted part of the attack in order for a single act or a relatively limited number of the acts of the accused, providing all other conditions have been met, to be qualified as crimes against humanity. Bearing in mind that in the case at hand a total of 48 civilians were killed, the Appellate Panel finds indisputable that the attack was comprehensive by its nature and resulted in a large number of victims, which ultimately renders the relevant Defense's objection ill-founded.

45. Also, Defense Counsel objected that the Operative Part of the Judgment does not include a factual description of *actus reus* of the offense the accused Pantelić was

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found guilty of, given that it does not specify that the accused himself actually killed anyone.

46. The Appellate Panel found this objection raised by Defense Counsel to be ill-founded as well, since the accused Pantelić was found guilty that he, as an accomplice, made a decisive contribution to the commission of the offense that resulted in the killing of 48 civilians in the *Paklenik* pit. Taking the theoretical concept of complicity as a starting point, it is not of decisive importance for its existence that each of the perpetrators took each of the actions that led to the ultimate result, but it suffices that their individual actions supplemented each other and that in their entirety they constituted a whole that necessarily led to prohibited consequences, which was the case here. The exact manner in which any of the members of the armed group participated in the commission of the criminal offense is insignificant, as is the issue of whether they all opened fire and killed the captured civilians. What is essential is that by his action he in a decisive manner contributed to the prohibited consequence, and that he had the awareness of common action. In any case, during the proceeding it was proven that the killing of 48 captured civilians represented a result of a joint action of all those in their escort, including the accused Pantelić, regardless of whether he personally killed any of the prisoners.

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

47. Defense Counsel raised the objection that the challenged Judgment is based on the evidence obtained through the essential violation of CPC provisions, arguing that the record of examination of witness Jovan Božić at the Prosecutor's Office, No. KT-RZ-145/05 of 13 July 2009, was made in contravention of Articles 151, 152, 153 and 154 of the CPC BiH, given that the whole process was carried out by a legal advisor, that no presence of the prosecutor was ever stated for the record, even though it was stated at the bottom of the record that it was signed by the Prosecutor, that the questions were asked by a legal advisor who did not speak any of the official languages in BiH, yet there was no translation for no interpreter signed the record.

48. The Appellate Panel finds that the foregoing grounds of appeals are ill-founded and do not bring into question the legality of the evidence, or the correctness and legality of the challenged Judgment. In that regard, it should be noted that the Defense raised the

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mentioned objections also during the first-instance proceeding, so in fact now in the appeal it only reiterated them. In that regard, in the challenged Judgment the Trial Panel gave specific and clear reasons which this Panel upheld as valid and well-supported.

49. Besides, the Appellate Panel finds it necessary to note certain provisions of the CPC BiH which the Defense apparently ignored when it comes to the objection in question. Thus Article 20)g) of the CPC BiH, *inter alia*, stipulates that an authorized person means legal officers, or investigators for the BiH Prosecutor's Office, who operate under prosecutor's authorization. In that regard, the Appellate Panel does not find disputable the fact that a legal officer conducted the examination of a witness during investigation, nor is it prescribed by the BiH Criminal Procedure Code that a legal officer may not undertake such activities. The fact is that the Prosecutor was not present during the examination of this witness although there is a signature in the box envisioned for prosecutor's signature. However, this Panel does not accept Defense's inference that the signature is illegible, since the signature affixed is clearly that of the legal officer who conducted the activity at issue, whereby Article 154(9) of the CPC BiH was complied with. In that regard, it should be noted that a typified witness examination transcript template was used in the specific case, and that at the time the witness was examined in the case of suspects Boriša Čeho *et al*.

50. Also, it can be assumed, as properly concluded by the Defense, that the legal officer at the time of witness hearing did not speak any of the official BiH languages, or at least did not speak them well enough, and it is also beyond dispute that the witness examination record lacks questions the legal officer asked in a language he speaks. However, the Appellate Panel finds ill-founded the Defense's objection that one may conclude based on the above that there was no translation, especially because the record was not signed by an interpreter.

51. The thing is that, having reviewed the record, the Appellate Panel concluded that it clearly indicates the persons who attended witness examination, so it was clearly stated that an interpreter was present, with his full name, in compliance with Article 152(1) of the CPC BiH. However, the CPC BiH does not stipulate that the record should be signed by the interpreter, which means that the content of translation can be verified by naming the person who provided translation and attended the hearing.

52. Besides, the Appellate Panel, just like the Trial Panel, concluded that the witness was

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properly warned before the examination, in accordance with the CPC BiH, that he said at the trial hearing, as follows from the trial transcript dated 19 February 2013, that there were five or six persons present during the examination, that he was examined by a foreigner, that there was an interpreter there who translated everything for him, and that he signed the record without reading it, yet he had listened while it was dictated. The record does not contain any objection by the witness that he was prevented from reading the record, nor did the witness state at the trial hearing that he had specifically demanded to read it. Also, the record was signed by persons who attended the hearing, and who signed it in accordance with Article 154 of the CPC BiH.

53. Therefore, since during the trial the witness confirmed he had signed the record in question, which, together with the signature of the person who took the statement and the signature of the record-taker, and the presence of the interpreter, beyond a doubt represents a confirmation of authenticity of its content, the Appellate Panel, just like the Trial Panel, concluded that the record represents a lawful piece of evidence, whereas the appeals objections to the contrary were found to be ill-founded.

54. Also, it needs to be said that Defense Counsel has objected to the manner of examination of this witness, in terms that the examiner used deceptions and asked leading questions, which was not in line with Article 86(7) of the CPC BiH. However, having reviewed the record, this Panel found that those objections were ill-founded, since the mentioned Defense Counsel's conclusion does not follow from the course of witness examination. It is true that the Appellate Panel noted that throughout the examination the witness was asked direct questions, but it was also noticeable that the witness mostly answered by simple affirmation (yes) or negation (no), while he rarely used broader sentences in his answers, which is why this line of questioning was rather understandable. Besides, one also needs to be mindful of a significant time lapse between the date of witness examination and the time about which he testified, so from that aspect it is quite understandable that the witness was asked additional questions with the aim of verifying and resolving certain issues, which is permissible under Article 86(7) of the CPC BiH.

55. Therefore, the Appellate Panel finds that the mentioned evidence, record of witness Jovan Božić's examination at the Prosecutor's Office, No. KT-RZ-145/05 of 13 July 2009, was made in a lawful manner, in accordance with the relevant provisions of the CPC BiH, which renders ill-founded the objections raised by the second-accused's Defense Counsel that the Trial Judgment is based on the essential violation of criminal procedure

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provisions under Article 297(1)i) of the CPC BiH.

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

56. Article 297(2) of the CPC BiH stipulates that *a substantial violation of the principles of criminal procedure also exists if the Court has not applied or has improperly applied some provisions of this Code during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper judgment*.

57. Defense Counsel for the accused Miloš Pantelić raised the objection that in the contested Judgment the Court gave a different assessment of evidence weight for the same witnesses, so the part of his testimony that supports the conviction and aggravates the status of the accused was accepted as credible, consistent and accurate, whereas the part of his testimony that had an acquitting character was not accepted as accurate, which stands in contravention of Article 3 and Article 14 of the CPC BiH. In that regard, Defense Counsel pointed to the testimony of witnesses Jovan Božić, Ljubisav Gladanac and Milovan Simić, which the court fully upheld in the part where they described the convoy movement before its arrival in front of the *Sladara* company in Rogatica, which confirm that that was the location where the civilians were transferred onto the *Terpentine* bus, and that the bus was operated by witness M-7, while not upholding their statements in the part where they described that witness M-7 with the bus was waiting at Sjemeč and not in front of *Sladara,* and that the accused Pantelić was with them, which means he was not on the *Terpentine* bus that took the people to the *Paklenik* pit.

58. Regarding this objection, the Appellate Panel finds that in its Judgment the Trial Panel paid equal attention to all adduced evidence, as well as all relevant facts, those incriminating the accused, as well as those in their favor, as was the case with the statements of witnesses Jovan Božić, Ljubisav Gladanac and Milovan Simić.

59. It follows from the challenged Judgment that the Trial Panel evaluated the evidence in the manner that it analyzed the statements of each witness the appeal mentions, providing reasons why it found particular parts of their statements to be unconvincing and unreliable, and others convincing, reliable and congruent with the other adduced evidence, which renders ill-founded Defense Counsel's objection that the Trial Panel acted in contravention of Article 14(2) of the CPC BiH, which would mean that an essential violation of criminal procedure provisions was made.

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60. The Appellate Panel underlines that such an assessment of the mentioned appeals objections by Defense Counsel does not prejudice the examination of accuracy of the adduced evidence in conjunction with the established facts, which will be done in analyzing the appeals objections under erroneously or incompletely established facts, but in this section merely makes a conclusion that the appeals objections at issue are ill-founded in terms of essential violation of criminal procedure provisions. Whether the trial panel has attributed adequate probative value to a particular piece of evidence in the context of establishing relevant facts, or whether it was able to establish the facts based on a particular piece of evidence, is a process which is any way evaluated through the analysis of the established facts. In this part, the Appellate Panel merely draws a conclusion that there is no violation of Article 297(2) of the CPC BiH, committed in the manner as alleged by Defense Counsel.

III. INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

STANDARDS OF REVIEW

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

62. 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.

63. 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.

64. The Appellate Panel may substitute its own finding for that of the Trial Panel only

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where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

65. Article 299 of the CPC BiH stipulates when a judgment may be appealed for incorrectly or incompletely established facts. Decisive facts are established directly by way of evidence, or indirectly from other facts (indicia or control facts). Only those facts that are provided in the judgment may be considered existent, and regardless of the existence of decisive facts the judgment must always provide reasons concerning their existence, or else there can be no established facts (incompletely established facts). If a decisive fact has not been established in the manner as it indeed existed in the reality of an event, we are then talking about incorrectly established facts.

66. The Appellate Panel shall give an assessment of whether the facts have been established incorrectly in relation to the facts and findings the Defense referred to in its appeal. As previously stated, such an assessment requires a criterion under which all appeals objections will be addressed and it will be decided whether a certain decisive fact follows from the adduced evidence.

STANDARD APPLICABLE TO ERRORS IN FACT

67. When considering alleged errors of fact, the Appeals Chamber will apply a standard of reasonableness. Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber. In reviewing the findings of the Trial Chamber, the Appeals Chamber will only substitute its own finding for that of the Trial Chamber "when no reasonable trier of fact could have reached the original decision."[2] In determining whether or not a Trial Chamber's finding was reasonable, the Appeals Chamber "does not lightly disturb findings of fact made by a Trial Chamber."[3] This because the appeals proceeding does not amount to a new trial. On the contrary, the reason the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known: the Trial Chamber has the advantage of observing witness testimony first-

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[2] *Prosecutor v. Halilović*, IT-01-48-A, ICTY Appeals Chamber Judgment, 16 October 2007, Par. 9.

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hand, and is, therefore, better positioned than this Chamber to assess the reliability and credibility of the evidence.[4] As established by the Appellate Panel in the *Kupreškić* case:

"Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber."[5]

68. In other words, an accused who enjoyed the application of the reasonable doubt standard throughout his trial must meet a rather high standard of review when seeking a reversal of Trial Panel's factual findings in the appeals proceedings.

69. The same standard of reasonableness and the same deference to factual findings of the Trial Chamber apply when the Prosecution appeals against an acquittal or punishment based on alleged errors in fact made by the Trial Chamber. Thus, when considering an appeal by the Prosecution, the Appeals Chamber will only hold that an error of fact was committed when it determines that no reasonable trier of fact could have made the impugned finding.[6] However, since the Prosecution must establish the guilt of the accused at trial, the significance of an error of fact occasioning a miscarriage of justice takes on a specific character when alleged by the Prosecution.[7]

70. In *Bagilishema*, the Appellate Panel took the following position:

"Because the Prosecution bears the burden at trial of proving the guilt of the accused beyond a reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a

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[3] *Prosecutor v. Blagojević and Jokić*, ICTY Appeals Chamber Judgment, par. 9; *Prosecutor v. Musem*, ICTR-96-13, Appeals Chamber Judgment, 16 November 2001, par. 18.
[4] *Prosecutor v. Furundžija*, IT-95-17/1-A, ICTY Appeals Chamber Judgment, 21 July 2000, par. 37.
[5] *Prosecutor v. Kupreškić et al.*, IT-95-16-A, ICTY Appeals Chamber Judgment, 23 October 2001, par. 30; *Prosecutor v. Halilović*, IT-01-48-A, ICTY Appeals Chamber Judgment, 16 October 2007, par. 10.
[6] *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, ICTY Appeals Chamber Judgment, 9 May 2007, par. 9; *Prosecutor v. Bagilishema*, ICTR-95-1A-A, ICTY Appeals Chamber Judgment, 3 July 2002, par. 13.

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defence appeal against conviction. An accused must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution faces a more difficult task. It must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the accused's guilt has been eliminated."[8]

71. In this regard, under the ICTY Statute and relevant international instruments, the Prosecution is always attributed the burden of proof as to the accused's guilt beyond a reasonable doubt. The Prosecution is not relieved of the burden when in the appeals proceedings it attempts to bring down a factual finding going in favor of the accused, which guided this Panel too during decision making.

A. APPEAL FILED BY DEFENSE COUNSEL FOR THE ACCUSED PREDRAG MILISAVLJEVIĆ

Convicting Part of Judgment – Section 1

72. First of all, the Appellate Panel notes that Defense Counsel for the accused Predrag Milisavljević, elaborating on the appeal with regard to the grounds of appeal concerning the incorrectly and incompletely established facts, mostly compared witness Ferid Spahić's statements given during the investigation with the statement he allegedly gave on 11 September 1992, which was allegedly re-typed in 1995. All grounds of appeal in that regard rely on the argument that all statements given by this witness stand in contravention of the statement of 11 September 1992, since that statement does not mention the name of Predrag Milisavljević, while others do.

73. Bearing in mind the conclusions made by the Trial Panel regarding the credibility of this statement, which are fully upheld by this panel too, as well as the already provided reasoning, the Appellate Panel states that it will not revisit the objections raised by Defense Counsel in this part of his appeal when it comes to the credibility of the evidence

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[7] *Prosecutor v. Halilović*, IT-01-48-A, ICTY Appeals Chamber Judgment, 16 October 2007, par. 11; *Prosecutor v. Krnojelac*, IT-97-25-A, ICTY Appeals Chamber Judgment, 17 September 2003, par. 14.

[8] *Prosecutor v. Bagilishema*, ICTR-95-1A-A, ICTR Appeals Chamber Judgment, 3 July 2002, par. 14 (emphasis added); also see *Prosecutor v. Limaj et al.*, IT-03-66-A, ICTY Appeals Chamber Judgment, 27 September 2007, par. 13; *Prosecutor v. Halilović*, IT-01-48-A, ICTY Appeals Chamber Judgment, 16 October 2007, par. 11.

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in question, nor does it find purposeful to evaluate the objections that bring the established facts from the challenged judgment in relation to the content of the statement at issue.

74. Defense Counsel for the accused Predrag Milisavljević objected that during the proceedings the Trial Panel did not establish the exact number of persons exhumed from the *Paklenik* pit, stating in that context that on page 1 of the Chief Pathologist's Report there is a note that the final number of corpses exhumed from the *Paklenik* mass grave is 73, while on page 6 of the same report it says that the number is 75. Besides, Defense Counsel also challenges the manner in which the victims were killed, noting that, according to the report, the direction of bullets was 2 in the head from the front and 6 in the body, which is not consistent with what the only eye-witness, Ferid Spahić, said, since his testimony was that the prisoners above the pit were facing the armed Serb soldiers and that they were in that position when they were all shot at. Also, Defense Counsel noted that witness Spahić had said resolutely that the prisoners were shot by short bursts of fire, while witness M-7 said he had heard bursts of fire.

75. The Appellate Panel concluded that those objections were ill-founded and irrelevant, finding beyond doubt that all 48 civilians with whose murder the accused was charged in the indictment have been exhumed from the *Paklenik* pit and identified. It is also beyond dispute that the pit contained more persons than the number stated in the indictment. However, bearing in mind that the accused was not charged with the death of persons who could not be brought into connection with the convoy that set out from Višegrad on 14 June 1992, the Appellate Panel finds that the Trial Panel's conclusion that there was no need to establish the circumstances under which those persons lost their lives was correct.

76. Also ill-founded was the objection bringing into question the manner of killing the civilians, since witness Spahić said at the trial that upon his arrival at the pit he saw that the soldiers set aside the first ten persons from the group and took them to the pit, after which the accused Milisavljević said or pointed by his weapon that the first two should come closer, fired two short bursts at them, and they just vanished. After that the witness described how he started looking around, and when he focused his attention back on the front of the column he saw that the ten persons that had been set aside were missing.

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77. Therefore, contrary to the appeals objections pertaining to the position of soldiers in relation to the captives, in terms of the direction they were shot from, the Appellate Panel concludes that by his direct observation witness Spahić saw the killing of two civilians only.

78. Also ill-founded is the objection that the statements of witnesses Spahić and M-7 were divergent, given that witness Spahić said that after the escape from the pit he heard all-out shooting, which is in line with the statement of witness M-7, who said he had heard bursts of fire.

79. Defense Counsel argues that no judgment can be based on the statements of witnesses Spahić and M-7, and that the Trial Panel drew a wrong conclusion that their statements were fully congruent, given that witness Spahić, unlike witness M-7, does not at all mention that the accused Milisavljević took him from one bus to another in front of the *Sladara* company, put his hands behind his back and tied them with wire, nor that he beat him up. Also, Defense Counsel claims that in his first statement of 9 June 2009 witness M-7 did not mention the accused Milisavljević at all.

80. Regarding this objection, the Appellate Panel first of all states that it does not follow from the factual substratum of the convicting part of the Operative Part of the Judgment that the accused Milisavljević personally took civilians from one bus to another, tied their hands with wire, and beat them up. In the context of discrepancy between the statements of witnesses Spahić and M-7, the Appellate Panel notes that witness Spahić said at the trial that upon exit they turned towards the bus, after which they put their hands behind their back, and the soldiers tied them with wire. The witness added he did not see who tied their hands for he was turned towards the bus, and that after all men were tied up they were all forced into the bus, while five, six, seven of them were beaten up brutally.

81. Therefore, the Appellate Panel finds that a quite logical conclusion follows from this witness's statement, who said he had been facing the bus, which is why he mentioned the name of the accused Milisavljević as the person who tied his hands and beat him up, but resolutely confirms he saw him for the first time after they boarded the *Terpentine* bus. Also, the Appellate Panel finds incorrect Defense Counsel's allegations that in his statement made on 9 June 2009 witness M-7 did not at all mention the accused Milisavljević, since the witness said in that very statement that the accused

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Milisavljević was among the bus escort from Višegrad onwards, and that he saw him in front of the *Sladara* plant in Rogatica when the civilians boarded the *Terpentine* bus, and further on in the escort of the bus towards the *Paklenik* pit.

82. In that regard, the Appellate Panel finds ill-founded the objections related to the discrepancies between the statements of those witnesses regarding the accused Milisavljević's position in the bus, and the uniform he wore that day. This Panel finds it completely irrelevant whether the accused Milisavljević was "*sitting on the hood of the bus*" or was "*standing somewhere by the door*," since the statements given by witnesses Spahić and M-7 established beyond a doubt that the accused was in the escort of the bus from *Sladara* to the *Paklenik* pit. It should be noted that witness M-7 confirmed at the trial that the notion of "hood" refers to the inner front part of the bus on which one could sit. Besides, the Panel had in mind that it was quite possible and logical that during the ride the accused Milisavljević indeed spent some time sitting on the hood, and also standing by the hood, next to the door. In any case, witnesses Spahić and M-7 clearly described their acquaintanceship with the accused, presented details regarding his presence on the bus – during those moments when they could actually see him, and identified him in the courtroom, which is why the Appellate Panel, just like the Trial Panel, finds that identifying the accused Milisavljević and his presence in the escort of the *Terpentine* bus have not been brought in question at all.

83. Also ill-founded are objections as to the type of uniform the accused wore on the critical occasion. According to the Appellate Panel, the discrepancies between the witness statements are quite understandable, since both witnesses said that persons in both military and police uniforms took part in escorting the bus, and that the passage of time between the critical event and the giving of statement is also not without significance, which is why one cannot expect the witnesses to remember every detail while giving their statements. However, with regard to this objection too the Appellate Panel notes that the type of the uniform the accused Milisavljević wore on the critical occasion is not of decisive importance, given the fact that his presence on the *Terpentine* bus has been established beyond a doubt based on the adduced evidence.

84. Towards the end of his objections raised on this ground of appeal, Defense Counsel for the accused Milisavljević first objects to the court's failure to evaluate at all, and after that that it wrongly evaluated the statements of defense witnesses Goran Nedić, Božo

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Tešević, Saša Knežević and Luka Dragičević, who all said that no army members had ever accompanied any civilian convoy.

85. The Appellate Panel finds these objections to be ill-founded too, since it follows from the challenged Judgment that the Trial Panel made an evaluation of the mentioned statements, and in that regard provided reasoning that they were aimed at covering up the participation of the unit the witnesses belonged to, in this critical event as well as in similar events at the time. It is also noteworthy to say that one of the witnesses was Višegrad Brigade commander. Therefore, mindful of the indisputable statements of witnesses Spahić and M-7 in the context of the accused Milisavljević's presence in the convoy's escort, the Appellate Panel concludes that the Trial Panel provided a valid reasoning with regard to the evaluation of statements given by those defense witnesses, which this Panel also upholds as such.

B. APPEAL FILED BY DEFENSE COUNSEL FOR THE ACCUSED MILOŠ PANTELIĆ

Convicting Part of Judgment – Section 1

86. Regarding the appeals grievances filed by Defense Counsel for the second accused Miloš Pantelić, the Appellate Panel primarily notes, just like in evaluating the objections under the grounds of appeal concerning essential violations of criminal procedure provisions, that it considers redundant to analyze again and elaborate on the objections raised by this Defense Counsel that are identical to those raised by Defense Counsel for the principal accused, which above all relate to the position and actions of the accused Pantelić on the bus transporting the civilians from the *Sladara* company in Rogatica towards the *Paklenik* pit, with regard to the type of uniform he wore, as well as the tying of civilians hands and beating them prior to their boarding the *Terpentine* bus. This because the Panel, as was already mentioned, holds that certain discrepancies in witness statements did not affect the Trial Panel's conclusion, upheld by this Panel too, that the accused Pantelić was present in front of the *Sladara* company in Rogatica while the civilians were transferred from one bus to another, and that while carrying arms he took part in escorting the bus towards the *Paklenik* pit.

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87. According to this Panel, the foregoing conclusion, contrary to the objections raised on appeal, follows beyond a doubt from the statement given by witness M-7, who testified at the trial and described in detail all situations in which he had seen the accused Pantelić. Witness M-7 said he had seen him on convoy's departure from Višegrad, on 14 June 1992, then upon convoy's arrival in Sokolac and the following morning when they set off from Sokolac towards Rogatica. The witness also said that he had also seen Pantelić by the *Sladara* company in Rogatica, that he was present during the transfer of civilians from one bus to another, during which he partly took part in tying the hands of civilians, and their beating. The witness went on to describe in detail that after the civilians the bus was also boarded by four soldiers *from Rogatica* and four from the Višegrad escort, including the accused Pantelić, that Pantelić was in the front part of the bus, and that after the bus stopped the escort took the civilians off the bus, formed a column, and they all together, including the accused Pantelić, went towards the woods, and he also saw him on their return from the woods with the other escorts.

88. The Appellate Panel finds ill-founded the Defense's objection that the challenged Judgment is based solely on the testimony of witness M-7, since witness Spahić too described all the events, from convoy's very departure from Višegrad onwards, in an identical manner. True, witness Spahić was not sure whether the accused Pantelić was present there, which is why, in describing one of the convoy escorts who took them towards the pit, he said his facial contours resembled those of the accused Pantelić, whom he identified in the courtroom.

89. However, bearing in mind the resolute testimony of witness M-7, which is fully congruent with his statements given during the investigation, the fact that he knew the accused Pantelić well since seven or eight years before the war, whom he said came from an impoverished family and had no employment, with a place of residence between the settlements of Okolišta and Donja Lijeska, which the Defense did not contest, and, ultimately, bearing in mind the facts that the witness recognized the accused Pantelić in the courtroom, this Panel too finds that the witness' testimony points to the conclusion that the accused Pantelić was indeed present and took part in the foregoing events.

90. Defense Counsel also raised the objection that the court failed to adduce a single piece of evidence based on which to find that the accused Pantelić was part of a widespread and systematic attack and that he knew of such an attack, noting in that

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regard that his mere membership of the police, and subsequently the army, is not a decisive fact concerning his participation in the widespread and systematic attack.

91. Contrary to the objections raised on appeal, the Appellate Panel finds that the Trial Panel, bearing in mind the established facts, drew a correct conclusion that the accused Pantelić's actions, by their nature and consequences, indeed constituted part of the widespread and systematic attack on the civilian population, which the accused knew of, and that those actions could not be viewed outside the context of such an attack, on which the Panel has already provided relevant reasoning, noting that the challenged Judgment provided clear and specific reasons too, which this Panel upholds as correct and based on the adduced evidence.

92. The Appellate Panel in this context notes that under customary international law, and under Article 172 of the CC BiH, it is essential that the accused knows about the attack on the civilian population and that his actions constitute part of that attack, wherein it is not necessary for the Prosecution to prove by direct evidence that the accused knew of this context and nexus, but such a connection may be established also through indirect evidence.

93. It is exactly in that context, according to this Panel, that the Trial Panel correctly concluded that in this specific case there is a *nexus* between the specific actions the accused Pantelić was found guilty of and the established attack on the civilian population, given that the accused, as a member of the Višegrad Brigade at the time of commission of crimes at the *Paklenik* pit, and before that as a member of the SJB Višegrad reserve unit, must have been aware of the events in the territory of the Višegrad Municipality, in terms of the massive nature of the attack and the comprehensive operation of Serb forces against the Bosniak civilian population of the Višegrad Municipality, as well as the gravity and nature of the underlying crime.

94. In that regard, the Appellate Panel concludes that the accused Pantelić's actions could not be set aside as separate or independent from the overall events in the Višegrad Municipality, especially when one takes into account that the accused took those actions together with other members of the RS police and military forces, which leads to the only possible conclusion, that the accused Pantelić was fully aware of the ongoing attack and knew that by his actions he was contributing to the attack. While analyzing the evidence

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and the established facts, the Appellate Panel was not able to notice that the accused opposed such an attack by any action of his or that he in any way whatsoever manifested his disagreement.

95. Defense Counsel also objected that the challenged Judgment does not contain proof to support the conclusion that the accused Pantelić killed anyone, nor has the court proven that the accused contributed to the commission of crime in a decisive manner. In that regard, Defense Counsel challenges the Trial Panel's conclusion that the accused Pantelić, not later than at the *Sladara* company in Rogatica, became aware of the fate of the men who had been separated.

96. In terms of the foregoing objections, the Appellate Panel finds that the Defense properly concluded that no evidence was adduced during the first-instance proceedings that would beyond a doubt lead to a conclusion that the accused Pantelić too fired at the civilians at the *Paklenik* pit. However, as correctly found by the Trial Panel, which is a conclusion absolutely shared by this Panel too, by all other actions taken from the moment when he became aware that the civilians would be killed, to the moment of leaving the place of their execution, the accused Pantelić gave a decisive contribution to killing the civilians.

97. Although there is no evidence confirming that the accused Pantelić took direct actions of perpetration – firing at the lined-up civilians at the *Paklenik* pit, the Appellate Panel, just like the Trial Panel, finds that by all his other actions the witnesses testified about, his participation in the escort of civilians aboard the *Terpentine* bus and their marching to the execution site, having become aware they would be killed after their hands were tied, and by his armed presence at the execution site, he gave a decisive contribution to the commission of the crime.

98. The Appellate Panel finds it indisputable that all those who escorted the civilians on the convoy from the *Sladara* company in Rogatica to the place of their execution at the *Paklenik* pit gave a decisive contribution to the commission of the crime. It follows from the testimony of witnesses Spahić and M-7 that all members of the escort were armed, and after the civilians got off the bus near the Kalimanići village, members of the escort were deployed on both sides of the column with their weapons at the ready, and in that formation marched the civilians to the pit, assuming a semi-circled position around

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the pit upon arrival. According to the Appellate Panel, all this clearly begs the conclusion that all members of the escort, including Pantelić, regardless of whether they personally fired at the civilians or not, by their actions gave a decisive contribution to the commission of the crime.

99. Besides, this Panel finds it particularly important that there is no single piece of evidence or in this context even an indicia that the accused Pantelić opposed the commission of the crimes at any moment and by any action of his, but on the contrary, by the actions he took he clearly shared the intent with the other escorts of the convoy from the very beginning to the very end, which begs the only logical conclusion, that he agreed to the commission of the crime and that he decided to participate therein, which is why he was found guilty as a co-perpetrator, in terms of Article 29 of the CC BiH.

100. With regard to the objection pertaining to his knowledge about the fate of the separated men, the Appellate Panel upholds the Trial Panel's conclusion that the accused Pantelić, at the latest in front of the *Sladara* company in Rogatica, became aware that the separated men would be killed. Ill-founded in that regard is Defense's objection that witness Spahić told the trial they had been told they would be exchanged, in which context Defense Counsel hypothetically asked how then was it possible for the accused Pantelić to know that the civilians would be killed.

101. The Appellate Panel had already said which actions of the accused Pantelić beg an indisputable conclusion that he shared common intent of all escort members regarding the fate of the civilians, while concerning this matter, in the context of the finding that it was at the latest in front of the *Sladara* company that the accused Pantelić became aware that the Bosniak civilians would be killed, the Appellate Panel notes that such a timeline ensues beyond a doubt from the testimony of witness M-7, who said that upon their return from Sokolac they stopped at a check-point in Rogatica, near the *Sladara* company, that they stayed there for two to three hours and that it was there, following negotiations, that they decided to return the separated men, after which they were transferred from one bus to another, with their hands tied and beaten.

102. The Appellate Panel finds correct the Trial Panel's conclusion that the accused Pantelić, if not sooner, then at least in front of the *Sladara* company in Rogatica, became aware that the separated men would be killed, so all the actions he undertook after

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that were done with the intent to kill those men.

103. Defense Counsel labeled as erroneous and unacceptable the Court's position not to credit the testimony of defense witnesses Milovan Simić, Ljubisav Gladanac and witness Jovan Božić given at the trial. Counsel also argued that the court provided no reasons why it credited one part of one witness testimony but not another part. Defense Counsel said witnesses Simić and Gladanac stated they had set off from the *Sladara* company in Rogatica and waited for the *Terpentine* bus at Sjemeč, and that the accused Pantelić was with them on the bus operated by driver a.k.a. "Burduš", while, contrary to that, only witness M-7 claimed that the rest of the convoy had waited for him in Rogatica upon return from the pit.

104. In the context of this objection, the Appellate Panel notes that in the challenged Judgment the Trial Panel provided an evaluation of each relevant evidence, and explained why it credited particular statements, and why it did not others. Thus in relation to the testimony of witnesses Milovan Simić and Ljubisav Gladanac, who said they had waited for the *Terpentine* bus at Sjemeč and that the accused Pantelić was together with them, the Trial Panel found that the testimony of those witnesses were not convincing for they are not consistent with regard to essential facts, such as the time of *Terpentine* bus departure from the *Sladara* company towards the pit, the arrival of *Terpentine* bus at Sjemeč, regarding which the witness Simić said he did not see the *Terpentine* bus arriving at Sjemeč and its return to Višegrad, which is in contravention of the statement given by witness Ljubisav Gladanac, who said they were waiting at Sjemeč for the bus to return from the pit for the escort was on that bus too, and both of them said that the accused Pantelić was with them at Sjemeč, the only difference being that witness Simić saw him standing with some soldiers. Besides, these witnesses said they had returned to Višegrad at about 1 p.m. or 2 p.m., which is completely opposite from the testimony of witnesses M-7 and Jovan Božić, who had said resolutely it had been night-time when they returned to Višegrad.

105. The Trial Panel accordingly concluded that witnesses Simić and Ljubisav Gladanac were congruent only with regard to the accused Pantelić's presence, which is in contravention of the testimony given by witness M-7, who was resolute in describing where exactly he saw Pantelić, and how he knew him at all. Therefore, the Appellate Panel finds that the Trial Panel had made an objective conclusion, which was also

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properly reasoned, which is surely a result of the benefit the Trial Panel has, given that it gets to observe the witnesses while testifying, and in that regard the Appellate Panel upholds the Trial Panel's conclusion, believing that the statements of those witnesses were aimed solely at diminishing the criminal liability of the accused Pantelić.

106. Besides, the Appellate Panel finds that the challenged Judgment provides clear reasons why the Trial Panel credited the statement witness Jovan Božić gave during the investigation, and not the testimony he gave at the trial, regarding the accused Pantelić's presence. In his statement given during the investigation, witness Božić said he had seen the accused Pantelić getting off the *Terpentine* bus which had just returned from the pit. The witness said Pantelić had "*arrived on that bus*," to which Defense Counsel objected on the grounds that the witness failed to specify the hauler's name. However, the Appellate Panel, just like the Trial Panel, given the context of the questions asked of the witness, concluded beyond a doubt that the witness was referring to the *Terpentine* bus.

107. Unlike his statement given during the investigation, at the trial the witness said he could not see whether the accused Pantelić stepped off the bus that had returned from the pit, while regarding his acquaintance with the accused he said he had met him no sooner than in 1995 or 1996, which is completely opposite from what he said during the investigation, which is that he knew him from Višegrad, and described him as a person of short stature, plus he named all locations at which he had seen him during the convoy's movement.

108. Therefore, the Appellate Panel finds that the Trial Panel provided acceptable reasons to credit the statement witness Božić gave during the investigation, which is congruent with the statement of witness M-7, so the Appellate Panel, just like the Trial Panel, finds that witness Božić changed his testimony at the trial for the sole purpose of diminishing the accused Pantelić's responsibility.

109. Finally, the Appellate Panel noted that the Trial Panel, having examined the events at the *Paklenik* pit and the killing of 48 civilians, unnecessarily tried to learn about the further movement of *Terpentine* bus, clarifying certain contradictions from the statements of witnesses that, according to the Defense, bring into question the accused Pantelić's presence at the pit. However, in that regard the Appellate Panel finds that in the case at hand it was not of a decisive importance whether, as witness M-7 claims, "*the other*

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vehicles in the escort" waited for the *Terpentine* bus in front of the *Sladara* company in Rogatica or at Sjemeč, given that the accused Pantelić's presence at the pit has been established beyond a doubt, initially through the statements of witness M-7, given during the investigation as well as at the trial, who knew him well and saw him on the bus on its departure from Rogatica towards the pit, and then also witness Spahić, who said the escort on the bus marched them in a column to the pit, and witness Božić, who in his statement given during the investigation, which the Trial Panel credited, confirmed he had seen the accused Pantelić getting off the *Terpentine* bus which had just returned from the pit.

110. In accordance with the foregoing, the Appellate Panel, just like the Trial Panel, mindful of all facts and circumstances, drew the only reasonable conclusion, which is that the accused Pantelić was present at the *Paklenik* pit when the 48 civilians were killed, and that the Defense's claims to the contrary cannot be upheld as well-founded.

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

Acquitting Part of Judgment – Section 4

111. In the framework of the grounds of appeal concerning the incorrectly or incompletely established facts, the Prosecution has, regarding Section 4 of the acquitting part of the Judgment, noted that the Trial Panel had made an erroneous conclusion that it had not been proven that the accused Miloš Pantelić had beaten up victim Uzeir Čakar. In that regard, the Prosecution said it was a fact that there were discrepancies in the statement witness Uzeir Čakar gave at the trial and his statement given in the case of Novo Rajak before the Cantonal Court in Sarajevo. However, another fact is that the witness explained those discrepancies in a specific and logical manner, saying that during his examination before the Cantonal Court in Sarajevo nobody had really asked him about Pantelić. Besides, the Prosecution said it was a fact that only victim Uzeir Čakar testified about the circumstances of his being beaten up, but during the testimony he described the course of events in a clear and specific manner, detailing who was present during the beating, what happened afterwards, and what the consequences of the beating were. The appeal argues that in the reasoning of the challenged Judgment the Trial Panel fails to explain why it credited the statement of witness Novo Rajak, who was not an eye-

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witness to the beating of Uzeir Čakar, but had a motive to testify to the benefit of the accused Pantelić.

112. In the opinion of this Panel, contrary to the objections raised on appeal, the Trial Panel correctly concluded that based on the evidence adduced regarding the circumstances described under this count of the indictment one could not, under the beyond-any-reasonable-doubt standard, establish the accused Pantelić's responsibility for the action he has been charged with.

113. The fact is that regarding this count of the indictment the Prosecution adduced but a single piece of evidence – the testimony of victim Uzeir Čakar as a witness. Bearing that in mind, the Appellate Panel fully upholds the Trial Panel's conclusion that in cases when the indictment is based on the statement of a single witness such a statement must not leave a shred of a doubt in its accuracy and veracity.

114. However, the statement of this witness differs in its essential parts from the statement the witness gave on 8 February 2006, in the Novo Rajak case conducted before the Cantonal Court in Sarajevo, when he also, *inter alia*, testified about his detention in a container at Donja Lijeska. The witness told the trial that during his detention in the container he found one Munib Hajdarević there, that shortly thereafter Miloš Pantelić entered the container, whom he knew well since they were neighbors, and who slapped him a couple of times, after which his lip started to bleed. After that Nenad Tanasković entered the container and also hit him hard, and after him Novo Rajak, who was the one who helped him out of the container.

115. Unlike this statement, the witness in the case of Novo Rajak stated that the container was empty when he got in. When asked directly whether anyone known or unknown to him ever entered the container, the witness said that first there was one person who slapped him, and then another, who also slapped him. During cross-examination, he said that the person who entered the container and hit him had a stocking on his head.

116. Obviously, there are certain discrepancies in the foregoing statements, which the witness explains by saying that in his 2006 statement nobody really asked him about Pantelić, while he offered no explanation regarding one Munib Hajdarević's

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presence in, or absence from, the container.

117. Given the foregoing, the Appellate Panel finds correct the Trial Panel's conclusion that the witness' explanation is unconvincing, since during his 2006 statement he was asked directly whether anyone known to him ever entered the container, yet the witness did not mention the accused Pantelić, even though he knew him well for they were next-door neighbors, and also stated that the person who had hit him had a stocking on his head, which he did not say at the trial. Besides, it should be noted that during the trial the Defense examined witnesses Novo Rajak and Mujo Čakar, Uzeir Čakar's distant relative, both of whom said the witness had never told them that anyone had ever beaten him, nor had he ever mentioned the name of Miloš Pantelić, while witness Novo Rajak also said that at the time he did not see any injuries on Uzeir Čakar, nor did he at the time see the accused Pantelić at all.

118. Bearing in mind the foregoing, the Appellate Panel, contrary to the objections on appeal, finds that witness Uzeir Čakar did not explain the discrepancies in his statements in a specific and logical manner, which is why his statement given at the trial is also disputable, while regarding the Defense's claim that no reasons were offered why witness Novo Rajak's statement was credited, the Appellate Panel stated that it cannot be concluded from the challenged Judgment that the Trial Panel had based its decision solely on the statement of this witness, but his statement was used as control evidence.

119. Therefore, bearing in mind that in the case at hand the key fact – concerning the identity of the person who hit Uzeir Čakar, was not established beyond a doubt, the Appellate Panel concludes that the Trial Panel has drawn a proper conclusion according to which, due to the lack of evidence, and applying the principle of *in dubio pro reo*, it was not possible to establish the accused Pantelić's responsibility for the action charged against him under the given count of the indictment, which resulted in dismissing as ill-founded the objections raised on appeal regarding this particular charge.

Acquitting Part of Judgment – Section 5

120. Regarding the objections pertaining to Section 5 of the acquitting part of the

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Operative Part of the Judgment, the Prosecution first confirms the fact that the statements of witness Salko Šabanović given during the investigation and trial indeed differ, but notes that at the trial the witness provided logical reasons to explain the discrepancies. The Prosecution argues that the Trial Panel ignored the fact that the statements of this witness given during the investigation were of general nature and without a description of numerous events the witnesses testified about in more detail at the trial. Also, the Prosecution argues that the Trial Panel did not sufficiently consider the statement of witness Islam Cero, an eye-witness to the torching of Mujo Arnautović's barn in the helmet of Počivale, nor the statement of Jasmin Cero, an eye-witness to the burning of Alija Podžić's house in the hamlet of Jabukovac, and that the Trial Panel failed to explain why it credited the statements of defense witnesses Momčilo Trifković and Boško Trifković, while ignoring the fact that those witnesses belonged to the same company as the accused Pantelić, and were not present in the ground-floor room in the school when the beating of Salko Šabanović began.

121. The Appellate Panel notes that under this Count of Indictment the accused Pantelić was acquitted of the charges that he committed the persecution of the Bosniak civilian population by arresting or detaining and torturing people and destroying their property on a large scale. Following an assessment of the claims on appeal, the Panel concluded they did not cast doubt on the Trial Panel's findings regarding the accused Pantelić's liability.

122. Contrary to the objections on appeal, the Appellate Panel concluded that witness Salko Šabanović failed to offer a logical explanation regarding the discrepancies between his statements given during the investigation and trial, concerning the key fact – that the accused Pantelić is the person who on the critical occasion took him out of his home and marched him away. Testifying at the trial, the witness said that upon soldiers' arrival in the village of Kabernik, he was approached by two soldiers with balaclavas on their heads, one of whom had black fingerless gloves. The witness said that in the vicinity of *Butkove stijene* the soldiers took off their balaclavas, after which he recognized the accused Pantelić and Nenad Tanasković. However, in the statement given during the investigation, witness Šabanović said that on the critical occasion five or six Serb soldiers came to his home, yet he did not mention that any one of them had balaclava, but that immediately near his home he recognized Nenad Tanasković, who had red gloves on his hands, while Pantelić was dressed in civilian clothes. Explaining those discrepancies

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between his two statements, the witness said it was possible that he confused the two, saying that Pantelić had gloves. The witness went on to say that during their trip from his home to *Butkove stijene* the masked persons took turns, some were coming and some were just passing by, further explaining that hew knew Pantelić was in front of his home because at the time he wore gloves, which he had when he took off his balaclava at *Butkove stijene*.

123. Bearing in mind the mentioned discrepancies between the two statements of witness Salko Šabanović, as well as his explanations regarding those discrepancies, the Appellate Panel has, contrary to the objections on appeal, concluded that by his explanations the witness failed to remove beyond a doubt the dilemmas regarding the key facts – that it was none other than the accused Pantelić that took him out of his home and marched him away.

124. Besides, also heard concerning this event were witnesses Jasmin and Islam Cero, who said they had seen the moment when the column was joined by Salko Šabanović, escorted by unknown soldiers, without mentioning the accused Pantelić whom they knew well, nor did they confirm they had seen Pantelić during their arrest, noting that none of the soldiers in their escort wore any mask that day, and that most of them had gloves, which stands in contravention of witness Šabanović's statement who claimed that only Pantelić wore gloves that day, which is why he was certain it was him who took him out of his home, for he had them when he took off his mask at *Butkove stijene*.

125. Bearing in mind the aforementioned, the Appellate Panel finds these objections ill-founded, while upholding the Trial Panel's conclusion that it was not possible, based on the adduced evidence and under the beyond-reasonable-doubt standard, to establish the accused Pantelić's responsibility for the foregoing actions.

126. Further, under this Count the accused has been acquitted of the charges that he committed persecution by a large-scale property destruction, by taking part in torching Mujo Arnautović's barn in the hamlet of Počivale and Alija Podžić's house in the hamlet of Jabukovac.

127. In that regard, the Prosecution objected that the Trial Panel did not sufficiently consider the statement of witness Islam Cero, an eye-witness to the torching of

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Mujo Arnautović's barn in the hamlet of Počivale, as well as the statement of Jasmin Cero, an eye-witness to the torching of Alija Podžić's house in the hamlet of Jabukovac.

128. Contrary to the foregoing objections, the Appellate Panel finds that the Trial Panel did consider the statements of both witnesses, Islam and Jasmin Cero, as well as the statements of other witnesses examined on the given circumstances, correlating them mutually, after which it drew the conclusion that the only thing beyond dispute is that Mujo Arnautović's barn and Alija Podžić's house were set on fire, but that there is no reliable evidence based on which, under the principle of beyond a reasonable doubt, one could draw the conclusion that the accused Miloš Pantelić took part in the torching. Such a conclusion has been made by this Panel too, because all the examined witnesses moved within the same group and along the same path, and they all knew the accused Pantelić well, plus it was only one witness who, in both cases, saw the accused Pantelić taking the actions as charged under this count of the indictment.

129. Regarding the burning of Mujo Arnautović's barn, only witness Islam Cero said he had seen Pantelić approaching the barn, after which it caught fire, while witness Jasmin Cero, who was in the same group, said he had seen Arnautović's barn burning, located some 50 meters away from the road they were moving along; however, he said he did not know who set the house on fire. In his testimony, witness Salko Šabanović said that while moving along the road they saw Mujo Arnautović's house burning, but he did not know who set it ablaze. He added he recognized Pantelić only after he removed the mask from his face at *Butkove stijene*, while all other witnesses claimed that none of their escorts had any mask that day, which they resolutely denied when asked directly. Therefore, mindful of the facts that in the case at hand only one witness from the group said he had seen Pantelić approaching the barn which afterwards caught fire, the Appellate Panel finds that the Trial Panel drew a correct conclusion that the accused Pantelić's responsibility for the action in question could not be established beyond any reasonable doubt on the statement of only one witness, which stands in contravention of the statements given by other witnesses.

130. Also, only one witness, Jasmin Cero, said he had seen the accused Pantelić pore gasoline on Alija Podžić's house, but that somebody else had set it ablaze, claiming that witnesses Islam Cero and Esad Bektaš were present when Podžić's house was set on fire and could see it for themselves. However, witness Islam Cero said that,

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while they were passing by, he saw smoke above Alija Podžić's house, yet he does not know who set it on fire, while witness Esad Bektaš claims he had seen smoke coming from the houses, but did not see who set them on fire, noting only that he had seen Nenad Tanasković setting ablaze the house of a forest ranger by taking a motorbike to the house and setting it on fire. Salko Šabanović too testified about these circumstances, but said nothing about seeing Podžić's house burning, stating however that a lot of homes were set on fire that day, but that he does not know who burned them.

131. Therefore, the claim that the accused Pantelić took part in burning Alija Podžić's house is in this case substantiated by the statement of one witness only, which stands in contravention of the statements of other witnesses, so the Appellate Panel concluded that the Trial Panel properly found that the accused Pantelić's responsibility under the beyond-reasonable-doubt standard cannot be established based on that statement alone.

132. In the framework of its objections pertaining to the beating of Salko Šabanović at the school in Orahovci, the Prosecution stated that the Trial Panel did not explain why it credited the statements of defense witnesses Momčilo and Boško Trifković, while ignoring the fact that those witnesses belonged to the same company as the accused Pantelić, and that they were not present in the ground-floor room in the school when the beating of Salko Šabanović began. Besides, the Prosecution said it does not always means that a statement that is closer to the event in terms of timeline is more comprehensive or correct, arguing that, in that regard, the Trial Panel ignored the fact that in 2007 witness Šabanović gave a statement in the Nenad Tanasković case.

133. Contrary to these objections, the Appellate Panel finds that the Trial Panel, according to the challenged Judgment, credited witnesses Momčilo and Boško Trifković only in the part of their testimony that pertains to the accused Pantelić's presence at the school in Orahovci, when the civilians were brought in, and not that the accused took any action towards those civilians, after which it was stated that it does not ensue from the factual description provided in the indictment that the accused committed the actions based on which to contribute to the unlawful detention of civilians, nor has such a qualification been accepted, given that his participation in the actions that preceded the detention has not been proven.

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134. As it follows from the challenged Judgment, the Trial Panel based its decision on witness Salko Šabanović's inconsistent statements, since during the trial he said that during his stay at the school in Orahovci he was twice taken to a basement room, which is when Pantelić punched him two or three times and knocked out two of his teeth, and also on the morning after, when Pantelić again repeatedly punched him in the face. Conversely, in his statement given in the Nenad Tanasković case in 2007, describing the same event, the witness said that the accused Pantelić was among the persons who took him to the room, but did not say who hit him, claiming he did not know their identity, adding that Pantelić, Tanasković, Jovica and Brane Lakić were present in the room, but said specifically that none of them had hit him, but that there were other persons in the room who were hitting him. Besides, witnesses Islam and Jasmin Cero confirmed they had seen bruises on Šabanović when he was brought back to the room, but did not see who hit him, nor has Šabanović himself ever told them about it, which was confirmed also by witness Mujo Čakar who knew Šabanović well, saying he has never told him after the war who had actually mistreated him.

135. In that regard, when it comes to the objections raised on appeal, the Appellate Panel primarily finds that the Prosecution is right in stating that it does not always have to mean that a statement that is closer to the event in terms of timeline is more complete or accurate. However, in the case at hand, bearing in mind that in both statements the witness described one and the same event, while producing certain inconsistencies with regard to the key fact – the identity of the person hitting him, the Appellate Panel holds that based on a single statement, not corroborated by other evidence, the accused cannot be found liable for the actions he has been charged with. Consequently, the Appellate Panel concludes that in the case at hand the Trial Panel drew a proper conclusion, and finds the relevant objections on appeal ill-founded.

Acquitting Part of Judgment – Section 6

136. Regarding Section 6 of the acquitting part of the Judgment, the Prosecution notes that witnesses Himzija Tvrtković and Rašid Tvrtković say that on the critical occasion they did not see the accused Miloš Pantelić among the soldiers, but not that the accused Pantelić was not present there, with a special emphasis on witness Rašid Tvrtković's statement that he has not seen the accused Pantelić since the accused's childhood, that he has not seen him in a camouflage uniform, and that in the 1980's he moved to

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Višegrad and has not had any contact with him. The Prosecution also argues that witness Rašid Tvrtković was not present at the site at the moment when Hamed Tvrtković and Husein Tvrtković were arrested, and that in the reasoning of the challenged Judgment the Trial Panel fails to state what the imprecision of the read-out statement of witness Derviš Aličehić actually consists of. Also testifying about this count of indictment were witnesses Islam Cero and Junus Tufekčić, but the Prosecution argues that the Panel failed to mention the two in the reasoning of the Trial Judgment.

137. The Appellate Panel concludes that the Trial Panel has properly, guided by the principle of *in dubio pro reo,* rendered an acquittal and acquitted the accused Pantelić of the charges that he committed the act he was charged with under this count of the indictment.

138. Witness Himzija Tvrtković, whose husband and son, Hamed Tvrtković and Husein Tvrtković, were abducted on the critical day, said she has never found out about their fate, but also said she knew Miloš Pantelić well, and did not see the accused among the other soldiers on the critical occasion. Also, witness Rašid Tvrtković said he too knew the accused Pantelić since their childhood days, but did not see him that day among the soldiers in front of the house, when his brother Hamed Tvrtković and nephew Husein Tvrtković were abducted, and stressed in his statement he would have recognized Pantelić if he had seen him back then.

139. The Appellate Panel concludes that the Trial Panel properly credited the evidence given by witnesses Himzija Tvrtković and Rašid Tvrtković, bearing in mind that on the critical occasion both witnesses were present at the location from which Hamed Tvrtković and Husein Tvrtković were abducted, and upholds the Trial Panel's conclusion that their statements were credible, clear, reliable and mutually consistent, taking into account that the witnesses did not have any reason to protect the accused Pantelić, especially given the fact that close members of their family were abducted on the critical occasion.

140. Regarding the objection raised on appeal that in the reasoning of the challenged Judgment the Trial Panel failed to specify the alleged imprecision of witness Derviša Aličehić's read-out statement, the Appellate Panel concludes that the Trial Panel provided clear reasoning in that regard, stating that the witness mentioned the accused Pantelić only once, without describing what he did at the time and how he behaved, unlike the

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actions of one Vito Racković. As the statement of this witness was read out, and since it was not possible to cross-examine the witness with regard to the key facts, the Trial Panel could not base its decision on this statement.

141. When it comes to M-2's testimony, she told the trial she had seen the accused Pantelić with a group of soldiers who had taken them away on a truck hood, after Hamed Tvrtković and Husein Tvrtković were forced into the vehicle, which is when Vito Racković threw her off the truck, while in the statement of 7 August 2012 she said she had not personally seen Pantelić, but had heard from others that he had been there. While explaining the discrepancies between the two statements, the witness said she had had terrible fear back then, felt completely lost, and had seen Pantelić standing by the truck. Given the discrepancies and her explanation, the Appellate Panel finds that the Trial Panel drew a proper and correct conclusion, that on the critical occasion, given the circumstances, fear and disorientation, she was not able to recognize the accused Pantelić with certainty.

142. Regarding the objection on appeal pointing to the fact that witnesses Islam Cero and Junus Tufekčić also testified about the circumstances under the relevant section of the acquitting part of the Judgment, but that in its reasoning the Trial Panel did not make any reference to the two witnesses, having reviewed the case record the Appellate Panel found it was correct that the witnesses Islam Cero and Junus Tufekčić testified at the trial about the circumstances under section 6 of the acquitting part of the Judgment. However, analyzing the content of witnesses Islam Cero's statement given at the hearing held on 19 March 2013, the Panel found that he had heard about Hamed Tvrković's abduction from Meho Cero, who had told him that the accused Pantelić[9] had been present among the soldiers back then. Also, witness Junus Tufekčić, in the statement given at the hearings held on 26 February 2013 and 9 April 2013, stated he had heard from Safet Tvrtković's wife that Omer Čančar, Alija Čančar, Hamed Tvrtković and his son Husein had been abducted on that occasion. When asked by the accused Pantelić's Defense Counsel whether the accused Pantelić was among the soldiers, the witness said he had not seen the accused himself, but it was his assumption that he had been present there[10].

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[9] Transcript from the hearing held on 19 March 2013.

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143. Given the aforementioned, and mindful of the fact that these witnesses were not actually eye-witnesses to Hamed Tvrtković and Husein Tvrtković's abduction, but witnesses with indirect knowledge, the Appellate Panel concludes that their statements were not relevant with regard to the key facts, and that the Trial Panel based its conclusions on the key facts on the relevant evidence only, which means on the statements of those witnesses who had their own direct observations.

144. Consequently, the Appellate Panel finds correct the finding made by the Trial Panel that given the discrepancies between the statements of witnesses regarding this section of the acquitting part of the Judgment, one could not establish key facts beyond a doubt, specifically whether the accused Miloš Pantelić was present and participated in abducting civilians Hamed Tvrtković and Husein Tvrković, so that based on such conclusion, applying the principle of *in dubio pro reo,* the Trial Panel properly acquitted the accused of the relevant charges, which is the conclusion and assessment this Panel upholds as well, while dismissing as ill-founded the appellate grievances in this regard.

Acquitting Part of Judgment – Section 7

145. When it comes to Section 7 of the acquitting part of the Judgment, in its appeal the Prosecution argues that witness Junus Tufekčić explained the discrepancies in his statements given during the investigation and at the main trial, stating he had always said that the accused Pantelić was among those who set his house on fire. According to the Prosecutor, the Trial Panel ignored the fact that defense witness Nenad Mirković, whom the Panel credited, was a neighbor and member of the same company as the accused Pantelić, and that he had a strong motive to testify to the benefit of the accused. The appeal argues that the Trial Panel ignored the fact that witness Marković's testimony regarding the exact time when Junus Tufekčić's house was set on fire stands in contravention of the statements given by witnesses Junus Tufekčić, Islam Cero, Boško Trifković and Salko Šabanović. According to the Prosecutor, it is illogical that witness Nenad Mirković should fail to hear a close range shooting or shell explosions.

[10] Transcript from the hearing held on 26 February 2013 and 9 April 2015.

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146. With reference to the foregoing objections on appeal filed by the Prosecution, the Panel holds that in this case too the Trial Panel was properly guided by the principle of *in dubio pro reo* in acquitting the accused Miloš Pantelić of the charges related to the burning of Junus Tufekčić's house.

147. In his statement given at the hearing held on 26 February 2013 regarding the circumstances pertaining to Section 7 of the acquitting part of the Judgment, witness Junus Tufekčić stated he had watched the soldiers, among which he recognized the accused Miloš Pantelić, from his garden, at a distance of some 150 meters from the house. When asked by the Defense to clarify from which distance exactly he observed the scene, the witness said it was some 70 meters from the garden next to the house. After that answer, Defense Counsel for the accused Pantelić presented to the witness his statement from the investigation, in which he said he had observed it all at a distance of more than 500 meters from the woods near Kabernik.

148. Bearing in mind the noted discrepancies in the statements given by this witness, the Appellate Panel concludes that the Trial Panel properly found that witness statements on crucial facts were inconsistent, unclear and unconvincing, since the witness mentions various locations from which he watched the events in front of his house and its torching. Besides, the Panel notes that on three different occasions the witness stated three different distances from which he watched the event, which significantly depart from each other (70, 150 and 500 meters).

149. The Prosecution argues in its appeal that witness Junus Tufekčić's statement was corroborated by the statements of witnesses Salko Šabanović, Islam Cero and Boško Trifković. However, in that regard the Appellate Panel upholds the Trial Panel finding that those were products of indirect knowledge, that those witnesses merely confirmed that Junus Tufekčić's house was set on fire and burned down in June 1992, but had no knowledge of who exactly took part in its burning, nor has Junus ever told them about it.

150. As for the objection on appeal by which the Prosecution points to the fact that defense witness Nenad Mirković, whom the Panel credited, was the accused's neighbor and member of the same company as the accused, arguing he thus had a strong motive to testify for the accused, by analyzing witness Nenad Mirković's statement the Appellate Panel concludes he was on good terms with Junus Tufekčić, who was his first neighbor,

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and that it was none other than Nenad Mirković who advised him to stay clear of home for a while, for he could not protect him from paramilitary formations, and with whom he had remained on good terms even after the war. In his testimony witness Mirković said he had watched the arrival of unknown soldiers who stopped in front of Junus' house, yet he did not hear any shooting or grenade explosions, but only saw, some half an hour later, that Junus' house roof was on fire.

151. Consequently, the Appellate Panel concludes that the Trial Panel properly found that the Prosecution's evidence was not of such a quality so as to take tit as a basis to conclude, under the beyond a reasonable doubt principle, that it was none other than the accused Miloš Pantelić who set fire to Junus Tufekčić's house.

152. As for witnesses Junus Tufekčić's statements, the Trial Panel found it was not a statement that would leave no doubt as to its accuracy and veracity, especially when taking into account the discrepancies in the statements, in which he spoke about the location and distance from which he observed the critical event, and the fact that in his statement witness Mirković said that Junus Tufekčić could not have possibly seen the events that were taking place around the house, from the woods near Kabernik, which is more than 500 meters away from the house.

153. According to the Appellate Panel, the Trial Panel quite properly had in mind that witness Tufekčić's statement could not be verified, which is to say it is not corroborated by statements of witnesses, and stands in contravention of witness Nenad Mirković's statement, which is why the Trial Panel was not in a position to establish the accused Pantelić's guilt for the actions in question beyond a reasonable doubt, which is the conclusion upheld by this Panel as well, which is why it dismissed as ill-founded the objections on the appeal arguing the contrary.

Acquitting Part of Judgment – Section 8

154. This section of factual findings of the Trial Judgment acquitted the accused Ljubomir Tasić, Predrag Milisavljević and Miloš Pantelić of the charges that in the manner described in the Operative Part of the Judgment they committed the persecution of Bosniak civilians in the villages of Smriječje, Veletovo, Čengići, Žagre, Gornji and Donji Dubovik and Hanište by detention and forced deportation.

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155. The Prosecution argues that in relation to this count of the indictment the Trial Panel drew a wrong conclusion that regarding the accused Ljubomir Tasić the Prosecution failed to offer such evidence that would clearly and beyond a reasonable doubt point to the accused Tasić's responsibility for the forced deportation of population, and in relation to Predrag Milisavljević and Miloš Pantelić that it was not proven that they participated in the unlawful detention of civilians on the convoy. While accepting the Trial Panel's conclusion on the forced deportation of Bosnian civilians from the mentioned villages, the Prosecution still challenges the conclusion that it was not proven that the accused Tasić intended to persecute the civilian population by their forced deportation. According to the appeal, the accused's intent stems from his very actions, which are reflected in his order when he told the mentioned population that ethnic cleansing was about to take place, that convoys had been organized offering them three directions of departure, and that all those who will have stayed would be killed. The appeal also argues that the accused showed his intent through his presence at multiple locations during convoy's passing by, in the hamlet of Čengići, as well as in Bosanska Jagodina, and ultimately in Višegrad, from which the convoy departed for Olovo and Kladanj. In its appeal the Prosecution also challenges the conclusion of the contested Judgment in terms of the lack of evidence pointing to the accused's discriminatory intent, arguing that it ensues from the fact that only Bosniak civilians had been deported, while Serb soldiers provided escort, which begs the conclusion that the civilians were displaced from their homes exclusively because of their ethnic or religious background. Ultimately, citing prosecution witness statements, above all those given by Milija Šijaković, Gina Krtinić and Draga Gavrilović, as well as partly those of witnesses Ferid Spahić, Zizo Karaman, Meho Čelik, M-4 and M-5, the Prosecution argued that the accused was *de facto* commander of the fourth company, from which it ensues that the accused Tasić was part of the organization, in this specific case a military structure that organized and carried out a plan of forced transfer of Bosniak civilians. According to the Prosecution's theory, the accused Tasić was one of the executors of the plan to relocate the Bosniak population. It can be concluded based on his entire conduct that he concurred with the entire event and shared the intent of the other Serb soldiers. As for the accused Predrag Milisavljević and Miloš Pantelić's criminal actions, in his appeal the Prosecutor points to the Trial Panel's proper conclusion that the two accused, fully armed, participated in convoy's escort, but that the challenged Judgment drew a wrong conclusion that it was not proven that the civilians on the convoy were detained unlawfully, which was the reason why the charges from the indictment that the accused committed

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persecution by unlawful detention of civilians were not upheld. According to the Prosecutor, by their actions the accused gave a decisive and considerable contribution to the commission of unlawful detention, which all ensues from the fact that the victims were unarmed civilians who did not wear any uniform, did not offer any resistance, that they were provided no evidence on the need to arrest them, while on the other hand the accused were members of the reserve police unit and were armed, and thus aware that any arrest must be based in law, which was not the case here, therefore the accused's actions were covered by their direct intent.

156. However, contrary to Prosecution's arguments on appeal, the Appellate Panel concludes that the Trial Court has, in this part of the challenged Judgment, completely and properly established all facts relevant to deciding in this criminal matter. The Trial Court acted completely in line with Article 281(2) of the CPC BiH and with due diligence evaluated the statements of all witnesses heard on the circumstances, as well as the general circumstances at the critical time, and based on such evaluation drew its conclusion on all facts essential for a proper resolution of all disputable issues, primarily the issues raised by the appeal: the existence of intent on the part of the accused for the purpose of carrying out persecution of the non-Serb civilian population from the territory of the Municipality of Višegrad, and the existence of a discriminatory intent, primarily on the part of the accused Tasić, during the relevant period.

157. Taking into account the fact that the key prosecution witness Ferid Spahić, who had been a direct participant in the negotiations on the Bosniak population relocation, did not confirm the decisive fact that the accused Tasić had issued the order for the relocation of the civilian population, nor could the witness have concluded based on his actions that the accused acted in a discriminatory manner, which did not follow from the statements of other witnesses heard, above all Sabahudin Čelik, Meho Čelik, Seno Kasapović, witness M-6 *et al.*, one cannot beyond a reasonable doubt draw a conclusion as to whether the elements of this criminal offense have been satisfied. The Appellate Panel accepts the fact that the accused was present during the meeting at the *Rzavski bregovi* coffee bar, that the accused informed village representatives about the organization of a convoy to take them from the territory of the Municipality of Višegrad, that the accused was in Bosanska Jagodina when the population boarded the buses, as well as at the town square in Višegrad, yet it finds, as properly concluded by the Trial Panel as well, that besides the provability of the accused's actions and the totality of circumstances under which the

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transfer was carried out, which was beyond a doubt unauthorized and in contravention of the rules of international humanitarian law, it was not proven that the accused's actions included his intent to carry out persecution of the non-Serb civilian population, which is an essential element of this charge.

158. In paragraphs 436, 448, 449, and ultimately in paragraph 455 of the challenged Judgment, the Trial Panel has made proper conclusions regarding the foregoing circumstances, starting from the fact that none of the witnesses, including the key prosecution witness Ferid Spahić, could not confirm that the accused had threatened them in any way whatsoever at the mentioned meeting (on the contrary, most of the witnesses found his actions to be well-intended, since they held he had in a way warned them of the danger coming from "another army"), via the fact that witness Spahić, witness M-6, M-5 speak about the trust they had towards the accused, which is why they were the ones who insisted that they Serb neighbors be part of the convoy escort, to the fact that none of the witnesses heard said that the accused had issued any order with regard to the boarding of buses or the movement of convoy, or confirmed any circumstances that would pertain to the convoy planning and organization. Consequently, his participation in the given event, which is undisputable, does not by itself imply his knowledge in terms of persecution of the non-Serb population, whose existence would entail criminal responsibility, which beyond a doubt points to the validity of the Trial Panel's conclusion. For the foregoing reasons, this Panel too finds unacceptable the prosecution's theory raised on appeal that it is possible to take the accused's actions or behavior towards the Bosniak civilians in the territory of the Municipality of Višegrad and draw a conclusion that his *mens rea*, or intent, was proven, in terms of his intent that the criminal offense be committed as a consequence of his conduct.

159. Also, contrary to the Prosecutor's appeal, the Appellate Panel finds that the Trial Panel has, in this part of the challenged Judgment, completely and correctly established all relevant facts for deciding in this criminal matter also in relation to the accused Predrag Milisavljević and Miloš Pantelić.

160. Having analyzed the objections the Prosecutor raised on appeal pertaining to the foregoing accused, the Appellate Panel found them ill-founded. The reasoning of the challenged Judgment, in this Panel's opinion, provides complete and correct factual conclusions under this section of the Operative Part of the Judgment, pertaining

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to the accused Predrag Milisavljević and Miloš Pantelić, finding that the Prosecution did not prove the accused's guilt for the criminal offense of Crimes against Humanity under Article 172(1)h) and the CC BiH as read with Subparagraph d) – deportation or forcible transfer of population, and Subparagraph e) – imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, as read with Article 29 of the CC BiH, all as read with Article 180(1) of the CC BiH.

161. In this Panel's opinion, the challenged Judgment quite correctly states that during the evidentiary proceedings, given the status of the accused (in the escort of the convoy in the capacity of soldiers or reserve policemen), the Prosecution did not present any evidence regarding the existence of decisive facts to indicate that the accused knew, or were aware that by executing the order to escort the convoy they in fact contributed to a forcible transfer of the population. In that regard, the Trial Panel was right in comparing the convoy escort order to the order to kill a particular person or persons, whose illegality is obvious, and finds that, unlike with the murder order, with the convoy escort order it cannot be merely assumed that the person carrying out the order has the knowledge and awareness of his contribution to the forcible transfer, but it is necessary to clearly prove it, which in this case the Prosecution failed to do.

162. Finally, when it comes to the Prosecutor's theory on the accused Milisavljević's and Pantelić's responsibility, that by their actions under this count of indictment they also committed the persecution of the civilian population by their incarceration, this Panel shares the conclusion of the Trial Panel, and finds that in this regard too the Prosecution failed to adduce proper evidence. Taking into account the statements of the witnesses heard on the circumstances of the entire event concerning the organization of convoy and its movement, and the role of the accused in that connection, one cannot beyond a reasonable doubt draw a conclusion on the existence of knowledge with the accused, during the convoy escort, about the fate of civilians, or that the goal of convoy organization was the persecution of civilian population by incarceration. It should be noted in that regard, as properly found by the Trial Panel, that it follows from the adduced evidence that it was not before they reached the *Sladara* company facilities that the accused definitively became aware of the further fate to befall the separated men, when the appropriation of money, other valuables and personal documents began, and when they were all tied with wire and transferred into the *Terpentine* bus. Those actions (separation on the Išćerića hill

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and beyond) are however included in Count 1, under which the accused were found guilty.

163. Bearing in mind that the Prosecutor's appeal did not really bring into question the Trial Panel's findings in the acquitting part of the challenged Judgment, it begs the conclusion that the Trial Panel was correct when based on Article 284(1)c) of the CPC BiH it acquitted the accused Ljubomir Tasić, Predrag Milisavljević and Miloš Pantelić of the charges under Count 8, which is why the Trial Judgment, pursuant to Article 315(2) of the CPC BiH, was upheld in this part too.

IV. CRIMINAL CODE VIOLATIONS

APPEAL FILED BY DEFENSE COUNSEL FOR THE ACCUSED PREDRAG MILISAVLJEVIĆ

164. Defense Counsel for the accused Predrag Milisavljević has, in the framework of this ground of appeal, raised the objection that the criminal offense of Crimes against Humanity was not codified as a criminal offense under domestic law at the time of the war from 1992 to 1995, while the ban on retroactive effect represents a classical principle of both international as well as national criminal law. Defense Counsel noted that retroactivity is permissible only to the benefit of the accused in the form of the application of a more lenient law.

165. As to the objection raised, the Appellate Panel first of all notes that the Defense properly argued that the criminal offense of Crimes against Humanity under Article 172(1) of the CC BiH was not as such prescribed by the criminal code in effect at the time of commission. Under the principle of legality, no one can be punished by a criminal sanction for an offense which, before it was committed, was not prescribed under law or international law as a criminal offense, and for which no criminal sanction was prescribed by the law.

166. However, the Appellate Panel finds that in the case at hand it is exactly the kind of incrimination that includes a violation of the rules of international law. At the critical time, the criminal offense of Crimes against Humanity constituted a criminal offense from the

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aspect of both customary international law as well as the principles of international law.

167. Such a position of the court is based on the case law of the European Court of Human Rights and illustrated in numerous cases that looked into the requirements of the principle of legality under Article 7 of the ECHR. In those cases, the European Court of Human Rights never brought into question the punishment for the offenses committed during a period when such action was not defined as a criminal offense by domestic law, when it comes to crimes against humanity, since at the critical time the criminal offense of crimes against humanity beyond a doubt constituted a criminal offense under international law.

168. In the context of the aforementioned, the Appellate Panel points that the Judgment of the European Court of Human Rights in Strasbourg of 10 June 2012, in the case of sentenced person Boban Šimšić, in conjunction with the above, *inter alia* says as follows:

"The Court observes that the present applicant was convicted in 2007 of persecution as a crime against humanity with regard to acts which had taken place in 1992. While the impugned acts had not constituted a crime against humanity under domestic law until the entry into force of the 2003 Criminal Code, it is evident from the documents cited in paragraph 8-13 above that the impugned acts constituted, at the time when they were committed, a crime against humanity under international law. In that regard, it is noted that all the constituent elements of a crime against humanity were satisfied in this case: the impugned acts were committed within the context of a widespread and systematic attack targeting a civilian population and the applicant was aware of that attack (contrast Korbely, cited above, §§ 83-85).

The applicant argued that he could not have foreseen that his acts could have constituted a crime against humanity under international law. It is noted, however, that the applicant committed those acts as a police officer. The Court has held that persons carrying on a professional activity must proceed with a high degree of caution when pursuing their occupation and can be expected to take special care in assessing the risks that such activity entails (see Kononov, cited above, § 235). Furthermore, having in mind the flagrantly unlawful nature of his acts, which included murders and torture of Bosniacs within the context of a widespread and systematic attack against the Bosniac civilian population of the Višegrad Municipality, even the most cursory reflection by the applicant

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would have indicated that they risked constituting a crime against humanity for which he could be held criminally accountable.

The Court concludes that the applicant's acts, at the time when they were committed, constituted an offence defined with sufficient accessibility and foreseeability by international law. This complaint is therefore manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention."

169. Finally, the Judgment of the European Court of Human Rights in the Maktouf/Damjanović case od 18 July 2013 also affirms an identical position in conjunction with trials for crimes against humanity, which were incorporated in domestic law in 2003. The relevant decision clearly says that "the State Court and the Entity courts therefore have no other option but to apply the 2003 Criminal Code in such cases."

170. Accordingly, Defense Counsel's objections regarding the incorrect application of criminal law were dismissed as ill-founded.

V. GROUNDS OF APPEAL UNDER ARTICLE 300 OF THE CPC BiH: DECISION ON PROPERTY CLAIM

A. STANDARDS OF REVIEW

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

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

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

174. 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.

175. 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.

B. PROSECUTOR'S APPEAL

176. In its appeal regarding the criminal sanction imposed on the accused Predrag Milisavljević and Miloš Pantelić, the Prosecution argued that the imposed prison sentences of 20 (twenty) years each were not proportionate to the degree of the accused's criminal responsibility, the motives for which they committed the crime and the intensity of endangering a protected good, as well as that the Trial Panel did not sufficiently appreciate other aggravating circumstances on the part of the accused. In that regard, the Prosecution argues that the Trial Panel failed to evaluate the accused's position in terms of the fact that as members of a reserve police unit they had the obligation to protect the security and safety of all citizens in the territory of the Municipality of Višegrad, then there is the issue of the number of killed civilians, and the fact that they took part in appropriating money and personal belongings, and in tying the victims' hands with wire.

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177. Contrary to the objections raised on appeal, the Appellate Panel concludes that the Trial Panel properly evaluated all aggravating circumstances on the part of the accused, as stipulated by the relevant provisions laid down in the CC BiH. In so doing, the Appellate Panel paid particular attention to the degree of the accused's guilt, the motives for the commission of the criminal offense, the intensity of jeopardizing or violating the protected good, and the circumstances under which the crime was committed and the ensuing consequences.

178. In that regard, the Appellate Panel, just like the Trial Panel, finds that no punishment can adequately reflect the gravity of killing so many people, as well as the mental pain inflicted on their families, especially because the taking of lives was committed on a discriminatory basis. However, the Appellate Panel upholds the Trial Panel's conclusion that, however horrifying this crime itself may be, there are accused persons who have committed more serious crimes, such as the criminal offense of genocide or mass murders, including the masterminds of those crimes, who deserve harsher punishments.

179. Regarding the objection that the Trial Panel did not sufficiently appreciate the accused's position, the Appellate Panel, even though that fact bears no particular relevance, notes that at the time of commission the accused were ordinary members of the Višegrad Brigade – VP 7158, not members of the reserve police unit, as the Prosecution claims, nor members of any command structure.

182. Also, regarding the objection that the Trial Panel did not appreciate the facts that the accused took part in appropriating money and personal belongings, and in tying the victims' hands with wire, the Appellate Panel finds that those actions were in this specific case taken into account on the part of both of the accused, but that they practically constituted preliminary actions that were taken in the framework of the ultimate *actus reus*, which is the killing of civilians, whereby the basic and fundamental human right of victims in democratic societies the was violated – the right to life, defined in Article 2 of the ECHR.

183. Given the aforementioned, Prosecution's objections in relation to the imposed criminal sanction were dismissed as ill-founded.

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C. EXTENDED EFFECT OF APPEAL FILED BY DEFENSE COUNSEL FOR THE ACCUSED PREDRAG MILISAVLJEVIĆ AND MILOŠ PANTELIĆ

184. Although Defense Counsel for the accused Milisavljević filed a merely formal appeal against the decision on criminal sanction, without providing any specific reasons in that regard, while Defense Counsel for the accused Pantelić did not even file any appeal on those grounds, but only on the grounds of essential violation of criminal procedure provisions and incorrectly and incompletely established facts, the Appellate Panel has, mindful of Article 308 of the CPC BiH defining the extended effect of an appeal, re-examined the Trial Judgment also in the part related to the decision on criminal sanction for both accused.

185. Re-examining whether the criminal sanctions the challenged Judgment imposed on the accused were proper and lawful, the Appellate Panel was primarily mindful of the fact that the accused were found guilty of the criminal offense of Crimes against Humanity under Article 172(1)h) as read with Subparagraph a) of the CC BiH, and that they committed the given criminal offense as co-perpetrators, in terms of Article 29 of the CC BiH, as well as of the significance and gravity of the crime.

186. The Appellate Panel also had in mind all circumstances prescribed in Article 48 of the CC BiH, which may be of influence in having the punishment more or less lenient, and in that context also all the aggravating circumstances properly established by the Trial Panel, such as the fact that the victims were selected on a discriminatory basis and killed in a particularly brutal manner, including same family members, which is why some families lost the majority or all of its male members, as well as that the accused never really showed its opposition to the commission of the crime.

187. Also, the Appellate Panel paid particular attention to the fact that the accused acted in concert and that each of them gave a decisive contribution to the commission of the crime – the killing of 48 civilians. However, unlike the acts of commission by the accused Predrag Milisavljević, in relation to whom it has been proven beyond a doubt that on the critical occasion he was a direct perpetrator of the killing of civilians, meaning that he was the first to open fire on the lined-up civilians, the Appellate Panel finds that no single piece of adduced evidence confirmed that the accused Miloš Pantelić too fired at the civilians.

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188. As was already explained, based on the adduced evidence and on their correlation the Appellate Panel applied logical reasoning to draw an undisputable conclusion that the accused Pantelić was present at the *Paklenik* pit when civilians were killed, meaning that by his actions that were in the function of securing the column and the area in front of the as the place where the civilians who had been forcibly brought there were killed, or in the function of preventing any attempt of escape or resistance by those forcibly brought there, he gave a decisive contribution to the killing of all those civilians, save witness Spahić who was the only one who managed to escape. However, although it is quite probable that all of them fired their arms, the Panel was not able to establish beyond a reasonable doubt that the accused Pantelić too fired at the civilians, for the simple reason that none of the witnesses who testified about the event could not confirm that he did, unlike the accused Milisavljević who was established to have fired the first round.

189. Bearing in mind the specific acts of commission of the crime by both accused, and by taking into account individual contributions of each of them to the resulting prohibited consequences, the Panel finds that from the aspect of punishment the actions of commission they undertook should be treated separately, which means a certain distinction should be made between them.

190. The Appellate Panel thus finds that in relation to the actions undertaken the accused Predrag Milisavljević received a proper sentence of 20 years in prison, while in relation to the accused Miloš Pantelić, bearing in mind the foregoing circumstances, this Panel has concluded that a more lenient sentence may also achieve the purpose of punishment, which is why it modified the Trial Judgment in the part related to criminal sanction, by sentencing the accused Pantelić for the given criminal offense, while applying Articles 39, 42 and 48 of the CC BiH, to 15 (fifteen) years of imprisonment, to which, pursuant to Article 56(1) of the CC BiH, the time he spent in pre-trial from 22 June 2012 to 31 May 2013, and from 28 October 2014 onwards, shall be credited.

191. The Appellate Panel finds that these sentences will fully achieve the purpose of punishment as set forth in Article 39 of the CC BiH, from the aspect of both special and general deterrence.

192. Finally, it should be noted that Defense Counsel for the accused Predrag Milisavljević filed an appeal also with regard to the decision on property claim. However, since

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the appeal did not state any specific reasons that would cast doubt on the relevant part of the Trial Judgment, and since the Appellate Panel, under Article 306 of the CPC BiH, is obligated to review the challenged Judgment only in the framework of the objections raised on appeal, the Panel did not specifically analyze the appeal in that part, finding that particular ground of appeal to be stated in general terms only.

193. Mindful of the aforementioned, pursuant to Articles 313 and 314 of the CPC BiH the Appellate Panel made a decision as stated in the Operative Part of the Judgment. Since Sections 2 and 3 of the acquitting part of the Trial Judgment were not the subject of Prosecutor's appeal, that part of the Judgment remains unchanged.

MINUTES TAKER **JUDGE PRESIDING**

Denis Podžić

Mirko Božović

LEGAL REMEDY NOTE: No appeal lies from this Judgment.

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