

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case No. S1 1 K 014267 13 Krž

Delivered on: 16 December 2013

Before the Appellate Panel comprised of:

Judge Hilmo Vučinić, Panel President
Judge Dragomir Vukoje
Judge Redžib Begić

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MIRKO (MILE) PEKEZ

SECOND INSTANCE VERDICT

Prosecutor of the BiH Prosecutor's Office:

Mirko Lečić

Counsel for the Accused:

Attorney Duško Panić

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Number: S1 1 K 014267 13 Krž
Sarajevo, 16 December 2013

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Appellate Division Panel of the Section I for War Crimes, comprised of Judge Hilmo Vučinić, as the Panel President, and Judges Dragomir Vukoje and Redžib Begić, as members of the Panel, with the participation of Legal Advisor Medina Džerahović, as the Record-taker, in the criminal proceedings against the accused Mirko Pekez, son of Mile, for the criminal offense of War Crimes against Civilians, in violation of Article 173(1)(c) and (f) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), as read with Article 29 and Article 180(1) of the same Code, deciding upon an appeal of the Counsel for the Accused, Attorneys Duško Panić and Predrag Radulović, filed from the Verdict of the Court of Bosnia and Herzegovina, No. X-KR-05/96-1 of 15 April 2008 rendered upon the Decision of the Constitutional Court of Bosnia and Herzegovina, No. AP 116/09 of 22 October 2013, at the Panel session held in the presence of the Prosecutor of the BiH Prosecutor's Office, Mirko Lečić, the Accused in person, and Attorney Duško Panić as the Accused's Counsel, on 16 December 2013, issued the following:

V E R D I C T

Granting, in part, the appeal filed by the Counsel for the accused Mirko (Mile) Pekez, and **r e v i s i n g** the Verdict of the Court of Bosnia and Herzegovina, No. X-KR-05/96-1 of 15 April 2008 with regard to the application of the criminal code, legally qualifying the crime of which the accused Mirko (Mile) Pekez is found guilty as the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (the CC of SFRY), taken in conjunction with Article 22 (Complicity) of the same Code, and sentencing the Accused with regard to the decision on sentence, pursuant to Articles 38 and 41 of the CC of SFRY, to imprisonment for a term of 20 (twenty) years.

Pursuant to Article 50 of the CC of SFRY, the time the Accused spent in custody, running from 30 October 2007 to 22 April 2008, and the time spent serving the sentence of imprisonment pursuant to the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/96-1 of 15 April 2008, running from 22 April 2008 through 18 November 2013, shall be credited towards the sentence imposed.

As to its remaining part, the First Instance Verdict shall remain unrevised.

REASONS

I. PROCEDURAL HISTORY

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

1. The Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No. X-KR-05/96-1 of 15 April 2008 found the accused Mirko Pekez (son of Špiro), **Mirko Pekez (son of Mile)**, and Milorad Savić (son of Ljupko) guilty in as much as they committed, by the acts described in the enacting clause of the referenced Verdict, the criminal offense of War Crimes against Civilians under Article 173(1)(c) and (f), taken in conjunction with Article 29 of the CC of BiH and Article 180(1) of the same Code.

2. For the referenced crime, the Trial Court sentenced the accused **Mirko Pekez (son of Mile)** to a long-term imprisonment of 29 (twenty nine) years, while the accused Mirko Pekez (son of Špiro) and Milorad Savić (son of Ljupko) received the sentences of long-term imprisonment for 21 (twenty one) years each. Pursuant to Article 56 of the CC of BiH, the time the Accused have spent in custody, running from 1 November 2007 onwards, shall be credited towards the sentence imposed. Applying Article 188(4) of the CPC of BiH, the Accused were relieved of the duty to reimburse the costs of the proceedings, while applying Article 198(2) of the CPC of BiH, the injured parties Nuriya Zobić, Zejna Bajramović, Omer Karahodžić, Fahrija Mutić and Subhudin Zobić, including the injured party Mustafa Bajramović and the killed civilians' relatives, were instructed to pursue their claims under property law in a civil action.

3. Deciding upon the appeals filed by the Counsel for the Accused, the Appellate Division Panel of the Court of BiH handed down the Verdict No. X-KRŽ-05/96-1 of 29 September 2008 dismissing as ill-founded the appeal of the accused Mirko Pekez (son of Mile), upholding the Trial Verdict in the part concerning this Accused, granting the appeals of the other two Accused, revoking the Trial Verdict in the part concerning these two Accused, and ordering a hearing before the Appellate Panel.

4. The Decision of the Constitutional Court of Bosnia and Herzegovina on Admissibility and Merits, No. AP-116/09 of 22 October 2013, rendered upon an appeal lodged by Mirko Pekez (son of Mile) (the applicant), found a violation of Article 7(1) of the ECHR. Accordingly, the Constitutional Court of BiH revoked the Appellate Verdict of the Court of BiH, No. X-KRŽ-05/96-1 of 29 September 2008, in the part concerning this Accused, and remanded the case back to the Court of BiH for a new decision in accordance with the guarantees provided for under the referenced Article of the Convention.

5. Having acted pursuant to the above referenced Decision, the Appellate Panel concluded that, following the revocation of the final Appellate Verdict in its referenced part, the case is now at the stage of deciding upon an appeal from the Trial Verdict, more precisely, from the part thereof concerning the accused Mirko (Mile) Pekez. It was, therefore, necessary to hold a hearing before the Appellate Division Panel.

B. THE APPEAL AND THE RESPONSES TO THE APPEAL

6. The Counsel for the Accused, Attorneys Duško Panić and Predrag Radulović, timely filed an appeal from the Trial Verdict, in the part concerning the Accused, on the grounds of the erroneously and incompletely established state of facts, miscarriage of justice, and the decision on criminal sanction, with a motion that the appeal, together with the whole case record, be forwarded to the Appellate Division Panel for review and consideration. Under the same appeal, the Counsel moved the referenced Panel to grant the appeal, render a decision revoking the Trial Verdict, and order a hearing, or to revise the Trial Verdict, and impose on the Accused a commuted sentence.

7. The Prosecution filed no appeal, but rather responded to the Defense's appeal, with a motion that the appeal be refused as ill-founded, and that the Trial Verdict be upheld.

8. On 16 December 2013, the Appellate Division Panel held a session pursuant to Article 304 of the CPC of BiH. The parties and the Defense addressed their appellate reasons, having particularly pointed to a new procedural situation.

9. Repeating the appellate reasons, the Accused's Counsel pointed to the fact that he had no communication with the Accused considering his hearing impairment, and that the Accused was just a figure in the courtroom. In support of his arguments, the Counsel also submitted the relevant medical documents. The Counsel argued that, following the Appellate Verdict's revocation, the Court did not properly decide to remand the case to the appellate stage of the proceedings because, in a legal gap situation, the case should be remanded to the confirmed indictment stage. Ultimately, the Counsel submitted that the state of facts was erroneously established, and moved the Court, if all the presented reasons were dismissed, to take into account all the extenuating circumstances on the part of the Accused, and to impose on him, for the referenced crime, a sentence within the penal maximum magnitude of 15 years. The Accused stood by his Counsel's arguments, and asked that the proceedings be reopened, considering his claims that he had taken no active part in the referenced crime commission, that others did it, and that he could describe it all in detail.

10. Responding orally, the Prosecutor agreed with the motion that the Defense's appeal be granted in the part concerning the criminal code application, and that the Accused receive a criminal sentence within the range of sentencing prescribed for the referenced crime. According to the Prosecutor, the special maximum is a sentence of imprisonment for a term of 20 years.

11. Having reviewed the impugned Verdict insofar as contested by the appeals, pursuant to Article 306 of the CPC of BiH, the Appellate Panel rendered the decision as stated in the enacting close of the Verdict for the reasons that follow.

C. PRELIMINARY CONSIDERATIONS

12. Before dealing with the appellate reasons subsumed under the concrete legal grounds, the Panel will, within the preliminary considerations, refer to the Counsel's orally presented arguments stressing the Accused's incompetency to stand trial, and to participate in the procedural activities, as well as to the Court's improper decision to try the case at issue at the second instance stage. According to this Panel, the Counsel's appellate reasons are ill-founded.

13. The Panel's footing for such a position lies in the Trial Panel's concrete and reasonable arguments, and in the facts that, already during the investigation stage, the Accused was clearly informed about all his rights, that he even invoked his right to remain silent, and his right to give no statement before the Prosecutor in terms of Article 6(3) of the CPC of BiH, and that from the beginning, he had an *ex officio* counsel selected at his own choice. Therefore, it seems illogical that during the entire course of the proceedings, the Accused could not have become aware of the acts charged against him, despite all the submissions in writing, and all the documents he has signed since the first questioning in the Prosecutor's Office, or ultimately, based on the indictment.

14. The Appellate Panel has further concluded that, even if the Defense's arguments that the Accused participation in the proceedings was merely formal, namely that he was not aware of the charges pressed against him until the main trial commencement, there is but a slight likelihood that he was not interested in this fact given that, already by that time, he had been in custody for a longer period of time, and that he was brought before the Court twice. It is therefore logical that the Accused must have had a strong interest in everything concerning his life and freedom, and that he must have had a need to react, by indicating that he did not understand what was communicated to him.

15. The Court has reviewed the medical documentation filed by the Defense at the Appellate Panel's session, namely the findings of a specialist in otolaryngology, and the Medical Findings, Evaluation and Opinion establishing that the Accused was unfit for military service. However, the audio-video footage of the hearing held in the first instance revealed that the Accused had testified with no major difficulties, that he answered the questions posed by both the Defense and the Prosecution, and that pursuant to the medical diagnosis, the Court provided him with a hearing aid. Obviously, the Accused's hearing is indeed significantly impaired, but using a hearing aid he is able to hear and understand a clear conversation. At the session held before this Panel, the Accused had no problems answering the questions posed by the Panel President, which is why the members of the Panel are satisfied that the hearing impairment, referred to by the Defense, in terms of their inability to communicate with the Accused, and that he was just a figure in the courtroom, is not of such a nature so as to prevent the Accused from normally standing the trial. From this Panel's perspective, all the foregoing leads to the conclusion that the Defense's tactics was to try to abuse the Accused's undisputedly impaired hearing for wrong purposes, because the Accused became aware, particularly after the indictment confirmation, and following the Trial Verdict delivery, of the gravity of the crimes charged against him, namely of the charges of which he was found guilty

under the non-final Verdict. This is why the advanced complaints lack the required logical and any proved grounds.

16. As to the complaints contesting the stage of the proceedings, the Appellate Panel has noted that the Appellate Verdict of this Court was revoked under the Decision of the Constitutional Court of 22 October 2013, in the part concerning the Accused, and that, accordingly, there is no dilemma that this case is now at the appellate stage of the proceedings, which preceded the revoked decision rendering. More specifically, the concrete case does not concern the situation prescribed under Article 327 of the CPC of BiH, namely a situation in which the extraordinary remedy to reopen the proceedings in favor of the convicted person applies, because the Constitutional Court has departed from the procedure anticipated under sub-paragraph f) of the said Article. According to the said provision, if the Constitutional Court found a violation of human rights and fundamental freedoms, like *in concreto* case, it should have noted the violation, whereupon the Court of BiH would be obliged to remedy the established violation in the reopened proceedings. In such a case, the proceedings would be remanded to the confirmed indictment stage, as ill-foundedly indicated by the Defense. However, considering that the stage of the proceedings was in advance determined under the Constitutional Court's Decision, this Court has, in the concrete case, acted in accordance with the foregoing.

II. APPELLATE GROUNDS UNDER ARTICLE 299 OF THE CPC OF BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS

A. INTRODUCTORY REMARKS

17. In these proceedings, the Court is under obligation to rectify the violation found by the Constitutional Court's Decision, namely that, with respect to the sentence imposed in the concrete case, the CC of BiH was retroactively applied to the prejudice of the Applicant/Accused.

18. Notwithstanding that the Accused's guilt was not the subject of the Constitutional Court's consideration, this Panel has analyzed the essential facts on the grounds of which the Accused's guilt was proved and established. Thereupon, this Panel applied, to such an established state of facts, the provisions of the criminal code that was in effect at the time when the crime was committed, namely the provisions of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (the CC of SFRY), which was adopted as the Criminal Code of the Republic of Bosnia and Herzegovina pursuant to the Decree with the Force of Law (Official Gazette of the R BiH", No. 2 of 11 April 1992).

B. EVALUATION AND CONCLUSIONS OF THE APPELLATE PANEL

19. This Panel has concluded that the appellate complaints of the Counsel for the accused Mirko (Mile) Pekez, concerning the incorrectly and incompletely established state

of facts under Article 299(1) of the CPC of BiH, are ill-founded, and that, in relation to this part, the Trial Verdict's arguments are clear and well-founded.

20. More specifically, the contested Verdict found the accused Mirko (Mile) Pekez guilty of the commission of the acts and the offenses charged against him under the Indictment, namely that, in concert with the two other Accused, and all three of them as a part of an organized group of armed men, in violation of the rules of international law during war and armed conflict, committed killings and intentional infliction of serious physical and mental pain on persons, violations of physical integrity, and property plundering in the way as described in the enacting clause of the Verdict. The Trial Panel rendered this decision following a diligent and comprehensive evaluation of all pieces of evidence, individually and in combination with the other evidence, and following the examination of the arguments advanced by both the Prosecution and the Defense. According to the Appellate Panel, the foregoing Trial Panel's finding is proper and complete. The Appellate Panel will explain this conclusion in detail in the text to follow.

21. The appellate reasons pertaining to the erroneously and incompletely established state of facts are reduced to a theory according to which the Court has, based on an arbitrary hypothesis, found that the second-accused „*participated in a joint criminal enterprise of killing and plundering the Muslim civilian population from the villages of Ljoljići and Čerkazovići...*“, that this Accused's participation in all acts of the commission of the crime at issue was not fully clarified, particularly the act of civilians killing, and that with an unreasonable evaluation of the accepted Prosecution evidence, the Court failed to evaluate this evidence pursuant to this Accused's realistic relation toward the criminal offense of war crimes against civilians.

22. Following a detailed examination of the contents of the Verdict and of all pieces of evidence, individually and in combination, this Panel has concluded that the above referenced complaints are ill-founded, and that they have no footing in the properly and completely established state of facts in the contested Verdict, which has provided valid and acceptable reasons for all the decisive facts based on which the decision pertaining to this Accused was rendered.

23. Before drawing the final conclusion, that the accused Mirko Pekez (son of Mile) is guilty of the acts charged against him under the Indictment, the contested Verdict has first presented all relevant evidence. Thus, during the first instance proceedings, the following Prosecution witnesses were heard with regard to this fact: Nuriya Zobić, Borka Oparnica, Dragan Nišić, Dragan Ždrnja, Fahrija Mutić, Nedeljko Jandrić, Pero Savić, Zejna Bajramović, Omer Karahodžić, Subhudin Zobić, Dr. Rajko Todorčević, Dr. Hamza Žujo, forensic expert from Sarajevo, additional witness Miroljub Perlaš, as well as the Defense witnesses, including, among others, the following: Nikola Nikolaš, Nedeljko Jandrić, Jovo Topić, Jovo Prole, Vlajko Radić, Bosiljka Rosić, and also the First-accused and the Second-accused in their capacity as witnesses. The Trial Panel has evaluated their statements, and the presented objective documentation, fully in accordance with Article 281(2) of the CPC of BiH.

24. In addition to the existing three, out of four general (*chapeau*) elements of the criminal offense of War Crimes against Civilians under Article 142 of the CC of SFRY, namely that the crime is committed in violation of the international law, that the commission of crime was directed against the civilian population, persons who do not take active part in the armed conflict, who have laid down their arms, or were placed *hors de combat*, or who were protected under the provisions of the Geneva Convention on the Protection of Civilian Persons in Time of War of 12 August 1949, that the same violation was made in time of war, armed conflict or occupation, or that there is a *nexus* between the perpetrator's act and the war, the Trial Panel has properly found that the fourth disputed element was satisfied too. Therefore, this Panel has also held that the contested Verdict properly found beyond a reasonable doubt that the accused Mirko (Mile) Pekez indeed undertook the acts of commission of the referenced crime, namely that, as a co-perpetrator, he took an active part in the abduction, plundering and, ultimately, in the killing of the Bosniak civilians at the time, in the place and in the way as described in the enacting clause of the Trial Verdict.

25. This last element should be examined starting with the existence of a joint criminal design, the Accused's awareness of this plan, and his participation in the realization thereof. Witness Pero Savić testified in detail about the events that occurred during a memorial service lunch, at which the common design for the subsequently committed crimes was made, which was manifested through Jovo Jandrić's invitation to all present persons to retaliate for soldier Rade Savić's death, and to liquidate Muslims. According to this witness, all the persons who were present there at the time could clearly hear these words, considering that Jovo Jandrić said these words very loudly. Testifying before the Court, the Accused himself also did not contest his presence at the memorial service lunch.

26. This Panel has therefore upheld the Trial Panel's view that there was a common design, and that all participants in the referenced crime acted with intent, including the Accused, as a member of a group of armed men, whose activities were aimed towards this design realization. Even if he had not been aware of Jovo Jandrić's clear intentions, the Accused could have predicted the real goal based on all subsequent events, that is, the killing of the remaining Muslim population from the villages of Ljoljići and Čerkazovići.

27. Moreover, this Panel has concluded that already from the early stages of its realization, the Accused was indeed aware of the design's ultimate outcome and consequences, and that in concert with other participants, he shared this criminal intent to ultimately liquidate the gathered civilian population. The foregoing can be concluded based on all the acts taken by the Accused on the critical night, when together with the other armed, like-minded men, he led a group of helpless civilians, men, women and children, his neighbors, to a certain and unavoidable death. All the circumstances pertaining to that very night indicated that the Accused could not but be aware of the final outcome. More specifically, everything occurred during the night hours, between 21:00 and 22:00 hrs, when a group of armed men came to the civilians' houses, unlawfully expelled them, arrested them, and, instead of taking them to the Police Station for possible interrogation, under armed escort, kicking and insulting them, and indirectly telling them that they

would be killed, they took them to a remote location that was itself a symbol of hardship and suffering. All the foregoing suggests a logical conclusion as to what the destiny of those men would be.

28. The Accused's subjective attitude toward the committed crime is therefore clear. His attitude cannot be presented as his disagreement with the committed crime, or the consequences thereof, as the Defense's appeal unsuccessfully tried to show. On the contrary, it is clear that the Accused took an active part in the referenced crime, and that he knowingly and willingly wanted that the prohibited consequences occur.

29. The Trial Verdict has provided very strong and convincing facts as the footing for the conclusion that, on the part of the Accused, there were both the intellectual and the voluntary elements to participate in the common design realization, his *nexus* with this design, and the consequences anticipated under this common design.

30. More specifically, witnesses Pero Savić's and Miroljub Perlaš's statements undoubtedly proved that it was possible to oppose and reject the criminal plan presented by Jovo Jandrić. Expressing on that day their disagreement with the presented plan to liquidate Bosniak civilians, these two persons stood up, and left the memorial service lunch, having showed a positive example to all those who had also disagreed with this criminal intent. In view of the foregoing, it can be concluded that there was indeed a way to avoid participating in the realization of this monstrous plan, and that the above example was just one of the possible ways to do so. Therefore, had the Accused indeed wanted to distance himself from the criminal design realization, he could have done so at any stage prior to the ultimate goal realization.

31. It was not impossible to oppose the orders given by dangerous Jovo Jandrić, as the Defense described him. This is so particularly bearing in mind that the Accused was not under Jandrić's direct command, since Jovo Jandrić was Commander of the Police Station Unit, a reserve unit in that territory, while the Accused was a member of the RS Army. The foregoing was established beyond a doubt, based on both the documentary evidence and the Accused's testimony.

32. On the contrary, not only that the accused Mirko Pekez (son of Mile) subjectively wanted the occurrence of the anticipated consequences, but in addition to Jovo Jandrić, he demonstrated extreme cruelty during this whole period of time, which was particularly prominent among the other participants, and which proved his criminal intent. The foregoing was supported with very convincing facts provided by the survived witnesses, and presented under the Trial Verdict.

33. Witness Nurija Zobić identified the Accused in the courtroom, and testified that, on the critical night, he clearly saw the Accused among the armed persons who were taking them out of their homes, and that the Accused held his weapon pointed at him. This witness recalled that, while they were subsequently escorted in a column, the Accused held his rifle pointed at his head along the entire route.

34. Witness Fahrija Mutić also survived the summary execution. This witness

testified that he was taken out of his home, and that in front of his house he saw Jovo Jandrić and the Accused armed with automatic rifles. Once they were taken out of their homes, and once the column started moving, the Accused ordered the witness to call his earlier escaped father, threatening that he would kill him. The foregoing is supported with witness Omer Karahodžić's testimony too. Witness Karahodžić testified that, along the way, Omer and Šećo were beaten by the armed persons, and that, as far as he could see, they were beaten by the accused Mirko (son of Mile) Pekez and Jovo Jandrić. This factual finding clearly indicates the persistence of the accused Mirko (son of Mile) Pekez in the realization of his criminal intent, that is, it fully and clearly shows the Accused's subjective intent to participate in the objective action, which he indeed undertook, in concert with the other perpetrators.

35. Therefore, in addition to his obvious cruelty, the foregoing also undoubtedly demonstrates that the Accused indeed took part in the abduction of civilians from their homes and in their escort to the crime scene. The Accused himself contested neither his participation in the foregoing, nor in the plundering of the population. The Accused's criminal intent also ensues from his conduct during the plundering when, having asked the captured civilians "Who has any cigarettes", he cursed "their balijas' mothers".

36. According to the Appellate Panel, the appellate complaints that the Accused did not participate in the civilians' execution, are ill-founded. The Appellate Panel has held that, with regard to the proved finding that the Accused indeed committed the act of the civilians' execution, and thereby regarding his proved guilt, the Trial Panel presented detailed and logical responses to the complaints advanced by the Defense. The Appellate Panel has also concluded that, in doing so, the Trial Panel was particularly mindful of the contradictory evidence, and that it presented the arguments pertaining to the proved facts, as provided for under Article 290(7) of the CPC of BiH.

37. More specifically, the impugned Verdict presented valid and exhaustive arguments on the basis of which it was concluded beyond a reasonable doubt that the accused Mirko Pekez son of Mile indeed directly undertook the act of killing civilians at the time, in the place and in the way as established in the enacting clause of the Verdict.

38. Such a conclusion was properly based on the survived witnesses' statements, namely the testimony of: Nurija Zobić, Fahrija Mutić, Zejna Bajramović and Omer Karahodžić. These witnesses' statements are fully harmonized, and provide an overall picture of the unspeakable summary execution of civilians, which undoubtedly occurred, and of the Accused's participation in the act of commission of the referenced crime. All the foregoing has fully refuted the Defense's theory that the Accused was merely present at the execution site.

39. As an eye-witness to all the events that occurred on the critical night, Nurija Zobić testified, in a convincing and clear way, that the civilians were lined up along a ditch edge on the site where they would be executed upon Jovo Jandrić's order, with their backs turned toward armed persons, after which a command to open fire followed. The witness fell in the ditch, and upon regaining his consciousness a half an hour later, he realized that

he was wounded. Then he headed toward the woods together with Mustafa Bajramović, who also survived the execution.

40. According to the Appellate Panel, witness Fahrija Mutić's testimony is very important and relevant to drawing the conclusion that the Accused participated in the civilians' summary execution. Witness Mutić unequivocally described the method in which the summary execution was carried out, and the way in which the accused Mirko Pekez (son of Mile) came close to the ditch edge. This witness testified that the Accused cocked his rifle and fired another bullet at Mustafa Bajramović (son of Alija), who had not been immediately killed during the summary execution. At the main hearing, witness Mutić identified the Accused, and testified that the Accused was in charge of the referenced crime. All the foregoing, correlated with the other evidence, indicates beyond a doubt that the Accused indeed participated in the crime at issue.

41. In view of the foregoing, this Panel has held that the submission that there is no statement in these proceedings other than Fahrija Mutić's testimony on the basis of which the Accused could be indicated as the perpetrator of the referenced killings, is fully inadmissible. In addition to the testimony of survived witness Fahrija Mutić, witness Omer Karahodžić also testified that, after the shooting which he survived pretending to be dead, he heard someone saying: "Mirko, open a heavy burst of fire". This witness assumed that the Accused indeed did what he was told, because he heard the sound of fire after which he was shot. The Accused thereupon hit the witness's head with his rifle in order to check if he was alive.

42. According to the Appellate Panel, the referenced witnesses' statements are reliable, consistent, convincing and logical. These statements are not inconsistent, internally or mutually, as a result of the fact that these witnesses are direct victims, and that they survived the suffering which is difficult to forget, the details of which are deeply etched on their memories. Deep psychological traumas and human tragedy experienced by these persons, reaching beyond any normal and common human experience and comprehension, in the state of enormous fear, at the moment when they are awaiting their certain death, which they cannot prevent by anything, certainly represent an indelible incident for each of them.

43. This is all the more so considering that both these witnesses described, not accidentally but rather with certainty, the referenced details concerning the Accused (and Jovo Jandrić), based on what they saw, and on what is deeply etched on their memory. The foregoing is also consistent with the above conclusion that, in addition to Jovo Jandrić, the Accused's cruelty in the realization of the criminal design was particularly prominent, namely that he gave the most active contribution to its realization.

44. In this Panel's view, the foregoing is also supported with the fact that the survived witnesses indicated no specific act by any other person, or the other two accused persons in relation to the civilians' killing, because they either were not certain, or they poorly remembered them. This clearly suggests the conclusion that these witnesses testified about something which they had truly seen and experienced, rather than about an event

about which they had subsequently learned, or in an attempt to incriminate the Accused on no valid grounds, but just in order to hold someone criminally liable.

45. With such a state of facts, the appellate complaints still lack the required and proved grounds. The same refers to the Accused's statement that he merely watched the whole incident from a distance, and that he undertook no concrete action in the civilians' killing whatsoever.

46. Therefore, considering that it was established beyond a doubt that the Accused was present at the civilians' execution site, that he showed his criminal intent, and that he took a prominent role in the realization of this criminal intent, and considering that the referenced witnesses' statements are reliable and fully true, the single conclusion drawn beyond doubt is that the accused Mirko (Mile) Pekez directly participated in the killing of 23 Bosniak civilians, in the wounding of 4 persons, out of the 5 survived persons, at the time, in the place, and in the way as established in the enacting clause of the Verdict.

III. APPELLATE GROUNDS UNDER ARTICLE 298 OF THE CPC OF BIH: VIOLATION OF THE CRIMINAL CODE

47. The Accused's Defense objected that, in the concrete case, the Court should have applied to the perpetrator the adopted CC of SFRY as the more (most) lenient law, as established under the Decision of the Constitutional Court in this Accused's case.

48. According to the Appellate Panel, the referenced complaint is well-founded considering that, pursuant to Article VI/5 of the Constitution of Bosnia and Herzegovina, decisions of the Constitutional Court are final and binding, including the Decision rendered in the case of the accused/applicant Mirko (Mile) Pekez.

49. Bearing in mind, however, that the issue of retroactive application of the criminal code is of particular legal significance, and that, as such, it has already been subjected to examination and evaluation in several decisions by both the Constitutional Court and the European Court of Human Rights (the European Court), with direct implications for the Court of BiH's acting in war crimes cases, the Appellate Panel considers it necessary to present here an overview of the views taken in the binding judgments rendered in both the national and the international case law.

50. In its decision rendered in *Maktouf and Damjanović v. Bosnia and Herzegovina* (Judgment of 18 July 2013, applications Nos. 2312/08 and 34179/08), which preceded the decision of the Constitutional Court in *Mirko (Mile) Pekez*, in evaluating whether the retroactive application of the CC of BiH to war crime cases inherently constitutes a violation of Article 7 of the Convention, the European Court has held in para. 65 as follows: "*At the outset, the Court reiterates that it is not its task to review in abstracto whether the retroactive application of the 2003 Code in war crimes cases is, per se, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis,*

taking into consideration the specific circumstances of each case and, notably, whether the domestic courts have applied the law whose provisions are most favorable to the defendant (see Sccopola, cited above, § 109).”

51. It is, therefore, clear that the European Court has dealt with the issues of retroactivity and of the assessment of the more lenient law exclusively in the circumstances pertaining to the concrete case, having strictly noted that war crime cases cannot be considered in general terms. Therefore, having relied on such a position, the same decision, in para. 69, concluded as follows:

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

52. Acting in compliance with the European Court’s case law in this decision, and deciding upon the application lodged by Zoran Damjanović (Decision on Admissibility and Merits, No. AP 325/08 of 27 September 2013), the Constitutional Court concluded that this case is not different from the said *Maktouf and Damjanović* case, both with regard to the factual substrate and the legal matter and, just like the European Court, found a violation of Article 7(1) of the European Convention. It clearly ensues from the referenced decision that, in determining which law is more lenient to the perpetrator, the Constitutional Court has relied on the minimum sentence standard, considering that the applicants received sentences of imprisonment for a term of 5 years (*Maktouf*), as the lowest possible sentence under the CC of BiH (the sentence which can be imposed applying the provisions on sentence commutation), and for a term of 11 years (*Damjanović*), as a sentence slightly above the minimum sentence of 10 years pursuant to the same Code.

53. However, in its decision rendered upon the appeal lodged by the accused *Mirko (Mile) Pekez*, the Constitutional Court has, relying on the case law in the two previous decisions, found that the standard governing the decision on the more lenient law in the concrete case, is the maximum prescribed sentence, considering that the accused Pekez received the sentence of 29-year long-term imprisonment, which is closer to the maximum sentence prescribed under the CC of BiH (45 years in prison).

54. The Trial Verdict of the Court of BiH found the accused Mirko (Mile) Pekez guilty of the killing of 23 Bosniak civilians, and the wounding of 4 civilians, who had survived the summary execution but sustained bodily injuries, while a single civilian sustained no injury, and guilty of the plundering, whereby he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) and (f) of the CC of BiH. Under the same Verdict, the Accused received a sentence of the referenced long-term imprisonment. The Appellate Panel has concluded that the described charges represent the gravest forms of war crimes

with deadly consequences which, pursuant to the 1976 Code, carried the death penalty. This situation is, however, opposite to that which was the subject of the European Court's considerations in *Maktouf and Damjanović*, and of the Constitutional Court's considerations in *Zoran Damjanović*.

55. Once it has accepted the European Court's case law and its standards in determining whether the retroactive application of criminal law constitutes a violation of Article 7(1) of the Convention, the Constitutional Court exclusively relied on the standard of comparing the maximum prescribed sentences instead of evaluating all the factual and legal circumstances surrounding the concrete case, and the gravity of the consequences relevant to dealing with this legal matter. The Appellate Panel has noted that, in doing so, the Constitutional Court compared the 20-year imprisonment sentence, as a maximum sentence for the referenced crime prescribed under the CC of SFRY, with the 45-year long-term imprisonment, as a maximum sentence prescribed for the same crime under the CC of BiH, and excluded, contrary to its earlier position on the same matter, the death penalty as a possible sanction pursuant to the Code that was in effect at the time when the crime was committed.

56. In this context, in its present Judgment in the accused Pekez' case (para 29.), the Constitutional Court has taken quite a *new position*, totally opposite to the earlier established position¹, according to which the death penalty was eliminated from the criminal sanctions system, and in a situation when, in terms of Article 38(2) of the CC of SFRY, the death penalty can no longer be imposed, the maximum sentence for the referenced crime is 20 years in prison.

57. In support of such a conclusion, it has been stated that, once the Constitution of Bosnia and Herzegovina has taken its legal effect (14 December 1995), Additional Protocol No. 6 to the ECHR also entered into force, and that on 3 May 2002 the Council of Europe adopted Protocol No. 13 to the European Convention abolishing the death penalty in all circumstances, which was ratified by BiH on 1 November 2003. The foregoing leads to the conclusion that, during 2008, at the time when the contested decisions were rendered, there was no possibility to impose on the appellant the death penalty for the criminal offense at issue.

58. In a situation where the case law has been significantly changed regarding a very important legal matter, the Appellate Panel has considered advisable to rely on the conclusion drawn by the Constitutional Court itself in its decision in *Luca Tokalić et al. No. AP 1123/11 of 22 March 2013* (para. 115):

“The Constitutional Court reiterates that the changes in the case-law and different decision of the court in circumstances that are factually and legally similar or the same, may not result in the violation of legal certainty. However, the lack of reasoning as to why the

¹ *Abdulhadim Maktouf*, Decision of the Constitutional Court of BiH on Admissibility and Merits, No. AP 1785/06 of 30 March 2007, paras. 68 and 69.

circumstances of the instant case are different in relation to all previous cases in which the position was applied in regard to an important legal issue and which should be applied in similar future situations, in the absence of a mechanism through which it would be reviewed, may result in legal uncertainty and may undermine public confidence in the judiciary, which is contrary to the principle of the rule of law.”

59. The Appellate Panel has held that the issues of retroactivity and of the application of a more lenient law must be dealt with on a case-to-case basis, applying no general approach, and no automatism.² The foregoing is also supported with the statement in para. 69 of the cited decision of the European Court, implying the conclusion that, in the gravest forms of war crimes, the possibility to apply the CC of BiH as the more lenient law to the perpetrator, has not been categorically excluded.

60. Following a comprehensive examination, and in compliance with the legal order, the Appellate Panel has adopted the view of the Constitutional Court taken in its decision rendered in the case of the accused/applicant Mirko (Mile) Pekez (para. 29), which stated as follows:

“...The Constitutional Court has held that, in the concrete case, the CC of SFRY is undoubtedly the more lenient law to the appellant. Therefore, considering that the maximum sentence of 20 years could have been imposed on the applicant pursuant to the CC of SFRY, but that he received the sentence of long-term imprisonment of 29 years applying the CC of BiH in the concrete case, the Constitutional Court’s view regarding the imposed sentence is that the CC of BiH was retroactively applied to the detriment of the applicant, which is in violation of Article 7(1) of the European Convention”.

61. Which law is (the most) lenient to the perpetrator depends on the relevant circumstances, where the Court must take into account all punishment-related provisions: provisions on sentences, their fashioning or commutation (which law is more lenient along this line), caution measures, possible accessory punishment, new measures as a substitute punishment, security measures, legal consequences of the conviction, prosecution-related provisions; whether the new law anticipates one of its circumstances as the ground which in the concrete excludes unlawfulness, criminal liability or punishability, or whether, on the other hand, it extends punishability.

62. In the concrete case, the law which was in force at the time when the offense was committed (the CC of SFRY), equally as the presently applicable law (the CC of BiH), prescribes the criminal acts of which the Accused was found guilty as the criminal offense of War Crimes against Civilians.

² “The main starting point is not to deal with the selection of a more lenient law *in abstracto*, but rather *in concreto*, that is, without a general comparison between the old and the new criminal code, or new criminal codes, but rather by their comparing in relation to the concrete case at issue.” See, Group of authors: Commentaries on the Criminal Codes in Bosnia and Herzegovina, Volume I, Joint Project of the Council of Europe and the European Commission, 2005, p. 66.

63. In view of the foregoing, clearly there are legal requirements to conduct the criminal proceedings against the perpetrator for the criminal offense of War Crimes against Civilians and to punish him, considering that the actions undertaken by the Accused are criminal, both pursuant to the previous law which was in effect at the time when the crime was committed, and the currently applicable law, that is, the law in force at the time of the trial.

64. Bearing in mind all the above, a conclusion can be drawn that, in a situation where, according to the Constitutional Court's view,³ it is no longer possible to impose the death penalty, the maximum sentence for the referenced crime is 20 years in prison.

65. In relation to both the above said and the form of the Accused's participation in the referenced crimes, the Trial Verdict has clearly, and in a satisfying way, distinguished both the Accused's attitude toward what was done, and his acts of commission in relation to the other participants in the commission of individual acts. The Accused participated in the commission of the referenced criminal acts as a co-perpetrator, as prescribed under Article 22 of the CC of SFRY, which provides: "*If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act.*"

66. This Article, therefore, requires that, if several persons were found guilty of committing the crime as co-perpetrators, that is, as perpetrators of their own crime, the operative part of the Verdict must first state the acts of commission for each perpetrator individually, since the very existence of complicity, as a form of participation, depends on these acts' description. According to this Panel, a clear distinction of the acts of this Accused, based on a completely and properly established state of facts, results in a proper establishment of the Accused's guilt for the committed crimes.

67. The Appellate Panel has concluded that, by the acts described in the operative part of the contested Verdict, in violation of the rules of international law, the Accused, as a co-perpetrator, committed killings, immense suffering or violation of bodily integrity or health, and pillaging of property of the population, whereby he committed the criminal offense of War Crimes against Civilians under Article 142(1) of the CC of SFRY, taken in conjunction with Article 22 of the same Code.

68. In view of all the foregoing, the Appellate Panel has applied, to the already established state of facts, the CC of SFRY which was in force at the time when the referenced crime was committed, and, along this line, revised the contested Verdict regarding the legal qualification of the offense, as stated in the enacting clause of the Verdict.

³ *Mirko (Mile) Pekez*, Decision on Admissibility and Merits, para. 28 „...*The Constitutional Court notes that the foregoing clearly demonstrates that, at the time when the contested decisions were rendered, in 2008, there was no possibility that the appellant receive the death penalty for the referenced criminal offense.*“

IV. APPELLATE GROUNDS UNDER ARTICLE 300 OF THE CPC OF BIH: DECISION ON CRIMINAL SANCTION

69. The appeal did not specify, within this appellate ground, the reasons for which the decision on criminal sanction is being contested, or what exactly the violations of certain provisions are reflected in, that is, why the imposed sentence is considered to be too stringent. However, having orally presented his appeal, the Counsel moved the Court, in case that it does not grant any of the previous complaints, to be mindful of all the extenuating circumstances, and impose on the Accused a sentence within the range of penal maximum of 15 years in prison.

70. In its oral response to the Defense's submission, the Prosecution proposed a sentence of imprisonment for a term of 20 years, stating that this sentence is prescribed as an alternative for the death penalty.

71. Considering that, in the concrete case, the Panel applied the CC of SFRY, the same Code should also be applied in deciding on the complaints contesting the decision on sentence, within the range of sentences prescribed under Article 142 of the CC of SFRY for the criminal offense of which the Accused was found guilty, and pursuant to the provisions defining general principles in fixing punishment.

72. Pursuant to Article 41(1) of the CC of SFRY, the Appellate Panel has first determined the range of sentence prescribed for the referenced crime, particularly the special maximum, considering that the sentence imposed on the Accused under the revoked Verdict (for a term of twenty nine years) was imposed toward the special maximum, as prescribed under the CC of BiH. In para. 29 of the referenced decision, the Constitutional Court has clearly concluded:

“Considering that it was, therefore, impossible to impose the death penalty on the applicant, an issue arises as to which maximum sentence could be imposed on the applicant under the CC of SFRY. In this regard, the Constitutional Court has noted that Article 38(2) of the CC of SFRY provides that “The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty”. According to the Constitutional Court, it clearly ensues from the cited legal provision that, in a situation where the death penalty can no longer be imposed, the maximum sentence for the referenced crime is 20 years in prison.”

73. Such a view is also supported by the decision of the Constitutional Court of BiH in *Miroslav Vujanović* (Decision No. AP 656/04 of 13 September 2005), stating that the RS Supreme Court did not arbitrarily apply the law when it concluded that the 20-year sentence of imprisonment was prescribed as a special sentence, and that it was not a substitute for the death penalty.

74. Therefore, in a situation where, according to the Constitutional Court's view, the death penalty is eliminated and replaced with an alternative sentence of imprisonment, the prescribed sentence for the criminal offense of War Crimes against Civilians under Article

142 of the CC of SFRY is a minimum of 5 years in prison, or imprisonment for a term of 20 years, as a special maximum. As it also transpires from the cited Article 38 of the CC of SFRY, there is no possibility to impose the criminal sanction within the range of 15-20 years in prison.

75. The Appellate Panel has concluded that, in determining the type and the length of sentence, the Trial Panel properly found that, in the commission of the crime charged against him, the accused Mirko (Mile) Pekez acted with direct intent, being aware of the gravity of all individual acts he undertook, that he wanted both the execution of these acts and the occurrence of the prohibited consequences, and that he gave the most active contribution to the execution thereof, as clearly confirmed by the witnesses. Furthermore, according to this Panel's view, and contrary to the appellate reasons, the contested Verdict has properly considered as extenuating the circumstances that the Accused is father of two children, as well as his proper conduct before the Court, while the aggravating circumstances included the number of 23 executed civilians, that is, thirteen men and ten women, including one child, and three underage persons. Also an aggravating circumstance is the fact that the Accused demonstrated particular cruelty and ruthlessness against the civilians, and that following the summary execution he came back to the civilians and fired at them another burst of fire. One of the witnesses testified that, following the summary execution, it was exactly the Accused who checked if there were any survivors. The Accused's intent, that the death of all abducted civilians be a final outcome, is clear from his participation in this incident.

76. Taking into account all the above stated, as well as the magnitude of the sentence prescribed for the referenced crime, the purpose of punishment, and all the circumstances that can have impact on a more or less stringent sentence, particularly the degree of the Accused's criminal liability, his motives to commit the crime, his family situation and the health condition, this Panel has concluded that the sentence of 20 (twenty) years in prison for the committed crime is adequate to all these circumstances of the Accused, his personality as a perpetrator, and that thereby the purpose of punishment, both special and general deterrence, will be fully achieved.

77. Bearing in mind all the foregoing, the contested Verdict had to be accordingly revised, also with regard to the decision on sentence, by having the time the Accused spent in custody, and in serving the previously imposed sentence in this case, credited towards the new sentence imposed.

78. In view of the foregoing, and pursuant to Article 310(1), as read with Article 314(1) of the CPC of BiH, it was decided as stated in the enacting clause of this Verdict.

Record-taker:

PANEL PRESIDENT

Legal Advisor

J U D G E

Medina Džerahović

Hilmo Vučinić

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