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

No.: **S 1 K 014264 13 Krž**
Date: **22 January 2014**

In the Appellate Panel composed of: **Judge Azra Miletić, Presiding**
Judge Tihomir Lukes, Rapporteur
Judge Mirko Božović, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

PETAR MITROVIĆ

SECOND-INSTANCE VERDICT

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

Defense Counsel for the appellant Petar Mitrović:
Todor Todorović and Vesna Tupajić-Škiljević

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Sarajevo, 22 January 2014

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division of Section I for War Crimes, composed of Judge Azra Miletić, as the Presiding Judge, and judges Tihomir Lukes and Mirko Božović, as the Panel members, with the participation of legal advisor Belma Čano-Sejfović, as the record-taker, in the criminal case against the accused Petar Mitrović, for the criminal offense of Genocide under Article 171 of the Criminal Code of Bosnia and Herzegovina, deciding on the appeal filed by the defense counsel for the accused Petar Mitrović, Attorney Todor Todorović and Attorney Vesna Tupajić-Škiljević, from the Verdict of the Court of Bosnia and Herzegovina No: X-KR-05/24-1 dated 29 July 2008, with regard to the decision issued by the Constitutional Court of Bosnia and Herzegovina, No. AP-4126/09 dated 22 October 2013, at the session held on 22 January 2014, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Ibro Bulić, the Accused Petar Mitrović and his defense counsel, Attorney Todor Todorović and Attorney Vesna Tupajić-Škiljević, delivered the verdict as follows.

V E R D I C T

I The Appeal filed by defense counsel for the accused Petar Mitrović is **partly granted, and the Verdict delivered by the Court of Bosnia and Herzegovina No. X-KR-05/24-1 dated 29 July 2008 is modified so as to read:**

The Accused Petar Mitrović, a.k.a. „Pera", father's name Radivoje, mother's name Stana, born on 7 February 1967 in Brežani, Municipality of Srebrenica, residing at …, of … ethnicity, citizen of …, professional welder, completed secondary school education, single, served the army in Zagreb in 1986, registered in the VE Srebrenica, no prior convictions, no other criminal proceedings conducted against him,

IS GUILTY

because:

as a member of the 3rd Skelani Platoon, a constituent element of the 2nd Šekovići Special Police Detachment, together with Milenko Trifunović, Commander of the 3rd Skelani Platoon, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan, as special police officers within the same Platoon, and Brano Džinić as a special police officer in the 2nd Šekovići Special Police Detachment, and with other members of the Army of Republika Srpska (VRS) and the Republika Srpska Ministry of the Interior, having participated in capturing a large number of Bosniak men who, following the fall of the safe area of Srebrenica and its total occupation by the forces of the Army of Republika Srpska, attempted to leave the protected zone of Srebrenica, at which time they were invited and encouraged to surrender and were promised to be interrogated and exchanged and, afterwards, their personal documents and other personal belongings were seized from them and they were left without food, water and medical assistance, although many of them were seriously wounded, wherein, while seeing that the remaining Bosniak civilians, about 25,000 of them, mainly women and children, were transported by trucks outside the safe area of Srebrenica, on 13 July 1995 he conducted in a column the captured Bosniak male prisoners into the warehouse of the Farming Cooperative Kravica and detained them in the Farming Cooperative warehouse together with other imprisoned Bosniak men who were brought to the warehouse on buses, the total number of whom exceeded one thousand, and put most of them to death in the early evening hours in the following manner: the Accused Petar Mitrović, together with Milenko Trifunović and Aleksandar Radovanović, fired their automatic rifles at the prisoners and, after opening rifle fire, together with Slobodan Jakovljević and Branislav Medan, he took a position at the back of the warehouse where he stood guard to prevent the prisoners from escaping through the windows,

Whereby he committed the criminal offence of **Genocide under Article 141** of the Criminal Code of the Socialist Federal Republic of Yugoslavia, adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY), **as read with Article 24 of the same Law,**

so the Court, pursuant to the same legal provision, applying Article 38 and 41 of the Criminal Code of the Socialist Federal Republic of Yugoslavia,

SENTENCES HIM

TO 20 (twenty) YEARS OF IMPRISONMENT

Pursuant to Article 50 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, the time spent in custody under decisions of this Court, starting from 20 June 2005 to his committal to serve his sentence, as well as the time spent serving the sentence under the Verdict of the Court of Bosnia and Herzegovina, X-KRŽ-05/24-1 dated 7 September 2009, starting from 28 October 2009 to 18 November 2013, shall be credited towards this sentence.

II The first-instance verdict remains unchanged in the remaining part.

REASONING

I. PROCEDURAL HISTORY

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

1. The Verdict of the Court of Bosnia and Herzegovina, No. X-KR-05/24 dated 29 July 2008, found the accused Petar Mitrović guilty because, in the manner described in Section 1 of the Operative Part of the Verdict, he committed the criminal offense of Genocide under Article 171 of the Criminal Code of Bosnia and Herzegovina (the CC BiH), for which the First-Instance Panel, pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH)[1], applying Articles 39, 42 and 48 of the CC BiH, sentenced him to 38 (thirty-eight) years of long-term imprisonment. In accordance with Article 56 of the CC BiH, the time he spent in custody was credited towards the sentence, while under Article 188(4) of the CPC BiH he was relieved of the obligation to cover the costs of the

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

criminal proceedings. In accordance with Article 198(2) of the CPC BiH, the aggrieved parties S1 and S2, as well as members of the Association “Movement of Srebrenica and Žepa Enclaves Mothers” were instructed to pursue their property claims through a civil lawsuit.

2. Appeals from the verdict were filed by defense counsel for the accused Petar Mitrović, attorneys Todor Todorović and Vesna Tupajić-Škiljević, on the grounds of essential violations of criminal procedure provisions under Article 297 of the CPC BiH, violations of the Criminal Code under Article 298 of the CPC BiH, error of fact under Article 299 of the CPC BiH, and decision on criminal sanction under Article 300 of the CPC BiH, as well as a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), with the proposal that the Appellate Panel grant the appeal as well-founded, revoke the first-instance verdict and order a retrial.

3. Prosecutor of the BiH Prosecutor's Office did not file any appeal from the first-instance verdict, but submitted a response to the defense’s appeal, moving that it be dismissed as ill-founded and that the first-instance verdict be upheld.

4. Deciding on the defense’s appeal, the Appellate Division Panel, having held a panel session, in accordance with Article 304 of the CPC BiH, handed down the second-instance verdict, No. X-KRŽ-05/24-1 dated 7 September 2009, modifying the contested verdict with regard to the legal qualification of the offense, by way of qualifying the acts of the accused as the criminal offense of Genocide under Article 171 of the CC BiH, as read with Article 31 of the CC BiH (accessory). Consequently, the first-instance verdict was modified also with regard to the sentence, so that the accused was sentenced to 28 (twenty-eight) years of long-term-imprisonment. In the remaining part, the first-instance verdict remained unchanged.

5. Via his defense counsel, attorneys Todor Todorović and Vesna Tupajić-Škiljević, the Accused filed an appellation to the Constitutional Court of Bosnia and Herzegovina from the mentioned final verdict of the Appellate Panel, pointing to alleged violations of his rights guaranteed by Article 6 and 7 of the ECHR.

6. The Constitutional Court of BiH (the Constitutional Court), by its Decision No. AP-4126/09 dated 22 October 2013 (Decision of the Constitutional Court), granted the appellation of the accused Petar Mitrović and found the violation of Article 7(1) of the

ECHR, which is why it revoked the second-instance verdict of the Court of BiH, No. X-KRŽ-05/24-1 dated 7 September 2009, and remanded the case to this court, under the obligation to employ an emergency procedure and issue a new decision, in accordance with Article 7(1) of the ECHR, as concluded by the Constitutional Court, noting that their decisions are final and binding. Acting under the mentioned decision, this Panel found that after the revocation of the second-instance final decision the case was effectively remanded to the procedural stage where it was before the verdict was delivered, which means to the stage of deciding on the filed appeals.

B. PROCEEDINGS BEFORE THE APPELLATE PANEL

7. Acting in accordance with the Constitutional Court's instructions, on 22 January 2014 the Appellate Panel held a panel session to discuss the defense's appeal. After the Appellate Panel's session was officially opened, the parties were informed of the nature and scope of the new proceedings, to be conducted in accordance with the findings and instructions of the Constitutional Court as presented in the mentioned Decision. The parties were advised that the panel's session was convened for the purpose of implementation of the Constitutional Court's decision rescinding the previous second-instance decision, and that the case is therefore again at the stage where it was before the decision was issued – the appellate stage. Therefore, these proceedings will reconsider appellate claims in relation to what was indicated in the decision of the Constitutional Court, since the Constitutional Court did not decide on, nor did it find, any other violations the appellation raised. The Defense was given an opportunity to raise the appellate grievances again, but the Panel warned that the violations established in the Constitutional Court's Decision pertained to Article 7(1) of the ECHR, which is why the appeal should focus on that aspect, which means the issues of application of law and the decision on criminal sentence.

8. It is clearly visible from the reasoning of the Constitutional Court's decision that the established violation referred to Article 7(1) of the ECHR only, and that the revoked second-instance verdict had been delivered in the appellate proceedings before the Appellate Panel.

9. The convicted person – appellant did not receive any response to his appellate grievances with regard to the alleged violations of his rights under Article 6 of the ECHR, and in that respect the Constitutional Court said: "*Bearing in mind the conclusion regarding*

the violation of Article 7 of the ECHR and the order that the regular court in a retrial issue a new decision, the Constitutional Court believes it is not necessary to specifically consider the part of the appellation pertaining to the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina and Article 6 of the ECHR", which, in the opinion of this court, should be primarily resolved, because a removal of the violation of Article 7 of the ECHR does not have any effect on a possible violation of Article 6 of the ECHR, to which, again, the decision of the Constitutional Court did not refer.

10. The Court does not have the authority to review its own final decisions in the part where they were not brought into question by decisions of the Constitutional Court. Neither the guilt of the accused/appellant nor the established facts were brought into question by the decision of the Constitutional Court, nor has the Constitutional Court issued any order on the matter, which is why the Court cannot, in that part, reassess the appellate grievances and reconsider its previous decision in that part. In that regard, the court merely notes that the accused may file another appellation from the new verdict, with the Constitutional Court or directly with the European Court of Human Rights. Besides, the procedure following the decision of the Constitutional Court does not fall under the procedure on extraordinary legal remedy - reopening of proceedings under Article 327 of the CPC BiH. The CPC BiH does not contain provisions that would be applicable and that would regulate proceedings after the revocation of a final verdict of the Court of BiH in regular proceedings. Especially troublesome is the procedure removing a violation of only Article 7 of the ECHR, mandatory application of the more lenient law, which is rectified by reversing the verdict in which the violation was made.

11. The CPC BiH, Article 327, provides for a possibility of reopening of proceedings to the benefit of the convicted person, as an extraordinary legal remedy, once *„...a criminal proceeding was completed by a legally binding verdict...“*, under the specifically stated circumstances and conditions, where under Subparagraph f) of the mentioned Article it is stipulated that a proceeding may be reopened if „*the Constitutional Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights establish that human rights and basic freedoms were violated during the proceeding and that the verdict was based on these violations*.*“*

12. Consequently, the general condition that needs to be met in order to be able to talk about the reopening of a proceeding, on which the Defense insisted, is the existence of a

final verdict issued in a criminal proceeding. Besides, in order to allow the reopening of a proceeding to the benefit of the convicted person, it is necessary that the decision issued by one of the courts mentioned above **has established a violation of rights and freedoms**, and that the verdict is based on such violations. In *Maktouf and Damjanović vs BiH*[2] the European Court of Human Rights has found that the final verdicts of the Court of BiH, delivered in criminal proceedings conducted before the court against the applicants, made a violation of Article 7 of the ECHR on human rights. In all that, the European Court does not disturb the verdict itself, but only notes a violation and issues an order that it be removed. Based on the mentioned the decision, the Court of BiH, deciding on the motions to reopen the proceedings filed by the Defense for the convicted persons Damjanović and Maktouf, has allowed the reopening of the proceeding to the benefit of the accused, applying Article 327(1)f) of the CPC BiH.

13. Therefore, applying the provisions pertaining to the reopening of a criminal proceeding, when the final verdict has not been revoked, the court has the obligation to remove the established violations of the rights of the convicted persons, and in the reopened proceedings return a verdict rendering ineffective the previously final verdict in its entirety or in part (reversal) in the relevant section, or leaving the verdict in force.

14. Bearing in mind the foregoing, the Appellate Panel has in this proceeding limited itself to the appellate grievances pertaining to the application of the Criminal Code and, in that connection, the decision on criminal sanction, while fully maintaining and interpreting in the new verdict the part of the previous verdict that concerns the decision on appeal due to essential violation of criminal procedure provisions or erroneously or incompletely established facts, which has not been brought into question by the decision of the Constitutional Court.

II. GENERAL CONSIDERATIONS

15. Prior to providing explanation for each raised ground of appeal, the Appellate Panel notes that the appellant's obligation, in accordance with Article 295(1)b) and c) of the CPC BiH, is to state in the appeal the legal grounds to contest the verdict, as well as a reasoning to support the soundness of the raised appeal.

[2] Applications Nos. 2312/08 and 34179/08, the decision dated 18 July 2013.

16. Since the Appellate Panel, pursuant to Article 306 of the CPC BiH, reviews the verdict only insofar as it is contested by the appeal, it is the appellant's obligation to draft the appeal so that it can serve as a basis for reviewing the verdict.

17. In that regard, the appellant must specify the grounds of appeal based on which to contest the verdict, specify which part of the verdict, evidence or procedure of the court it challenges, and provide a clear and well-reasoned explanation to support the appellate claim.

18. Raising the appellate grounds in general terms only, as well as pointing to alleged irregularities during the first-instance proceedings without specifying which appellate grounds the appellant refers to, is not a sound basis for reviewing the first-instance verdict, which is why the Appellate Panel has, *prima facie,* dismissed as ill-founded all unreasoned and unclear appellate claims.

III. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE UNDER ARTICLE 297 OF THE CPC BIH

A. STANDARDS OF REVIEW

19. Essential violations of criminal procedure, as a ground of appeal, are defined in Article 297 of the CPC BiH.

20. Given the gravity and significance of the committed violations of procedure, the CPC of BiH differentiates between those violations that, if found to exist, create an irrefutable assumption that they have had a negative impact on the validity of the delivered verdict (absolutely essential violations) and violations where, in every specific case, it is left to court's discretion to decide whether the established procedural violation had or could have had a negative impact on the verdict's validity (relatively essential violations).

21. Absolutely essential violations of the CPC BiH are listed in Subparagraphs a) through k) of Article 297(1) of the CPC BiH.

22. Should the Appellate Panel find that there exists an essential violation of criminal procedure provisions, under Article 315(1)a) of the CPC of BiH it has the obligation to revoke the trial verdict.

23. Unlike absolute essential violations, the relatively essential violations are not listed in the law, but exist *when the Trial Panel during the trial or in reaching the verdict failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of a lawful and proper verdict (Article 297(2) of the CPC BiH).*

24. Defense counsel for the accused contest the first-instance verdict only on the grounds of alleged essential violations of the criminal procedure under Article 297(1) of the CPC BiH, so the Appellate Panel, having considered the appellate grievances, concluded that they were ill-founded for the reasons that follow:

1. <u>Essential violations of criminal procedure under Article 297(1)b) of the CPC BiH</u>

25. The Defense points to the existence of essential violations of criminal procedure under Article 297(1)b) of the CPC BiH, stressing that there was a judge participating in the trial who should have been disqualified under Article 29, Subparagraph a), of the CPC BiH, because, in the defense's opinion, he too is an aggrieved party in the criminal offense.

26. In support of its claim, the Defense notes the fact that the accused has ben found guilty of the criminal offense of Genocide, carried out with the intention to partly exterminate a national, ethnic and religious group of Bosniaks, and goes on to conclude that the Trial Panel President, Judge Hilmo Vučinić, belongs to the same national and ethnic group of Bosniaks, and that during the war he lived and worked in the enclave of Goražde, which was under similar uncertain conditions as was the case with the Srebrenica enclave, which is why, for the aforementioned reasons, he too is aggrieved by the criminal offense at issue.

27. However, it follows from the case record, and also from Annex B, Section A, of the first-instance verdict that during the first-instance proceeding the Defense had already requested a disqualification of the Trial Panel President, Judge Hilmo Vučinić, based on the provision set forth in Article 29, Subparagraph f), of the CPC BiH (the existence of circumstances raising reasonable doubt as to his impartiality), stating in their motion back then the same facts and circumstances they raise in this appeal too.

28. Article 30(2) of the CPC BiH stipulates that a petition for disqualification may be filed before the beginning of the main trial, and if the parties and the defense attorney later on learn of reasons for disqualification referred in Article 29, Subparagraphs a) through e)

of this Code, they can submit a petition as soon as they learn of these reasons. Article 32(1) of the CPC BiH stipulates that the Court, in plenary session, shall decide the petition for disqualification, while Paragraph 3 of the same Article stipulates that no appeal shall be permissible against a decision granting or rejecting the petition for disqualification.

29. In accordance with the aforementioned, the Plenum of the Court of BiH decided by its Decision No. SU-373/06 dated 8 May 2006 to dismiss, as inadmissible, the petition filed by defense counsel for one of the co-accused (the petition was filed before the decision on the separation of proceedings was issued) that all Bosniak and Serb judges be disqualified from the trial panel, while also dismissing as ill-founded the petition to disqualify the Trial Panel President on the grounds that during the war he lived in the enclave of Goražde that was in a similar situation as Srebrenica, and because he himself is a member of the Bosniak people, victim of the criminal offense in question.

30. In the Reasoning to the Decision, the Plenum stated that the described circumstances do not bring into question Judge Vučinić's impartiality, and that, apart from him, there are two international judges on the first-instance panel, who participate in making all important decisions. It was particularly noted that all decisions made during the proceeding are subject of review on appeal before the Appellate Division (where the law allows for an appeal), which includes judges of various nationalities.

31. Article 318(1) of the CPC BiH stipulates that the parties, the defense counsel and persons whose rights have been violated may always file an appeal from the first-instance decision of the Court unless when it is explicitly prohibited to file an appeal under this Code.

32. Bearing in mind that Article 32(3) of the CPC BiH stipulates that no appeal lies from a decision granting or rejecting the petition for disqualification, it follows that the Defense has no legal grounds to raise this claim again, for its has already been decided by a final decision.

33. The appeal erroneously refers to Article 297(1)b) of the CPC BiH, which stipulates that an essential violation of criminal procedure exists if a judge who should have been disqualified participated in the main trial, for this provision pertains to the situation where there exist reasons for the disqualification of a judge as set forth in Article 29, Subparagraphs a) through f) of the CPC BiH, but no disqualification during the proceeding

was ever decided on (whether there was no petition for disqualification or the judge did not seek his own recusal).

34. Therefore, bearing in mind the fact that this issue has already been decided by the Plenum of the Court of BiH and that no appeal lies from that decision, the appeal filed by the accused on this ground is dismissed as inadmissible.

2. Essential violations of criminal procedure under Article 297(1)i) of the CPC BiH, violation of the rights to a defense under Article 297(1)d) of the CPC BiH, and a violation of the rights guaranteed by the European Convention on Human Rights and Fundamental Freedoms

35. This Panel concludes that the appellate grievances pointing to the foregoing essential violations of the CPC are ill-founded.

36. In the context of these grievances, the appeal states that the first-instance panel's decision on the guilt of the accused is based solely and exclusively on unlawful evidence – statements by the accused Petar Mitrović and Miladin Stevanović given during the investigation, which were partly corroborated by the statements of protected witness S4. The Defense argues that the Record of Re-enactment of 4 October 2005 is also unlawful as evidence.

37. Defense Counsel states in the appeal that the first-instance panel, in violation of the CPC BiH, admitted the foregoing evidence, although Article 273(2) of the CPC BiH provides a specific list of situations in which one can depart from the method of direct presentation of evidence.

38. Also within the same appellate grievance, the appeal notes that the first-instance verdict was delivered after entering into force of the Law on Amendments to the CPC BiH changing the provision set forth in Article 78 of the CPC BiH, which specifically stated that a suspect, during interrogation, must be warned that his statement is admissible as evidence at the trial and that it may be read out and used at the trial even without his consent.

39. Also noted is the fact that the panel's decision on the admissibility of evidence in question was made before the Defense had the opportunity to present its own evidence,

which is why the appeal argues that the panel did not properly evaluate the mental state of the accused at the time when he gave his statement, nor the circumstances under which the statements were taken.

40. The appeal goes on to say that the statement the accused gave at the BiH Prosecutor's Office on 21 June 2005, which was admitted as evidence, is by its substance identical to the statement the accused gave to the Public Security Center (CJB) Bijeljina on 20 June 2005, which was not admitted because of the unlawfulness during its taking. According to the Defense, all the irregularities that existed during the taking of the statement from the accused at the CJB Bijeljina have resulted in a series of illogicalities in his statement given at the BiH Prosecutor's Office, when (in the presence of the then defense counsel) he was not told of the grounds for suspicion concerning the crime he was to be charged with.

41. Evaluating these appellate grievances, the Appellate Panel above all examined the reasonability of the decision of the first-instance panel to admit as evidence the Record of Statement taken from the accused Petar Mitrović at the BiH Prosecutor's Office on 21 June 2005, as well as the Record of Statement taken from Miladin Stevanović at the BiH Prosecutor's Office on 24 June and 1 July 2005 (investigative statements), although during the trial these two accused exercised their right to remain silent.

42. The decision of the first-instance panel to admit the foregoing statements was issued on 18 April 2007 in the form of a special decision, at the Prosecutor's motion to have the evidence listed in the Motion admitted into the case record and read out at the trial (No. KT RZ 10/05 od 5 May 2006), after the Defense has been given an opportunity to comment on the motion.

43. The Decision in question constitutes an integral part of the Verdict's Reasoning, and it thoroughly discusses the issues of legality of taking statements, and the possibility to use them during the trial if the accused is exercising his right to remain silent.

44. Reviewing the reasonability of those findings in the context of appellate grievances, the Appellate Panel concludes that the first-instance court properly found that the statements given by suspects Petar Mitrović, of 21 June 2005, and Miladin Stevanović, of 24 June and 1 July 2005, were obtained in a lawful manner, meaning that no essential violations of criminal procedure were made, contrary to what the appeal stated.

45. The first-instance panel has in a rather detailed manner analyzed all relevant provisions laid down in the CPC BiH, applicable to this procedural situation, and provided a very exhaustive argumentation from which it drew proper conclusions on their legality, as well as their admissibility. The Appellate Panel holds that the first-instance panel's analysis was correct.

46. It is well known that during the investigation the accused Petar Mitrović gave two statements – one to the CJB Bijeljina on 20 June 2005 and the other to the BiH Prosecutor's Office on 21 June 2005.

47. It is also well known that the statement to the CJB Bijeljina was taken in contravention of the CPC BiH, since the suspect was interrogated as a witness (with warnings that under the law are issued to witnesses in accordance with Article 86 of the CPC BiH), not as a suspect (in which case there exist special procedural guarantees provided in Article 78 of the CPC BiH).

48. The first-instance panel did not accept this statement as a lawfully obtained evidence, which, as the ultimate conclusion and the provided reasoning, is fully accepted by this Panel too.

49. Contrary to the appellate grievances of the defense for the accused, the statement the accused Petar Mitrović gave on 21 June 2005 on the premises of the Prosecutor's Office BiH, as the first-instance verdict properly finds, was taken in accordance with the provisions laid down in the CPC BiH, and as such meets all formal requirements for a lawfully obtained evidence.

50. The appeal implies that „all irregularities that existed while taking the statement at the CJB Bijeljina on 20 June 2005 reflected on the statement given on 21 June 2005 to the BiH Prosecutor's Office, which resulted in a series of illogicalities concerning the description of the event itself."

51. It should be noted at this point that the appeal does not specify in which manner the irregularities of 20 June 2005 reflected on the event that took place a day after, so from such an unclear allegation it is not possible to determine exactly which „illogicalities concerning the description of the event" the reflection would pertain to.

52. In any case, in the decision to admit the statement of 21 June 2005 the first-instance panel provided a well-reasoned explanation of the matter, which the appeal failed to challenge in a well-founded manner.

53. In the contested decision, the first-instance panel took into account the fact that the accused, while giving the statement to the police (20 June 2005), was not exposed to any threats or use of force, from which it logically follows that during the hearing at the BiH Prosecutor's Office, the day after, he did not have any trauma or fear from the previous day.

54. Further, the second statement was taken on the following day, by other persons and in an another location, which effectively disrupted the time and space continuity between the two statements. Also, prior to the second interrogation, an attorney was appointed to the suspect, with whom he has consulted. The accused was also informed of his rights and options.

55. Based on the established facts, the Appellate Panel concludes that the statement taken from the CJB Bijeljina, as well as formal irregularities in the process of taking that statement, have in no way affected the regularity of the procedure and the content of the statement given at the BiH Prosecutor's Office on 21 June 2005, from which it follows that the decision of the first-instance panel to admit the statement as evidence is proper and lawful.

56. According to the Panel, the objection that the accused was not informed of the grounds for suspicion against him was also ill-founded. In this context too the appeal fails to present a single piece of evidence or fact to corroborate its claim, unlike the first-instance verdict which provides a convincing and proper explanation on the issue, Page 268, which is why a conclusion presents itself that the accused indeed was informed about the grounds for suspicion against him. The Appellate Panel therefore concludes that the accused (then suspect) was informed about the grounds for suspicion against him.

57. Such a conclusion of the first-instance panel is made based on the statement by Sabina Sarajlija, who was present during the interrogation and who confirmed that the accused (then suspect) was twice informed of the grounds for suspicion against him, first time before an attorney was appointed to him and before he waived his right to remain silent, and the second time upon the attorney's arrival, when the Prosecutor, in the

presence of the suspect, informed the defense counsel of the charges and grounds for suspicion, also before the suspect ultimately decided whether to waive his right to remain silent. These claims are additionally supported by the statement the suspect gave for the record, which reads „I have understood what I am charged with and I will present my defense by answering the questions."

58. Bearing in mind the facts established in this way, as well as the fact that the defense did not explain the raised grievance at all, the Appellate Panel fully accepts the explanation and the finding of the first-instance panel that the accused, before giving the statement, was informed of the grounds for suspicion, and dismissed the appellate grievance as ill-founded.

59. Further, according to the Appellate Panel, the claims that the first-instance court, by accepting the mentioned statement, violated the accused's right to remain silent, the right not to contribute to the charges against himself and not to incriminate himself, referring to an alleged violation of Articles 78 and 273(2) and 281 of the CPC BiH, are ill-founded.

60. Article 78 of the CPC BiH provides advice that needs to be given to the suspect before interrogation, which concerns his rights, or obligations.

61. Pursuant to Paragraph 2 of the mentioned Article, the suspect, *inter alia*, needs to be advised of the following:

(1) the right not to present evidence or answer questions,

(2) the right to comment on the charges against him, and to present all facts and evidence in his favor.

62. Article 281(1) of the CPC BiH stipulates that a court shall base its verdict only on the facts and evidence presented at the main trial. On 21 June 2005, which is when the accused gave a statement, Article 273(2) of the CPC BiH read as follows:

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

63. The defense's appeal erroneously states that the first-instance panel, when it decided to read the transcripts of the investigative statements of the accused, erred in applying Article 273(2) of the CPC BiH. The reason why this appellate claim is deemed ill-founded is that the Panel admitted the transcripts based on Paragraph 1 of the mentioned Article, and not Paragraph 2, which the defense mistakenly cites.

64. The Appellate Panel accepts the position taken by the first-instance court that it follows from Article 273(1) of the CPC BiH that the statements given during the investigation are admissible as evidence at the main trial if during the main trial the accused decided to remain silent, since he is present at the main trial, and has been given an opportunity to explain or deny his previous statement.

65. This option available to the accused represents his right, which he may (but does not have to) exercise. The first-instance court is correct in making a distinction between the accused's right to remain silent and his right to explain or deny his previous statement. It is necessary to note that the fact that the accused, during the main trial, decided to exercise his right to remain silent, cannot prevent the prosecutor from adducing into evidence the statement the suspect gave during the investigation in a lawful, voluntary and free manner, which is to say it cannot undo the validity of the statement the Prosecutor took from him in a completely lawful manner.

66. The appeal further states that the first-instance verdict was delivered on 29 July 2008, which means after the Law on Amendments to the Criminal Procedure Code of BiH entered into force. This Law also amended a provision set forth in Article 78 of the CPC BiH. Article 72(2)(c) of the CPC BiH now explicitly stipulates that during the interrogation the suspect must be informed that his statement is admissible as evidence at the main trial and that even without his consent it may be read out and used at the main trial.

67. It is beyond dispute that the Law on Amendments to the Criminal Procedure Code of BiH (Official Gazette 58/08) was adopted on 17 June 2008 and entered into force on 29 July 2008. The Law, *inter alia*, amended provisions laid down in Articles 6, 78(2)c), and added Paragraph 3 to Article 273 of the CPC BiH.

68. Article 6 of the amended CPC BiH stipulates that the suspect, besides the obligation to inform him of the charges and the grounds for suspicion against him, must

also be warned that *his statement may be used as evidence in further proceeding* (*emphasis added*).

69. Article 78(2)c) of the CPC BiH, following the amendments, stipulates that during the interrogation a suspect needs to be advised that he has the right to comment on the charges against him, and to present all facts and evidence in his favor *and that, if he does so in the presence of defense counsel, the statement made is allowed as evidence at the main trial and may, without his consent, be read and used at the main trial (emphasis added).*

70. The added Article 273(2) of the CPC BiH now provides that:

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

71. The Defense's appeal includes the foregoing note that the first-instance verdict was delivered after the Law on Amendments to the CPC BiH (with the aforementioned amended provisions) entered into force, without stating that the Law in question actually entered into force on the very same day when the first-instance panel pronounced the verdict.

72. It follows from the aforementioned that the Prosecutor in charge of the case, and then also the first-instance panel, could not have acted in accordance with the provisions which at the time when the procedural action was taken (interrogation of the suspect, and admitting the evidence) did not exist at all, which is to say that, according to the then applicable provisions of the CPC BiH, the Prosecutor did not have the obligation to warn the suspect that his statement (if he has chosen to give one) is admissible as evidence at the main trial and that it even without his consent it may be read out and used at the main trial.

73. Finally, the Appellate Panel concludes that the proper interpretation of the first-instance panel's actions is that the warnings given were lawful and in accordance with the Criminal Procedure Code in effect at the time when the Panel issued the decision to admit

the statement of the accused. Subsequent amendments to Article 273 of the CPC BiH, which include new and more precise wording in the article, support such a position of the first-instance panel.

74. The Appellate Panel also considered Article 125 the Law on Amendments to the Criminal Procedure Code of BiH (Official Gazette No. 58/08), which stipulates that:

> In those cases where the indictment has been confirmed by the time this law entered into force, the proceeding shall continue under the provisions laid down in the Criminal Procedure Code of Bosnia and Herzegovina ("Official Gazette BiH", Nos. 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07 and 15/08), unless the provisions of this Law are more favorable to the suspect, or the accused.

75. The foregoing provision establishes a principle uncommon in procedural laws, since the principle of prohibition of retroactivity is characteristic of substantive criminal law. In support of that is the provision under Article 4 of the adopted CC SFRY, which in Paragraph 1 sets forth one of the general principles of the Criminal Code, according to which the perpetrator of a criminal offense shall be subjected to that law which was in effect at the time of commission of the criminal offense – *the principle of prohibition of retroactive effect of the Criminal Code* ***– the prohibition of retroactivity of law.***

76. This protects the principle of legality but also legal certainty, in the way that no one can be punished before he knew that such a conduct is forbidden or unlawful. This principle is also a principle of international law included in the most significant international instruments, such as, for instance, Article 7 of the ECHR and Article 15 of the International Covenant on Civil and Political Rights (ICCPR).

77. Article 4(2) of the adopted CC SFRY provides for an exceptional possibility of a retroactive application of a new, more lenient criminal code (exceptional permission of retroactivity when a new law is more lenient – retroactivity *in mitius*). The issue of the more lenient law (*lex mitior*) is raised in those situations when the criminal offense was committed while a certain law was in force, but by the time of a final verdict the law has been amended once or more times. The (mandatory) retroactive application of a new law is resorted to if it has been established that the new law is more favorable to the perpetrator of the given criminal offense.

78. The existence of this institution in substantive criminal law is quite natural and logical, especially bearing in mind that when a court decides on the application of the more lenient law to a particular set of facts, it has before itself both (or more) laws, and only then decides which law to apply in accordance with the foregoing principle. This sort of situation is not possible when it comes to procedural laws, since the court conducting the proceedings applies the procedural law in effect at the moment when the action is taken, and at that moment it cannot assume whether at all or in what way the procedural law might be changed in the future.

79. Supporting such a position is the commentary on the CPC BiH (Council of Europe /European Commission (2005), Commentary on criminal laws in BiH, Sarajevo, page 65) which reads as follows:

> …Unlike substantive, this issue is resolved in the procedural criminal law according to the provisions laid down in the law which is in force at the moment when the action is taken (the *tempus regit actum* rule), which means that it is of no significance whether a criminal offense was committed before the criminal procedure code entered into force, but the prerequisites for undertaking and for the validity of a procedural action are determined according to the law that was in effect at the time when it was undertaken. The problem, however, emerges in relation to those criminal proceedings which are underway at the moment when a new law enters into force, for an unlimited application of the new law might prevent the harmonization of the results of procedural actions taken under the old law with the ones taken under the new one. In such cases, the old provisions would apply to concrete cases until the completion of a phase or parts started under the old law, and the new ones to the parts that follow after the new law entered into force. This is a sort of compromise for the purpose of protecting the parties to the criminal proceeding, in which regard there exist two rules: the first one, according to which **the old procedural actions do not have to be repeated, because their results are valid also under the new law,** and the second one, that the running time-limits, on the day when the new law entered into force, must be calculated according to the rules that are more favorable to the party.

80. Consequently, it follows that the more lenient, or the more stringent character of a procedural law should be assessed with regard to the application of provisions that pertain to the statutory time-frames for taking particular procedural actions, meaning that the more

lenient law shall always be the law that leaves to the suspect, or the accused, a longer time-frame to take relevant procedural actions.

81. This interpretation is also the only logical one, since it does not bring into question the legality of the actions that, at the time when they were undertaken, were fully in accordance with the law.

82. Another ill-founded argument of the defense counsel is that the first-instance panel failed to properly apply the criteria for the admissibility of the accused Petar Mitrović's statement since it made the decision on admissibility before the defense was given the opportunity to present its evidence, which is why, the defense argues in the appeal, the Panel failed to properly assess the mental condition of the accused at the time when he gave his statement.

83. The order of presentation of evidence at the main trial is prescribed by Article 261 of the CPC BiH, from which it follows that evidence, as a rule, is presented by first adducing the prosecution's evidence, and after that the defense's evidence, to finally give the Prosecution a chance of rebuttal (the prosecution evidence rebutting defense's arguments), and the Defense of rejoinder (the defense evidence as a rejoinder to rebuttal). After that, the evidence possibly ordered by the court may be adduced as well.

84. The given legal provision in principle reflects the accusatory character of criminal proceedings and the application of the presumption of innocence principle, from which it ensues that the Prosecutor, through the presented evidence, is obliged to prove the guilt of the accused, while the accused, on the other hand, has the right to adduce his own evidence, but has no obligation to present evidence or comment on the prosecution's evidence. Consequently, the appellate grievance contesting the order of presentation of evidence remains unclear, since after presenting the prosecution evidence, the defense had the opportunity to challenge the probative value of the suspect's statement, but failed to do so.

85. It follows from the Reasoning to the Verdict of the First-Instance Panel that, in deciding on the admissibility of the accused's statement of 21 June 2005, the First-Instance Panel took into account the mental condition of the suspect, specifically his ability to comprehend the significance of investigative interrogation, and in that context considered the evidence provided by witnesses Sabina Sarajlija and Božo Bagarić, who

were present on the premises of the Prosecutor's Office BiH during the interrogation of the accused, as well as the findings and opinion of an expert witness, neuoropsychiatrist.

86. Based on the foregoing evidence, and the records made during the examination of the suspect, the Panel properly concluded that at the time when he gave evidence, the suspect was fit, well rested and able to answer questions. These conclusions are drawn from the conduct of the accused on the premises of the Prosecutor's Office, and from the statement of the aforementioned witnesses, who said that the accused, having been asked about his mental and physical condition, responded that he felt „well, and was ready to present his defense" (Page 3 of the Transcript), which is additionally supported with the fact that the examination of the accused was attended by his defense counsel, who had the opportunity to intervene if she believed that her client was unfit to give the statement, but she did not do so.

87. The Appellate Panel also concludes that the first-instance panel logically found that the report presented by neuropsychiatrist Dr. Abdulah Kučukalić strongly corroborates all the aforementioned. Dr. Abdulah Kučukalić has put together his report and opinion regarding the mental fitness of the Accused Mitrović, and found the existence of „a conscious simulation in an attempt to portray himself as an ill person with characteristics of pseudodementia, incapable of accepting and comprehending the real situation," and concluded that Mitrović is capable of comprehending the significance of his actions, and that he is considered to be mentally sane.

88. The Appellate Panel concludes that the first-instance panel properly found that such a conduct of the accused, or rather his simulation of pseudodementia, represents a botched attempt to contest the admissibility of the statement given at the Prosecutor's Office on 21 June 2005, which is why the first-instance panel properly concluded that the accused was capable of comprehending the significance and consequences of the statement he gave.

89. It ensues from the aforementioned that the procedure of taking the statement of 21 June 2005, and its subsequent admission into evidence, fully complied with the provisions set forth in the CPC BiH, which is to say that, contrary to the appellate claims, no essential violation of the CPC BiH was made, as argued by the appeal.

90. The Appellate Panel also finds ill-founded the appellate grievance that by separating the proceeding against him the first-instance panel committed an essential violation of criminal procedure. The Defense claims that by separating the proceedings the court imposed on the Accused Mitrović the obligation to testify in the case against the other accused.

91. According to the appeal, such a decision imposed on the accused another obligation – to testify, so he is forced to repeat his statement given during the investigation, which means to incriminate himself, which is in contravention of the provisions laid down in both the CPC of BiH and the ECHR.

92. In deciding on this issue, the Appellate Panel considered two aspects – legality and justifiability of the first-instance panel's decision to separate the proceedings, and the procedural situation in which the accused Mitrović found himself because of such a development, and his obligation to testify in cases against the accused Stevanović and Stupar *et al*.

93. It is beyond doubt that by its Decision dated 21 May 2008 the Court decided to separate the criminal case against the accused Miloš Stupar, Petar Mitrović, Milenko Trifunović, Miladin Stevanović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Velibor Maksimović, Dragiša Živanović, Branislav Medan and Milovan Matić, so as to create separate cases against the accused Petar Mitrović (I), Miladin Stevanović (II), leaving the remaining third case against Miloš Stupar *et al*. (III).

94. The same decision imposed on the accused Mitrović and Stevanović the obligation to testify in mutual cases and in the third remaining case (Stupar *et al.*), and have been guaranteed by the trial panel that nothing they may say as witnesses shall be used against them in their own cases.

95. The first-instance panel found reasons for separating the proceedings in the fact that it has admitted, and at the main trial read out, the statement Mitrović and Stevanović gave to the BiH Prosecutor's Office during investigation, which directly or indirectly implicate the other accused.

96. Starting from one of the fundamental procedural rights of the accused – the right to ask questions of witnesses (Article 259(1) of the CPC BiH) and the right of cross-

examination (Article 262 of the CPC BiH), the Court should have provided the accused with the possibility to cross-examine the persons whose statements implicated them directly or indirectly.

97. Given that the accused cannot be forced to give any statement during the proceedings, since he has the right to remain silent, the accused Mitrović could not be forced to give statement at the main trial in the case conducted against him.

98. In such a procedural situation, the first-instance panel acted properly when it separated the proceedings given that it is the legal right and interest of the remaining accused persons to cross-examine the person who implicated them directly or indirectly. That right is extremely important, and as such represents a valid reason to separate proceedings.

99. The other question that presents itself here is the question of procedural situation in which the accused Mitrović found himself after the proceedings were separated.

100. In its appeal Defense Counsel calls this “an imposed obligation to testify” and self-incriminate oneself, however the Appellate Panel concludes that these claims are ill-founded.

101. The fact is that after the separation of their cases, the accused Stevanović and Mitrović are no longer accused in mutual cases or in the case against the accused Stupar, but persons who have given statements on the criminal offense and its perpetrators.

102. Article 81(1) of the CPC BiH provides that witnesses shall be heard when there is likelihood that their statements may provide information concerning the offense, perpetrator or any other important circumstances (Paragraph 1 of the mentioned Article).

103. Pursuant to Article 81(4) and (5) of the CPC BiH, witnesses shall be notified of the consequences in case the witness fails to appear (possibility of imposing a fine or forcible bringing before the judge), which means that giving testimony as a witness is not a right but a legal obligation whose non-compliance entails a statutory punishment.

104. Consequently, the obligation to testify is an obligation that follows directly from the law.

105. Bearing in mind the substance of the statement the accused gave during the investigation, and the fact that during cross-examination at the main trial in a different case he may say something that would incriminate himself, the first-instance panel has, while separating the cases and imposing on him an obligation to testify in other cases, ordered that no information learned from the testimony of the Accused Mitrović in other cases shall be used in the proceeding against him.

106. The first-instance verdict properly states that protection from self-incrimination assumes the existence of a real risk that the testimony might be used against the witness in the criminal proceeding where he is the accused.

107. In that regard, the CPC BiH, when prescribing the right of a witness not to answer certain questions (Article 84 of the CPC BiH), clearly stipulates that a witness has the right not to answer certain questions if a truthful answer would expose him to criminal prosecution (Article 84(1) of the CPC BiH).

108. Paragraph 2 of the same Article stipulates that the witness who exercises his right not to answer such questions would still answer them if granted immunity.

109. Bearing in mind the aforementioned legal provisions, the first-instance panel properly found that the very purpose of granting immunity is to protect an individual who is forced to answer certain questions from suffering detrimental consequences.

110. Since the proceeding against the Accused Mitrović had already been initiated, the Prosecutor was no longer in a position to grant immunity from criminal prosecution, so that by separating the proceedings the same Panel acted in all three cases.

111. The first-instance panel did indeed give a guarantee that it would not use the substance of the Accused Mitrović's testimony, given as a witness, in the proceedings against him, in order to eliminate the consequences of possible self-incrimination. However, this guarantee to the Accused Mitrović is also provided by the law, for his statement given in another criminal case could not anyway be used as evidence at the main trial in the case against him, and the eventual verdict may be based only on the evidence adduced at the main trial, regardless of whether the court, for some other reasons, has some additional information.

112. For the aforementioned reasons, the Appellate Panel believes that the first-instance court provided specific, clear and lawful reasons based on which to issue the decision to separate the proceedings, and call the accused Petar Mitrović and Miladin Stevanović to testify in mutual cases and in the case against Miloš Stupar *et al.*, and that by so doing it did not make an essential violation of criminal procedure provisions, to which the defense unreasonably refers to in its appeal.

113. Also ill-founded is the appellate grievance that because the right to appeal the decision on accepting, as proven, facts established in the proceedings before the ICTY, was denied, the principle of fairness has been violated, so that, accordingly, the verdict is allegedly based on unlawful evidence.

114. The Defense finds legal grounds for such a conclusion in the provisions set forth in the Law on the Transfer of Cases from the International Criminal Tribunal for the former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Obtained by the International Criminal Tribunal for the former Yugoslavia in the Proceedings Before Courts in Bosnia and Herzegovina (the Law on the Transfer of Cases), especially Article 1(2) and Article 318(1) of the CPC BiH.

115. The Appellate Panel, above all, notes that the mentioned grievance that „some of the accepted facts constitute elements of the criminal offense which the accused was found guilty of," was presented in too general terms, since the defense does not at all state which facts specifically they are concerned with, but merely refers to them as "some".

116. Besides, the appeal in no way contests the substance of the accepted facts, nor does it point to the evidence that would possibly suggest different facts, but the only thing challenged is the principle under which there was no right to appeal the decision on established facts.

117. In consideration of this appellate grievance, the Appellate Panel has established the following:

118. Article 4 of the Law on Transfer stipulates that, after the parties have been heard, the court may, *proprio motu* or at the proposal of one of the parties, decide to accept, as proven, the facts established by a final decision in another case before the ICTY (accepted

facts), or to accept documentary evidence from the case before the ICTY if pertaining to the issues of significance in the current proceedings.

119. Article 1(1) of the Law on Transfer stipulates that the provisions of that law define the procedure of the transfer of cases the ICTY cedes to the BiH Prosecutor's Office, as well as the use of evidence obtained by the ICTY, in the proceedings before courts in Bosnia and Herzegovina, while Paragraph 2 of the same Article stipulates that if the provisions of this law do not specifically regulate issues referred to in Paragraph 1 of this Article, other provisions set forth in the BiH Criminal Procedure Code shall apply.

120. Article 318 of the CPC BiH stipulates that the parties, the defense attorney and persons whose rights have been violated may always file an appeal against the decision of the Court rendered in the first instance unless when it is explicitly prohibited to file an appeal under this Code, while Paragraph 2 of the same Article stipulates that a decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal against the verdict.

121. The Law on Transfer neither stipulates nor prohibits the right to a special appeal from the decision of the court to accept established facts in accordance with Article 4 of the same law; however, it also does not stipulate any special form in which that decision should be made, nor the criteria that need to be taken into account while making the decision.

122. Bearing in mind that the provisions laid down in the Law on Transfer concerning the issues that are not regulated by that law refer to the application of the CPC BiH, the Appellate Panel above all finds it proper to decide on established facts in the form of a decision, since the decision on this issue is made after the parties present their arguments in the form of motions, or responses to motions. The decision must include a reasoning, which would show whether the proposed facts meet certain admissibility criteria the first-instance panel adopted from the ICTY jurisprudence. This Panel endorses such a practice, believing it is correct and lawful.

123. What remains disputable is whether this type of decision on established facts represents a meritorious solution, which would allow a special appeal, or a procedural decision that may only be contested within the appeal from the verdict.

124. The appeal implies that some of the accepted established facts at the same time represent elements of the criminal offense of which the accused was found guilty, and based on that concludes that the decision on established facts is a meritorious decision.

125. The Appellate Panel, however, believes that the decision on established facts is a procedural decision that cannot be challenged by an interlocutory appeal, but it may only be contested within the appeal from the verdict.

126. It quite clearly follows from the first-instance verdict, and also from the interlocutory decision issued in this case (Decision of 3 October 2006) that only those facts were accepted that were clear, specific and identifiable, that do not represent conclusions, opinions or oral testimony, and, most importantly, they do not represent a characterization of a legal nature. Apart from these, the accepted facts also meet the other criteria – they include essential findings of the ICTY and have not been significantly altered, they do not confirm either directly or indirectly the criminal liability of the accused, they have been upheld or established in the appeals proceeding or have not been contested on appeal, and no further appeal is possible, they do not follow from a guilty plea agreement or voluntary confession, and ensue from a case in which the accused had a legal counsel and an opportunity to defend himself.

127. Bearing in mind the aforementioned, the Appellate Panel too finds that the first-instance panel properly concluded that the established facts accepted by the mentioned decision fully meet the acceptance criteria, and in no way violate the right of the accused to a fair trial and the presumption of his innocence. This is especially so because during the proceedings those facts were treated as evidence in the case, which the defense had the opportunity to challenge and contest by counter-arguments, or by its own evidence.

128. Further, the same decision denied the Prosecution's Motion dated 4 May 2006 to accept facts from the Judgment IT-02-60/1-A dated 8 March 2006, and IT-02-60/1-S dated 2 December 2003, and IT-02-60/2-S dated 10 December 2003, given that the first-instance panel concluded that some of the proposed facts constitute legal conclusions or directly or indirectly incriminate the accused, from which it follows that the first-instance court made a clear and proper distinction between the established facts that can be accepted and those whose acceptance would bring into question the accused's right to a fair trial.

129. The essence of the decision on acceptance of established facts is to contribute to judicial economy and honor the right of the accused to a speedy trial, and strike a balance between the right of the accused to a fair trial and reducing to the least possible extent the need for the appearance of the same witnesses to testify about the same circumstances in multiple cases. The decision on the acceptance of facts is therefore a procedural decision on adducing evidence, naturally if the evidence (in this case facts) meets the admissibility criteria.

130. In line with the foregoing, the Appellate Panel concludes that the decision on the acceptance of facts, in essence, represents a decision to admit evidence into evidentiary material. The Reasoning of the first-instance verdict properly provides the same explanation, and notes that the established facts constitute a special action of adducing evidence. If it accepts them, the first-instance panel shall treat the established facts as a piece of evidence adduced at the main trial.

131. Bearing in mind the aforementioned, it is only proper that during the trial the evidence should be admitted by procedural decisions, and that the evaluation of the evidence in terms of their substance and probative value should be made upon the completion of the main trial, when the first-instance panel will have had a good insight into all adduced evidence, and in terms of Articles 15 and 281(1) and (2) of the CPC BiH, be able to make a free evaluation of each piece of evidence individually and in correlation with the other pieces of evidence.

132. If the court should accept the Defense's position that there exists the right to an interlocutory appeal from the decision on the acceptance of facts during main trial, the same principle would then have to apply in relation to admitting into the evidentiary material any other piece of evidence, which would mean staying the proceedings until each such decision is final.

133. Besides the fact that the BiH Criminal Procedure Code does not have any such provisions, such a conduct would, also from the aspect of judicial economy, and also the right of the accused to a speedy trial, be absolutely unacceptable.

134. Consequently, the Appellate Panel concludes that the appellate grievance is ill-founded, which is why it was dismissed as such.

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

135. Finally, the Defense challenges the first-instance verdict on the grounds of essential violations of criminal procedure provisions under Article 297(1)k) of the CPC BiH, arguing that the Operative Part of the Verdict is incomprehensible, contradictory to itself and to the reasons of the verdict, and that the verdict does not include reasons concerning decisive facts.

136. The Defense also argues that the contested verdict lacks a careful evaluation of all evidence individually and in mutual correlation, that the panel failed to explain the probative value of „certain“ facts, and that in so doing it made an essential violation of criminal procedure provisions, which resulted in a miscarriage of justice.

137. In examining whether the defense's claim was reasonable, the Appellate Panel concludes that the appellate grievances to this effect were stated in general terms only, without any specification or explanation as to the nature of the alleged incomprehensibility of the Operative Part of the Verdict, and in which decisive facts exactly is the verdict allegedly contradictory to itself and the presented reasons.

138. Article 295(1) of the CPC BiH clearly stipulates that an appeal, *inter alia*, must contain grounds for contesting the verdict and the reasoning behind the appeal, which means that it does not suffice for an appeal to merely state the statutory formulation of the grounds of appeal under Article 297(1)k) of the CPC BiH, as was done in the case at hand, but an appellate grievance must be substantiated by concrete and clear facts and examples from the first-instance verdict that are allegedly deficient.

139. Since the appeal in question does not state any concrete examples of the alleged violations, and since the appellant explains his complaint regarding the method in which the first-instance panel considered the evidence merely by a general construct that the first-instance panel failed to explain the probative value of „certain facts,“ the Appellate Panel was not able to examine whether the raised complaint is reasonable.

140. Therefore, since the appellant neither specified not explained the alleged essential violation of criminal procedure, his complaint on the matter is dismissed as ill-founded.

IV. INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS UNDER ARTICLE 299 OF THE CPC OF BIH

A. STANDARDS OF REVIEW

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

142. 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.

143. 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.

144. To prove a miscarriage of justice, the applicant must demonstrate that alleged errors of fact found by the Trial Panel justifiably bring the accused's guilt under suspicion. To prove a miscarriage of justice, a prosecutor must demonstrate that, after taking notice of the Trial Panel's errors in finding of fact, any grounded suspicion in the accused's guilt was eliminated.

145. Therefore, only in case that the Appellate Panel concludes first, that no reasonable trier of fact could reach the contested findings, and second, that the factual error resulted in an erroneous verdict, shall the Appellate Panel grant the appeal which is filed pursuant to Article 299(1) of the CPC of BiH, and which claims that the facts have been established erroneously and incompletely.

(a) Appeal arguments of the Defense

146. The Defense's appeal arguments pertaining to the allegedly erroneously and incompletely established state of facts may be summarized as follows:

147. The Defense submits that the Trial Panel erred with regard to its findings concerning the mental health and mental capacity of the Accused, claiming that the Accused is … and a person of ...

148. In support of this argument, the defense states that the Accused faced problems even in his early youth, that he only finished four grades of primary school, that he did not finish secondary school and that, on two occasions, he was found fit for military service with restrictions. In support of these arguments, the defense refers to the findings and opinions of the expert witness in neuropsychiatry, Prof.Dr.Sci. Ratko Kovačević, and psychologist Spasenija Ćeranić, which indicate that ... The defense submits that the findings and opinions of the prosecution expert witness, Prof.Dr. Abdulah Kučukalić, neuropsychiatrist, and Senadin Fadilpašić, psychologist, are not reliable with regard to the same circumstances, since not all of the medical records on the mental health of the Accused were available to them. Finally, the defense argues that due to the claimed …, the Accused possessed neither the objective nor the subjective ability for any form of participation in the commission of the criminal offence of Genocide.

149. The appeal further argues that the Trial Panel grounds its conclusion of the Accused's knowledge of the existence of the genocidal plan solely on the testimony of the witness S4. The Appeal claims there was not an evaluation of the discrepancies in the statement of this witness of 22 May 2008 concerning the task assignments and knowledge of the planned killing before and after the break taken during the testimony. It is further argued that it follows from Richard Butler's report that common police officers did not have knowledge of the higher commands' plans. The defense's thesis is that the killings in the hangar were not planned but that the guards committed them to protect their physical safety, which was put at risk by the prisoners who rushed at them. The defense does not contest that the killings which were committed after the attack had ceased were unlawful, but it notes that the evidence proves that many persons participated in the killings and that they lasted the whole night, and it submits that the Court erroneously established the state of facts as stated in the operative part. It is also claimed in the appeal that the "Krivaja 95" operation was forced by the crimes committed by Muslims at the rear of the VRS forces and that nobody could have anticipated its final outcome. The defense further argues that the witness S4 stated that the Accused was not shooting on the referenced occasion, that the credibility of this witness is disputable as he entered into agreement with the Prosecutor's Office, that there is no evidence proving that the prisoners were shot at from

the back of the warehouse, and that the Accused had taken no action whatsoever that includes the elements of murder, let alone genocide. The Appeal states that the Court erroneously found that 1000 persons were killed in the warehouse and it pointed out that it remained unclear as to whether civilians or prisoners of war were killed there.

150. Evaluating the first instance verdict pursuant to the claims in the appeal, the Appellate Panel concludes that they are ill-founded and it refuses them as such on the following grounds:

151. In contrast to the arguments of the appellant, the first instance verdict provided specific and complete reasons which guided it in evaluating the mental state of the Accused and it compared the contradictory evidence – the findings and opinions of the respective expert-witnesses for the Prosecution and the Defense, correlated them with other presented evidence and rendered a final conclusion that "it has been established beyond doubt that, at the time when he was a co-perpetrator of genocide in the Kravica warehouse, Mitrović did not suffer from considerably diminished mental capacity". This Panel finds the opinion of the Trial Panel concerning the mental capacity of the Accused reasonable and grounded on all presented evidence. As it is properly analyzed in the contested verdict as well, the crucial difference between the respective findings and opinions of the experts witness for the Prosecution and Defense refers to the fact as to whether the Accused is a person capable of understanding the importance of his actions and of controlling them, or whether he is …, as claimed by the defense. To this end, the Trial Panel properly relied on the finding and opinion of the expert witness for the Prosecution, Prof. Dr. Abdulah Kučukalić, wherein it found his finding on mental capacity of the accused Mitrović corroborated with the presented evidence in its entirety, in contrast to the conclusion of Dr. Kovačević and Dr. Ćeranić. The Trial Panel analyzed a range of facts and circumstances – earlier war engagement of the Accused, beginning 1992, his coping with the stressful situations and his ability to perform complex police assignments, his conduct on the ground, consistent compliance with the issued orders and discipline, and particularly his own statement on the referenced event wherein the Accused did not state that he had experienced any psychological disorientation. In the context of the evaluation of his overall mental capacity, the Trial Panel also considered that, at the time covered by the Indictment, the Accused was a member of the special police unit and it therefore rendered a logical conclusion that he was mentally and physically fit and ready for service. Considering all the foregoing, the Trial Panel reasonably concluded that the

finding of Dr. Kučukalić wherein it states that the Accused "*deliberately simulates and presents himself as a person with pseudo dementia",* was credible and absolutely corroborated by other presented evidence as well.

152. All the foregoing circumstances corroborate the finding of the Prosecution expert-witness, Prof.Dr. Abdulah Kučukalić – stating that, *in tempore criminis*, the Accused was capable of perceiving the importance of the committed acts and of controlling his conduct, and that he was also entirely mentally fit.

153. Considering the presented evidence, the Appellate Panel is satisfied that the Trial Panel's finding on the Accused's mental capacity is the only reasonable finding that follows from the established state of facts. Therefore, the relevant claims in the appeal are hereby refused as ill-founded.

154. The defense also submits that facts were erroneously established with respect to the credence given to the testimony of witness S4, considering that this witness entered into an agreement with the Prosecutor's Office of BiH.

155. The Appellate Panel primarily concludes that the claims laid out in the appeal are inconsistent in this part, considering that they imply that the Court should not have given credence to witness S4, while, on the other hand, the defense itself referred to the part of this witness' testimony wherein he stated that he had not seen the Accused shooting.

156. Furthermore, this Panel finds that the Trial Panel quite thoroughly analyzed the credibility of witness S4 and it, therefore, provided a reasoning which is valid and supported by arguments, and which states the grounds for finding his statement acceptable and reliable.

157. The averments in the defense appeal focus on the fact that the witness S4 entered into the plea agreement, and is, therefore, not credible. It further elaborates on the discrepancies in his testimony and notes that the conclusion on the Accused's awareness that the captured men would be killed cannot be based on the testimony of such an unreliable witness. However, this Panel finds the stated claims in the appeal ungrounded.

158. The Appellate Panel primarily finds that the Trial Panel's arguments are valid with regard to the admissibility and reliability of the testimony of witness S4, being the witness who entered into the plea agreement, and that the first instance verdict provided good

reasoning and valid grounds for such a decision. Specifically, from page 8 of the first instance verdict onwards, the Panel provides a very detailed analysis of the credibility of the witness S4's testimony. In that context, apart from the provisions of Articles 15 and 281(1) of the CPC of BiH, the jurisprudence of the Constitutional Court of BiH was analyzed (in *M.Š*., AP-661/04, Decision on Admissibility and Merits dated 22 April 2005, Para 38), and it was eventually found *"…* "*[T]hat evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity is subject to the same standard, no stricter and no more lenient. Simply, with respect to evidence provided by witnesses testifying pursuant to a plea agreement or grant of immunity, there is neither a presumption of unreliability nor a presumption of truthfulness."…* Further, the Trial Panel refers to the jurisprudence of the Court of BiH in *Maktouf* (KPŽ-32/05, Appellate Verdict dated 4 April 2006): *„The Panel must, of course, consider all facts bearing on the reliability of the witness when analyzing the witness's evidence and exercise caution. However, the Panel must do the same when considering any evidence."*

159. Therefore, the Trial Panel analyzed the testimony of the witness S4 carefully and conscientiously, in isolation and in connection with other presented evidence, without a priori attaching smaller or greater evidentiary value to this testimony, which is the proper procedure.

160. Therefore, the Appellate Panel submits that this witness's testimony was evaluated under law, and the credence given to the context of his testimony is entirely justified and corroborated by other presented evidence as well.

161. The defense's claim concerning this witness' credibility is reduced to the statement that, merely because of the fact that he entered into the plea agreement, his testimony cannot be considered reliable. However, such discredit of the witness's testimony for the sole reason of the referenced fact is not logical, because no lawfully obtained evidence can be *a priori* rejected or considered privileged, but it rather has to be evaluated individually and in connection with other evidence, in order to verify its evidentiary value.

162. In a separate paragraph the Trial Panel analyzed the differences in this witness's statements, therefore the relevant argument in the appeal by the defense is entirely ungrounded and arbitrary.

163. The defense appeal erroneously states that the Trial Panel's conclusion on the Accused's knowledge of the genocidal plan was only rendered through the findings the witness S4 claimed to possess. The first instance verdict states a range of other circumstances and findings reached by the Accused directly and, correlating them with the statements of the witness S4, it draws a conclusion that the Accused had knowledge of the existence of the genocidal plan.

164. These circumstances pertain to the fact that, once they reached Srebrenica from Srednje, it was clear to the Accused, as well as to other members of his Detachment, that Srebrenica fell from a military point of view and that their task would not be to militarily attack the protected zone.

165. Furthermore, while performing their first assignment upon arrival – "terrain cleansing" on the hill of Budak, all members of the Platoon had the possibility to see that the Bosniaks were either expelled or that they decided themselves to run away from their homes, while the rest of them were to be taken to Potočari. The Trial Panel further concludes:

> "*Many witnesses also described the squalid and desperate conditions of the thousands of Bosniaks who had gathered there.*[3] *Accused Petar Mitrović acknowledged in his statement that the platoon was in Potočari on 12 July and saw women, children, and elderly boarding buses. S4 concluded, based on what he saw, that the women and children and elderly were being forced to leave. He pointed out a simple truth: "People do not leave their homes if they do not have to*."

166. What is particularly important in evaluating what the Accused could see and conclude during his stay in Potočari is the fact that on 12 July 1995, the Accused, as well as other members of the Platoon, were informed by Commander Trifunović that there would be a huge influx of surrendering Bosniaks from the woods. Considering that there were no provisions for these people's survival – food, water, medical aid, and also having witnessed all other events of that day, the Trial Panel rendered the only reasonable conclusion - the Accused was aware that those people would be killed, that is, their taking and placing into the hangar was conducted in accordance with the plan that would eventually result in their execution.

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[3] Dragan Kurtuma; Jovan Nikolić.

167. The first instance verdict further elaborates on the evidence:

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

168. Having analyzed all the referenced facts and evidence, the Trial Panel reached the only possible conclusion that could be reached by a reasonable trier of fact – the Accused had knowledge of the existing plan to kill all captured Bosniak men.

169. Considering all the foregoing, the claim of the Defense that the referenced event was actually an incident triggered by the murder of Krsto Dragičević and the wounding of Rade Čuturić by the imprisoned Bosniaks, is not supported by evidence. The first instance verdict analyzed this possibility as well, and it clearly distinguishes between the killings that were committed during the guards' necessary self-defense from the prisoners who attempted to escape, and the killings which followed. At that point they began to implement the previously designed plan for the execution of all those imprisoned in the hangar. With regard to this issue as well the defense did not succeed in properly contesting the inferences of the Trial Panel, which read as follows:

> "The prisoners were unarmed. The Accused was armed with an automatic rifle, and other members of the Detachment were also armed with automatic rifles, an M84 machine gun, and hand grenades. The warehouse was a completely enclosed structure, except for the windows in the back, which were being guarded by the Accused Mitrović, Jakovljević and Medan. Those windows were sufficiently large, which made them a potential avenue for escape, but impossible as a point from which an attack could be launched (which is also proved by the

fact that the witness S2 seized the opportunity and jumped out of the warehouse through the window). As previously described, the hangar had two separate sections. As established by S4, the Krsto/prisoner killings occurred in the right section, after all of the prisoners were secured inside the building, and occurred because Krsto insisted on going into the warehouse room against the orders of Milenko Trifunović. The prisoners on the left were unaware of what was happening in the right side of the warehouse, and S2 testified that although they heard gunfire from that location, they were told by their captors that the Bosniaks were firing on the warehouse. Access to the left side of the warehouse was chained and padlocked, according to Luka Marković. In the right room of the hangar the prisoners were crammed so tightly together, according to S1, that there was no space between them. Furthermore, according to S1, those in the back of the right side of the warehouse knew only that a prisoner had been shot and that panic had broken out. The only "threat" to the Accused from any of the unarmed prisoners would have been from those who had access to the doorway, a space measuring 2.45 by 2.35 meters wide (Exhibit O-232), and those people were surrounded by members of the 2nd Detachment, who were armed with automatic rifles, an M84 machine gun, and hand grenades (Exhibit – O- 232).

S4 testified that the only prisoners who approached the door were those who, having seen the prisoner and Krsto shot, were attempting to escape, and these people did not reach far past the threshold before they were shot dead with the M84 and the rifles of the police officers. The cries and curses of the prisoners, when they realized what was occurring, were heard by many witnesses, including Mitrović, S4, and workers at the warehouse, but it was obvious from the physical layout of the building that any final exhortations by the prisoners to take action were of no practical consequence. In addition, they were met not only by the gunfire of the Accused, but also by ethnic curses by those doing the shooting, as S4 testified. Finally, any doubt regarding whether the accused intended to kill the prisoners is completely eliminated by the fact that they continued the killings for more than an hour, and, when they believed that all were dead in the right part, systematically proceeded to kill those in the left part of the warehouse. Even Borovčanin admitted, when questioned by OTP investigators, that these killings were murder."

170. The cited analysis of the Trial Panel, and the rendered inferences on the non-existence of the legal requirements for necessary self-defense, have not been effectively contested by the arbitrary averments in the appeal. The appeal is inconsistent in this matter as well, since at one point it does not contest the fact that the killings that followed after the incident of murder of Krsto Dragičević were unlawful, but it also points out that many persons participated in them, and that the killings lasted throughout the night.

171. The subject matter of these proceedings does not refer to the participation of other persons in this event, nor is it their level of responsibility, but the actions and the responsibility of the accused Petar Mitrović. The fact that other persons also participated in the perpetration of the offence does not diminish the responsibility of the Accused, nor can it justify the unlawful actions he undertook.

172. It should be noted at this point that the Accused himself admitted in his statement that he had fired two shots and then was ordered to go to the back of the warehouse where he stood guard to prevent the prisoners from escaping. The arguments in the appeal that there is no evidence proving that anyone attempted to escape from that side, and that there was no shooting from there, are absolutely irrelevant, since everyone had a role in the perpetration of the killings and, through the performance of these roles, they contributed to the final objective.

173. The Trial Panel found that, through his actions, the Accused contributed to the killings in the warehouse in a decisive manner, which is the only reasonable conclusion that could be passed by a reasonable trier of facts. The claims in the appeal only present the uncorroborated allegations and theses of the defense, which are insufficient to contest the inferences of the Trial Panel with regard to these circumstances.

174. The appeal also argues that the Trial Panel erroneously established the state of facts concerning the total number of those killed in the Kravica warehouse, when it inferred that the total number of the killed persons exceeded one thousand persons.

175. The Appellate Panel finds that the Trial Panel thoroughly reasoned how they had reached the number of “more than one thousand” of those killed. Specifically, among others, witnesses S1, S4, Slobodan Stjepanović, Predrag Čelić and expert witnesses Vlado Radović (expert witness in civil engineering) and Dragan Obradović (surveyor expert witness) gave their testimony about this matter. The Trial Panel evaluated each of these pieces of evidence and inferred that the total number of those killed exceeded one thousand.

176. The appeal does not reason its argument that the inference that more than 1000 people were killed was erroneous, but only noted that the identified number of persons connected with the warehouse was 676. However, not all missing persons have been identified yet, and the bodies of those killed were transported to other locations, then reburied (primary and secondary graves), from which they were subsequently exhumed. All the foregoing indicates that the number of persons who have been identified to date cannot be deemed at all to be the total number of the killed persons, but may only be considered the lowest number of persons killed. Therefore, the averment in the appeal is refused as ill-founded.

177. Finally, the defense submits that the verdict neither states nor establishes the existence of an armed conflict without which, in the view of the defense, there is no war or war crime, that the operative part of the verdict does not include the names of the victims, nor does it state whether those killed were civilians or prisoners of war, or both.

178. The Appellate Panel notes that the referenced circumstances do not constitute essential elements of the criminal offense of genocide at all. Therefore, they are irrelevant to decision-rendering in this case.

179. For the foregoing reasons, the claims in the appeal contesting the correctness and completion of the established state of facts are hereby refused as ill-founded.

V. VIOLATIONS OF THE CRIMINAL LAW UNDER ARTICLE 298 OF THE CPC OF BIH

180. The Defense Counsel for the Accused also contest the first instance verdict due to the alleged violations of the Criminal Code, claiming that the Trial Panel erroneously applied the Criminal Code by accepting the legal qualification of the criminal offence as stated in the Indictment, that is, by qualifying the actions of the Accused under the CC of BiH, which came into force on 1 March 2003.

181. In reasoning the referenced claims in the appeal, the Defense Counsel refer to the provisions of Articles 3 and 4 of the CC of BiH, which set up the principles of legality and non-retroactivity, being the fundamental principles of criminal law.

182. Special emphasis is placed upon the principle under Article 4(2) of the CC of BiH, which foresees that if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall apply.

183. The Appeal further notes that the assessment as to which law is more lenient to the perpetrator shall always be made *in concreto*, taking into account a specific case and a specific perpetrator, in order to establish which law is generally more advantageous to the particular perpetrator.

184. Considering that both the CC of SFRY, which was adopted based on the Law on the Application of the Criminal Code of Republic Bosnia and Herzegovina and the Criminal Code of SFRY (the adopted CC of SFRY)[4], the law which was in effect at the time relevant to the Indictment, and the CC of BiH provide for the same criminal offence with the same legal elements (Genocide), the defense submits that the adopted CC of SFRY is more lenient to the Accused as it foresees the term of imprisonment ranging from 5 years to 15 years, and in the event of an aggravated form of the criminal offense, 20 years, while the CC of BiH foresees the imprisonment for a term not less than 10 years or a long-term imprisonment. Especially pointed to is the Decision of the Constitutional Court upon the appellation filed by the Accused regarding the application of law, or rather violation of Article 7 of the European Convention.

185. The Defense is of the view that Article 4a of the CC of BiH, to which the first instance verdict refers, does not prevent the application of Article 4 of the CC of BiH when it comes to the mandatory application of a more lenient law since Article 4a stipulates the possibility of prosecuting all forms of criminal offences in violation of the general principles of international law, which are offences that had not been foreseen by the national legislation at the time of perpetration.

186. The Appellate Panel has first noted that, pursuant to its right to independent judicial view, it does not support the legal positions and opinion presented in the Decision of the Constitutional Court. However, executing the Constitutional Court's Decision, which pursuant to Article, VI/5 of the Constitution of Bosnia and Herzegovina, is final and binding, the Panel has granted the appeal of the Accused's defense stating that the contested Verdict misapplied the criminal code to the prejudice of the Accused, namely that the most lenient law for the Accused was not applied.

187. As aforesaid, the Decision of the Constitutional Court is binding on this Court, so in these proceedings the Appellate Panel must remedy the violation found. However, since the issue of retroactive application of law, that is, the issue of evaluation of a more lenient law to the perpetrator, is legally very significant issue, and has been considered in a

[4] Decree with the Force of Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia which has been adopted as the Republic law during the imminent threat of war or a state of war (*Official Gazette of RBiH*, No. 6/92) and the Law on Confirmation of Decree Law (*Official Gazette of RBiH*, No. 13/94).

number of Decisions of both the Constitutional Court of BiH and the European Court of Human Rights (the European Court), which have direct implications for the cases tried before this Court, the Appellate Panel considers it is necessary to present a review of conclusions from the referenced Courts' relevant decisions.

188. In the Decision rendered in *Maktouf and Damjanović v. Bosnia and Herzegovina*[5], which preceded the decision upon the accused Mitrović's appeal, and whose conclusions formed the basis for the findings of the Constitutional Court, in evaluating whether the retroactive application of the CC of BiH to war crimes cases is itself in 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 favourable to the defendant (see *Scoppola*, cited above, § 109)."

189. Therefore, on the basis of such a presented position, clearly it is obvious that the European Court has evaluated the violation of Article 7(1) of the European Convention only in relation to the circumstances of the concrete case, having particularly noted that there can be no generalization in evaluating a more lenient law and the issue of retroactivity. Furthermore, it is obvious from the referenced European Court's decision that, within the circumstances of the case, the evaluation of a more lenient law was made by comparing the prescribed sentences minimum, namely that it concerned the criminal offense which could not have been considered as the gravest form of war crimes. Thus, para. 69 of the Decision stated 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."

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

190. We note that the Court of BiH has taken a fully identical position regarding the application of the law in several cases even before the referenced decision of the European Court was rendered, as noted and stated in para. 29 thereof[6].

191. In compliance with the case law of the European Court under the referenced Judgment, the Constitutional Court has concluded, in the case initiated upon an appeal filed by Zoran Damjanović (Decision on Admissibility and Merits, No. AP 325/08 of 27 September 2013), that this case does not differ from the referenced *Maktouf* and *Damjanović* case, both with regard to the factual substratum and the legal issue and, like the European Court, also found an identical violation of Article 7(1) of the European Convention. It clearly ensues from the referenced decision that in establishing the more lenient law to the perpetrator, the Constitutional Court has relied on the minimum punishment standard, considering that the applicants were sentenced to imprisonment of a term of 5 years *(Maktouf)*, as the lowest possible sentence under the CC of BiH (the sentence which can be imposed applying reduction provisions), and for a term of 11 years *(Damjanović)*, as a sentence slightly above the minimum 10-year sentence under the same Code.

192. Contrary to this, referring to the above referenced decisions, the Constitutional Court has found in the Decision on the accused Petar Mitrović's appeal that, in the concrete case, it should be determined which law prescribes a more lenient maximum sentence, considering that under the appellate decision the Accused received a long term imprisonment of 28 years, which is a sentence that, by its type, is a sentence prescribed in the CC of BiH for the gravest forms of the criminal offense, as opposed to the death penalty as the sentence prescribed under the law applicable *in tempore criminis* (the adopted CC of SFRY). Thus, para. 53 of the Decision stated as follows:

> "....it ensues in the concrete case that the Court decided to impose on the appellant a more stringent punishment for the committed offense, and that there was no need to determine which law prescribes a more lenient minimum

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

sentence, but rather to determine which law is more lenient with regard to the maximum sentence."

193. The appellate Verdict found the Accused guilty because, by the acts described in the enacting clause of the Verdict, he committed the criminal offense of Genocide under Article 171, as read with Article 31 of the CC of BiH, for which he received the sentence of long term imprisonment of 28 years. Obviously, this is a criminal offense falling under the gravest forms of crimes, which resulted in the death of a large number of persons, and which carried the death penalty under the CC of SFRY. It is thus obvious that this situation is quite opposite to the one with which the European Court was faced in *Maktouf and Damjanović*, or the Constitutional Court in *Zoran Damjanović*.

194. Having examined the grounds of the accused Mitrović's appeal, in analogy with the findings of the referenced decisions, the Constitutional Court found that, with the view to establishing possible violations of Article 7(1) of the European Convention, the prescribed maximum sentences under both the CC of SFRY and the CC of BiH need to be compared. In doing so, however, the Constitutional Court has not taken into account all the factual and legal circumstances of the concrete case, and the gravity of their consequences relevant to dealing with this legal matter. The Appellate Panel has noted that the Constitutional Court compared the 20-year prison sentence, as the maximum sentence for the referenced criminal offense prescribed under the CC of SFRY, with the sentence of long-term imprisonment prescribed for the same offense under the CC of BiH, while omitting, contrary to its earlier position on the same matter, the death penalty as the sentence prescribed under the law which was in effect at the time when the criminal offense was committed.

195. More specifically, in the present decision in the accused Mitrović's case, the Constitutional Court abandons its earlier position presented in *Abduladhim Maktouf*[7], and presents quite a new position in relation to the one earlier established in evaluating a more

[7] *Abdulhadim Maktouf*, Decision of the Constitutional Court of BiH on Admissibility and Merits, No. AP 1785/06 of 30 March 2007, para. 68. „*In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstic, Galic, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term*

lenient law. The Constitutional Court now states that the death penalty was eliminated from the criminal-legal sanctions system, and that, therefore, in terms of Article 38(2) of the CC of SFRY (*"for the criminal offenses carrying the death penalty, the court may also impose a 20-year prison sentence)*, in a situation when it can be no longer imposed, it is possible *„...to impose a maximum prison sentence for a term of 20 years (which was, pursuant to the referenced Code provisions, imposed instead of the death penalty, or a 15-year prison sentence (prescribed under this Code as a maximum prison sentence)"*.

196. In support of the conclusion that the death penalty was eliminated from the criminal sanctions system, it was stated that Protocol No. 6 to the ECHR came into force in parallel with the Constitution of Bosnia and Herzegovina (on 14 December 1995), and that on 3 May 2002 the Council of Europe adopted Protocol No. 13 to the European Convention concerning the abolition of the death penalty in all circumstances, which was ratified by BiH on 1 November 2003. This leads to the conclusion that in 2008, when the disputed decisions were rendered, there was no possibility to impose on the appellant the death penalty for the criminal offense at issue.

197. According to this Panel, such line of arguments is totally unclear, that is, the footing for such a conclusion is unknown, and therefore, the quality of the explanation itself cannot be evaluated. The Constitution of BiH (Annex IV to the Dayton Agreement), contains no provisions on the death penalty, while Article 2 of Protocol No. 6 to the European Convention, which forms an integral part of the Constitution, provides for a possibility to prescribe the death penalty for the gravest criminal offenses committed in war, wherein the Constitutional Court provided no arguments as to how this provision of the Protocol affects the present criminal legislation at the moment the Constitution was adopted. Making references to Protocol No. 13 to the European Convention, which is a single international-level document that abolishes the death penalty in all circumstances, has no impact in the concrete case considering that it was adopted on 3 May 2002, and ratified by BiH on 1 November 2003, or much later in relation to the death penalty abolition from the BiH criminal legislation (in 1998 in the Federation of BiH, and in 2000 in Republika Srpska). The conclusion, that the death penalty could not be imposed in 2008, would only be

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imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law".

relevant in a situation where the death penalty was indeed imposed, which is not the case in the Court's concrete verdict.

198. In addition, the Appellate Panel's view is that, in the situation when the case law has been significantly changed in relation to important legal issues, it is advisable to refer, like the Constitutional Court did, to the conclusion drawn by the Constitutional Court 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 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."

199. In the Appellate Panel's view, the issues of retroactivity and of the more lenient law application must be dealt with on a case-to-case basis, applying no generalization and the principle of automatism[8], as noted in para. 69 of the European Court's Decision in *Maktouf and Damjanović,* which implies the conclusion that the CC of BiH needs to be applied to the gravest forms of war crimes as the law which is more lenient to the perpetrator, and which ensures adequate punishing of the gravest criminal offenses committed against international humanitarian law, which is also binding on the state of Bosnia and Herzegovina pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide.

200. After a detailed analysis, the Appellate Panel has concluded that, having rendered such a decision regarding the application of a more lenient law, the Constitutional Court took its position *in abstracto*, and suspended all other criteria for evaluating the more lenient law. This is contrary to the European Court's Judgment to which it has referred, in a way that "the interim law", or the adopted CC of SFRY without the death penalty, is the only one that can apply to these criminal offenses, which is also a retroactive application of

[8] "This starting point is that the issue of a more lenient law shall not be dealt with *in abstracto*, but rater *in concreto*, that is, not by general comparing between the old and the new, or new criminal codes, but by comparing them in relation to the specific case at issue." See, group of authors: Commentaries to the Criminal Codes in Bosnia and Herzegovina, Volume I, Joint project of the Council of Europe and the European Commission, 2005, p. 66.

the law which was set by the Constitutional Court to be the existing and the most lenient law.

In the concrete case, both the law that was effective *in tempore criminis* (the CC of SFRY), and the presently effective law (the CC of BiH) prescribe the criminal-law acts of which the Accused was found guilty as the criminal offense of Genocide. It is therefore clear that there are legal requisites to prosecute and punish the perpetrator of the criminal offense of Genocide, considering that the acts taken by the Accused are criminalized both under the then effective law, or the law *in tempore criminis*, and the present law, or the law in force at the time of the court trial.

201. There is no dispute that the criminal offense of Genocide, of which the Accused was found guilty, is criminalized by both the CC of SFRY (Article 141 of the adopted CC of SFRY), and the CC of BiH (Article 171 of the CC of BiH).

202. The provision of Article 141 of the Adopted CC of SFRY reads as follows:

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

203. Article 171 of the CC of BiH reads as follows:

> *Whoever, with an aim to destroy, in whole or in part, a national, ethnical, racial or religious group, orders perpetration or perpetrates any of the following acts:*
>
> *a) Killing members of the group;*
> *b) Causing serious bodily or mental harm to members of the group;*
> *c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *d) Imposing measures intended to prevent births within the group;*
> *e) Forcibly transferring children of the group to another group,*
>
> *shall be punished by imprisonment for a term not less than ten years or long-term imprisonment*.

204. Furthermore, the act of killing of members of a group, being the act of the commission of the criminal offence of Genocide of which the Accused Petar Mitrović was found guilty, constitutes an act of the perpetration of the criminal offence of Genocide

under both Criminal Codes. It follows from the foregoing that both the Adopted CC of SFRY and the CC of BiH identically defined the criminal offence of Genocide. Therefore, when evaluating which law is more lenient to the perpetrator, the foreseen punishment should be analyzed under the decision of the Constitutional Court, in the manner as has previously already been done.

205. The Appellate Panel's view, however, is that the Trial Panel has erroneously concluded from the proper finding of facts that, in the commission of crime, the Accused indeed possessed genocidal intent, which resulted in an erroneous qualification of the form of the Accused's participation in the commission of the crime.

206. The Trial Verdict stated on p. 130 that:

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

207. In evaluating the Accused's genocidal intent, the Trial Panel has taken into account the number of victims, the use of derogatory language toward members of the targeted group, the systematic and methodical manner of killing; the weapons employed and the extent of bodily injury; the methodical way of planning; the targeting of victims regardless of age; the targeting of survivors; and the manner and character of the perpetrator's participation.

208. In view of the foregoing, the Trial Panel has ultimately concluded that:

> "In this case, the Panel considered evidence of the acts of the principle perpetrators (Section VI.C in the previous text), and analyzed that evidence together with the general context in which the acts occurred (Section V in the previous text), and the perpetrators' knowledge of that context (Sections VI.A and B in the previous text).
>
> Based on that analysis, the Panel concludes beyond doubt that the murder of the majority of the more than 1000 Bosniaks in the Kravica warehouse was co-perpetrated by the Accused with the aim to destroy Bosniaks, a protected group, in whole or in part."

209. Considering the evidence adduced and the Trial Panel's finding of facts, the Appellate Panel has concluded that no reasonable trier of fact could conclude that the accused Petar Mitrović indeed had a genocidal intent to destroy a protected group, in whole or in part.

210. According to the Appellate Panel, the Trial Panel adduced all available and necessary evidence, and determined all relevant facts pertaining to the existence of the essential elements of the criminal offense of Genocide. As reasoned above, the Appellate Panel's view is that the state of facts was not erroneously or incompletely established by the Trial Panel, wherefore the appellate arguments pointing to the contrary are dismissed as ill-founded. Thus, the Panel will not deal with the state of facts in this section of the Verdict, but it will rather, on the basis of the established state of facts, give a proper legal qualification of the form of the Accused's participation in the commission of the criminal offense at issue.

211. The Trial Verdict found the accused Petar Mitrović guilty because he, together with Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan, participated in the killings at the Kravica warehouse, wherein the accused Mitrović, by his acts, gave a decisive contribution to the commission of the crime, which is why he was found guilty as a co-perpetrator under Article 171(a), as read with Article 29 of the CC of BiH.

212. The specific acts undertaken by the Accused, along with members of the “Skelani” Third Platoon and Brano Džinić, are described in the enacting clause of the Trial Verdict:

> “… in his capacity of a member of the 3rd Skelani Platoon as a constituent element of the 2nd Šekovići Special Police Detachment, together with Milenko Trifunović, as Commander of the 3rd Skelani Platoon which he commanded, and Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan, as special police officers within the same Platoon, and Džinić Brano as a special police officer in the 2nd Šekovići Special Police Detachment in the period from 10 July to 19 July 1995, in which the VRS and MUP carried out a widespread and systematic attack against the members of Bosniak people inside the UN protected area of Srebrenica, with the common purpose and plan to exterminate in part a group of Bosniak people by means of forced transfer of women and children from the Safe Area and by organized and systematic capture and killing of Bosniak men by summary executions by firing squad, having had the knowledge of the plan to exterminate in part a group of Bosniaks, on 12 and 13 July 1995 were deployed along the Bratunac – Milići road, on the section of the road between villages Kravica and Sandići, Municipality of Bratunac, and undertook the following actions:
>
> c) on July 13, secured the road and participated in the capture and detention of several thousand Bosniaks from the column of Bosniaks (trying to reach the territory under the control of the Army of R BiH), while Milenko Trifunović encouraged them to surrender;

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

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

213. The Trial Verdict found that the Accused acted against persons considered as a protected group, and the appeal, as reasoned in the section pertaining to the finding of facts, failed to bring into question this conclusion. For the existence of the criminal offense of Genocide, the Accused's intent, awareness and relation toward the genocidal plan (the Accused must have a genocidal intent) also need to be established.

214. The Trial Panel has concluded not only that the Accused **had knowledge** that there was a genocidal plan to destroy a protected group of Bosniak men, in whole or in part, and that he participated in their killing **with intent**, but also that he himself shared this **genocidal intent**.

215. According to the Appellate Panel, the conclusion that the Accused had intention, or intent to kill a member of the protected group, is a single reasonable conclusion that ensues from all the evidence adduced with regard to this fact. It also ensues from the evidence adduced that the Accused had knowledge that there was a genocidal plan which was subsequently executed.

216. However, the Trial Panel's conclusion that, despite his knowledge of the genocidal plan and the intent to kill members of the protected group, the Accused also had the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group of people, does not ensue from the established state of facts beyond a doubt.

217. More specifically, pursuant to the Trial Panel's conclusions, the existence of a specific intent to destroy a protected group of Bosniak men, in whole or in part, ensues from a number of pieces of direct evidence. Thus the Verdict stated that over 1000 men were killed in the Kravica warehouse, that the Accused took part in these killings, that he

knew that the men at whom he was shooting were Bosniaks who had lived in the Srebrenica safe area, and that after the shooting began, verbal exchanges between the prisoners and the shooters contained ethnic and religious slurs and curses.

218. The Trial Verdict further stated:

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

219. In addition to the foregoing, the Trial Panel has particularly noted the fact that the weapons used against the unarmed men crowded into the two warehouse rooms included one M84 machine gun which was assembled and positioned on a table at the side of the entrance, and automatic rifles methodically refilled, and that also hand grenades which, in addition to lethal injuries also produced explosions that were heard by witnesses several kilometers away.

220. The Trial Panel has ultimately concluded that:

> "From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims, but intended to destroy them. The acts in which the Accused participated for around an hour and a half were the most physically destructive acts imaginable, committed and experienced at close range, within the sight and smell of the carnage and of the sounds of the dying. Members of the 2nd Detachment, Trifunović and Radovanović, stood at the

> entrance of the rooms and emptied one clip after another into the mutilated bodies of the dying men piled on the floor. The Accused Mitrović and members of the 2nd Detachment, Jakovljević and Medan, stood at their stations at the open windows at the other side of the rooms witnessing the slaughter, guns ready to prevent any attempts by the victims to escape. The Detachment member, Brano Džinić, lobbed grenade after grenade at close range into the masses of dying human beings. All persisted in their task for a total of around an hour and a half, in a systematic and methodical way, and even took a break after the first room, before starting all over again to reduce the living men in the second room to the condition of those in the first.
>
> To persist in imposing this level of devastation for the length of time that they did manifests a determination to destroy that has few equals."

221. The Appellate Panel has held, however, that all the foregoing facts and circumstances indicate that there was indeed a genocidal plan to destroy a group of Bosniak men, in whole or in part, and that the Accused had knowledge of the referenced plan. However, on the basis of the evidence adduced in relation to the Accused's state of mind and mental relation toward the offense, the Appellate Panel notes that it is not possible to conclude beyond a doubt that the Accused shared the specific intent to destroy the protected group of Bosniaks, in whole or in part.

222. The contested Verdict reasonably concluded that, even before 13 July 1995, the Accused had knowledge of the genocidal plan. According to the Appellate Panel, such a conclusion is supported with the valid testimony of witness S4, and the specific information obtained by the Accused during 12 and 13 July 1995, that is, following his arrival in the Srebrenica territory.

223. The Appellate Panel also considers as reasonable the Trial Panel's conclusion that the Accused was aware that his detachment was involved in the second phase of the task "to liberate Srebrenica", which implied no military attacks against the protected zone as it had been already "taken". A clear idea as to what his next task would be the Accused could gain already on 12 July 1995, when all the present eye-witnessed the „terrain cleansing", that is, the relocation and bringing in the remaining population in Potočari by certain members of the Detachment. In addition, the Accused could clearly see a large number of busses and trucks loaded with Bosniak women, children and the elderly (but not men), and witness S4 testified that the Platoon members discussed among themselves that the remaining men would probably be killed. The Trial Panel has established beyond a doubt all the foregoing facts, including the following circumstances:

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

224. In view of the foregoing, the Appellate Panel's view is that the Trial Panel's conclusion, that the Accused knew that the captured Bosniak men would be executed, is the only reasonable conclusion that a reasonable trier of fact could reach.

225. **The Accused's knowledge of the genocidal plan and someone else's genocidal intent, however, is insufficient to find the Accused guilty of the criminal offense of Genocide.** Rendering a convicting verdict for this gravest crime against the whole humanity requires a proof that he was not only aware that others had such an intent, but rather that the Accused himself shared the same genocidal intent too.

226. The Trial Panel properly set the standard for proving the special intent by stating that it may be difficult to find [e]xplicit manifestations of genocidal intent by the perpetrators, but that a genocidal intent can be established beyond a reasonable doubt based on the circumstances and facts surrounding the perpetrator's acts.

227. In this particular case, the Accused was aware of the genocidal intent and that it was designed by someone else. Being a member of the 3rd Skelani Platoon, the Accused acted under the orders of his superiors and took actions by which he contributed to the commission of the criminal offense, wherein he acted with direct intent.

228. However, considering the established state of facts, it is only possible to conclude beyond a reasonable doubt that the Accused acted with intent to deprive of life the captured Bosniaks.

229. Contrary to the foregoing, the circumstances and the facts analyzed by the Trial Panel in Section C, items 1 through 9, do not lead, beyond a reasonable doubt, to the conclusion that the Accused also shared genocidal intent. It is true that the Accused participated in the killings, which were committed in an extremely cruel and inhumane way, and that he persisted in the initiated task by observing the deployment of tasks set beforehand (who was to keep guard, who was to shoot, by which turn, who was to refill...). However, the Accused's commitment to the perpetration of the task he was assigned, the number and age of victims, the weapons employed, and even the slurs, rather suggest the conclusion that the Accused eagerly performed his task, but he cannot be equaled with those who took the unlawful actions with the exact aim to destroy in part or in whole the protected group.

230. It ensues from the testimony of witness S4 that, even back in the town of Srednje, soldiers knew the reason why they had been redeployed to Bratunac. This witness testified that even after their arrival in Bratunac, and while searching the terrain, they realized that their task would be to „kill the men and separate those infirm“. According to this witness’s testimony, while still in Srednje, certain members of the same platoon protested against their transfer to Bratunac. The witness himself was thinking of running away, and he stated that the reason for their protests was the fact that they did not want to meet with people they knew, as they supposed that they would be killed.

231. Both the witness S4 and the accused Mitrović confirmed with one accord that, in the evening on that day, their platoon was replaced by volunteers from Serbia (according to the Accused). This fact is important because it was found in the course of the proceedings that the killing of the Bosniaks detained in the hangar lasted throughout the night, which means that the Accused and the members of his platoon participated only in the first part of the execution (lasting for an hour and a half), whereupon other persons continued to kill the remaining survivors. Furthermore, witness S4 also testified that, before they left the referenced location, their commander Trifunović stated that what had happened was terrible, that many people got killed, and that, eventually, they would be the ones to „pay“. The witness confirms that he was present both at the funeral of Krsto Dragičević and the lunch after the funeral, and he states that those present there commented on what had happened saying that it was sad and should not have happened, and that someone would have to be accountable for that.

232. According to this Panel, the foregoing facts are important in determining the non-existence of the genocidal intent with the Accused. Specifically, lacking explicit evidence to clearly confirm the genocidal intent of the Accused, the Panel had to derive its conclusion on these, indirect pieces of evidence. It is necessary to take into account one of the fundamental principles of criminal procedure – the principle of *in dubio pro reo* under which, in case of a doubt about the existence of facts which constitute elements of a criminal offence or on which the application of a certain provision of the criminal legislation depends, the Court shall render a decision that is more favorable to the Accused.

233. The Appellate Panel's view is that the foregoing facts (protests against leaving for Bratunac, concerns about what had been done and in what manner) raise doubts about the finding of the Trial Panel that the Accused had genocidal intent.

234. The BiH jurisprudence has not previously dealt with the criminal offence of Genocide. Therefore, the Appellate Panel has reviewed the ICTY jurisprudence concerning this special element of the criminal offence, considering that the ICTY has tried the criminal offence of genocide in several cases. This particularly includes the judgments of the ICTY Appeals Chamber in *Radislav Krstić* (No. IT-98-33-1 of 19 April 2004), who was, *inter alia*, prosecuted for the same event, and who was a General-Major in the RS Army and Commander of the Drina Corps at the time when the offense was committed.

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

236. However, the Appellate Panel in this case has also rendered the conclusions identical to those rendered by the Appeals Chamber in *Krstić*, which primarily reflect the following:

> "The Trial Chamber concluded that, given that the subordinate Brigades continued to operate under the Command of the Drina Corps, the Command itself, including Radislav Krstić as the Commander, must have known of their involvement in the executions as of 14 July 1995. The Trial Chamber found that Krstić knew that Drina Corps personnel and resources were being used to assist in those executions yet took no steps to punish his subordinates for that participation. As

> the Trial Chamber put it, “there can be no doubt that, from the point he learned of the widespread and systematic killings and became clearly involved in their perpetration, he shared the genocidal intent to kill the men**.** This cannot be gainsaid given his informed participation in the executions through the use of Drina Corps assets.” The Trial Chamber inferred the genocidal intent of the accused from his knowledge of the executions and his knowledge of the use of personnel and resources under his command to assist in those executions. **However, knowledge on the part of Radislav Krstić, without more, is insufficient to support the further inference of genocidal intent on his part.**
>
> Further, at the Appeals hearing the Prosecution emphasised - as evidence of Krstić’s genocidal intent - the Trial Chamber’s findings of incidents in which he was heard to use derogatory language in relation to the Bosnian Muslims. The Trial Chamber accepted that “this type of charged language is commonplace amongst military personnel during war.” **The Appeals Chamber agrees with this assessment and finds that no weight can be placed upon Radislav Krstić’s use of derogatory language in establishing his genocidal intent**.”

237. Although not a binding precedent to this Court, the above quoted views of the ICTY Appeals Chamber are very important in rendering a decision in this case. This is primarily so due to the fact that this matter pertains to the application of the standards of international law by the ICTY, which has abundant experience and considerable authority in this matter, and also due to the fact that this matter also pertains to responsibility for the same event from the perspective of a person who was highly-positioned in the chain of command. Without excluding the possibility that “common soldiers” may also commit genocide and share genocidal intent, the Appellate Panel in this particular case finds that it is not possible, based on the presented evidence, to establish beyond a reasonable doubt that, through his actions, Petar Mitrović shared the genocidal intent of some members of the Main Staff. His knowledge of the plan and his participation in its implementation do not confirm that he also shared genocidal intent. Also, as already stated, the usage of derogatory language during the perpetration of the criminal offence does not necessarily have to be considered as a fact leading to a conclusion that the Accused shared such a complex and serious criminal intent.

238. Genocide is one of the most serious crimes known to mankind, and guilt for its perpetration may only be found if genocidal intent is established beyond a reasonable doubt.

239. This Appellate Panel finds that, based on the presented evidence and the established state of facts, it was not possible to find such intent of the Accused beyond a reasonable doubt. Precisely for this reason, the Appellate Panel is required to render a

decision that is more favorable to the Accused, that is, to find that the Accused did not have such intent.

240. What remains to be established is the mode of participation of the Accused Petar Mitrović, with regard to the facts established beyond a reasonable doubt. Bearing in mind all the foregoing, the Appellate Panel finds that the Accused participated in the perpetration of the referenced criminal offence as an accessory, not as a co-perpetrator, as was wrongly qualified in the Trial Verdict.

241. Aiding is defined in Article 24 of the CC of SFRY as follows:

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

242. Aiding, as a form of complicity, represents the intentional supporting of a criminal offence committed by another person, that is, it includes actions that enable the perpetration of a criminal offence by another person.

243. The criminal offense of Genocide is by its nature specific due to the additional subjective element that must be satisfied – genocidal intent, meaning the acts of (1) killing of members of a group; (2) inflicting serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (4) imposing measures intended to prevent births within the group and (6) forcibly transferring children of the group to another group, **must be committed with a special intent in order to be considered acts of perpetration of that criminal offence.**

244. This conclusion is also corroborated by the ICTY jurisprudence which is based on the position that what differentiates an accessory from a perpetrator of genocide is intent: if the person whose actions contributed to the perpetration of genocide had the intent to bring about the destruction of a group in whole or in part, that person is a perpetrator of

genocide. A person who does not share the intent to commit genocide, but who only knew of the perpetrators' genocidal intent, is an accessory to genocide.

245. Considering that all underlying elements of the criminal offense of genocide have been met, except for the genocidal intent (as reasoned above), the Appellate Panel has held that the acts of the Accused constituted the acts of aiding and abetting in the perpetration of the criminal offense at issue.

246. Specifically, the Appellate Panel finds it indisputable that genocide was committed in Srebrenica in July 1995. Due to its nature, that crime could not have been committed by a single person but had to include the active participation of a number of persons, each of whom had a role. However, it is evident that not all participants in the events in Srebrenica at the referenced time acted with the identical state of mind, nor did they take the same actions. The Court's role in this particular case is to establish the criminal responsibility of every Accused person individually, considering their actions, purpose and intent.

247. Based on the established facts, it is possible to conclude beyond a reasonable doubt that, at the time of the offence, the accused Mitrović, being aware of the existence of other persons' genocidal plan, performed actions by which he considerably contributed to the commission of that offence. Therefore, he participated in the criminal offence of Genocide as an aider and abettor.

248. In view of Article 314(1) of the CPC of BiH, which stipulates that the Panel of the Appellate Division shall render a verdict revising the Verdict of the First Instance if the Appellate Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance but that, in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, the Appellate Panel, by granting in part the appeal by the defense counsel for the Accused, revised the First Instance Verdict with regard to the legal evaluation and qualification of the offence and, at the same time it intervened concerning the factual description of the offence in a manner which entirely reflects the state of facts, the elements of the offence and the responsibility of which the Accused is found guilty by this Verdict, and which is more favorable to the Accused.

VI. DECISION ON CRIMINAL SANCTION

249. The appeal did not specify, with regard to this appellate ground, the reasons for which the decision on criminal sanction is being contested, and wherefrom violations of certain provisions were apparent, that is, why the sentence imposed is considered too stringent. However, at the session held on 22 January 2014, the Defense supplemented, to a certain extent, this appellate ground by stating that the Accused has never been punished for any minor or criminal offense, that he is not a person prone to conflicts, that his conduct during the entire proceedings was proper, and that he had testified in all other proceedings where the Prosecution proposed his evidence.

250. Considering that the Panel has, in the concrete case, applied the CC of SFRY, this Code had to be also applied in deciding on the appellate arguments contesting the decision on sentence, moving within the range of sentences prescribed in Article 141 of the CC of SFRY for the criminal offense of which the Accused is presently found guilty, and pursuant to the provisions providing for the general rules on meting out a sentence, and the instructions and opinion under the Decision of the Constitutional Court.

251. Pursuant to Article 41(1) of the CC of SFRY, the Appellate Panel has first determined the limits prescribed for the criminal offense at issue, in particular special maximum, considering that the sentence the Accused received under the revoked Verdict (28-year long-term imprisonment) pursuant to the CC of BiH moved towards a more stringent sentence. The referenced Decision of the Constitutional Court, para. 57 established that *„pursuant to the relevant provisions of the CC of SFRY (Article 38) a maximum prison sentence for any criminal offense prescribed under the Code (which could be imposed) would [be] 15 or 20 years in prison".* At the same time, the Constitutional Court concluded that *„...considering that in Bosnia and Herzegovina the death penalty can be neither imposed nor executed after 14 December 1995, it can be concluded that, if the provisions of the CC of SFRY were applied (in the concrete case) for the criminal offense of Genocide, there is a possibility to impose another type of punishment under this Code*", that is, the possibility to *„...impose a maximum prison sentence for a term of 20 years (which was under this Code imposed instead of the death penalty), or a 15-year prison sentence (prescribed by the same Code as a maximum sentence of imprisonment)".*

252. In view of the foregoing, in a situation when the death penalty is eliminated, the Constitutional Court's view is that the sentence prescribed under Article 141 of the CC of SFRY for the criminal offense of Genocide is 5 to 15 years, or 20 years as a special maximum, and the sentence which the Court may impose for the criminal offenses carrying the death penalty. Also, as it ensues from the quoted Article 38 of the CC of SFRY, there is no possibility to impose a criminal sanction within the range of between 15 and 20 years in prison.

253. In deciding on the punishment, the Appellate Panel concluded that the Trial Panel properly established all decisive facts, properly applied the law, and made no errors that would render the first instance verdict unlawful in terms of sentencing. The Appellate Panel therefore largely relied on the proper findings presented in the first instance verdict, primarily with regard to the general considerations and requirements the law foresees to be the criteria that should be taken into account when meting out the sentence, and then on the individually established facts and the circumstances relevant to sentencing in this particular case.

254. Articles 33 and 41 of the adopted CC of SFRY provide for the purpose of punishment and for the general principles in fixing punishment.

255. The general principle is that the type and range of the sentence must be “necessary“ and “proportionate“ to the “nature“ and “degree“ of danger to the protected objects: personal liberties and human rights, and other basic values. In case of genocide, the nature and degree of the danger will always be severe. The type of sentence the Court can legally impose in a case of genocide is limited to jail, and the range has been established as 5 to 15 years, or imprisonment for a term of 20 years. In addition to the general principle, the circumstances the Court must address when determining and pronouncing a sentence, can be divided into two groups, as follows: those that relate to the criminal act at issue and its impact on the community, including the victims; and those that relate specifically to the convicted person.

(i) <u>The sentence must be necessary and proportionate to the danger and threat to protected objects and values.</u>

256. „Genocide is a denial of the right to existence to entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of

existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law, and to the spirit and aims of the United Nations.[9] Punishment of genocide is a principle "recognized by civilized nations as binding on States, even without any conventional [treaty] obligation."[10]

257. The effectiveness of a sentence must take into account not only the fact that genocide was found to have been committed, but also the manner in which the specific act of genocide was committed in each particular case. „Genocide embodies a horrendous concept, indeed, but a close look at the myriad of situations that can come within its boundaries cautions against prescribing a monolithic punishment for one and all genocides or similarly for one and all crimes against humanity or war crimes".[11] In addition to the threat that was posed to the protected values and persons by the commission of genocide against them generally, the Panel examined the actual damage done to the protected persons in this particular case.

(ii) <u>The sanction must be necessary and proportionate to the suffering of direct and indirect victims of the crime.</u>

258. The direct victims of the crime of genocide for which the Accused has been convicted are the hundreds of men who lost their lives during the first approximately one and one half hours of the massacre at the Kravica warehouse on 13 July 1995, as well as the women and children related to these men whose families and lives were irreparably destroyed by the loss of these men in this particular way. The indirect victim is the protected group of Bosniaks from Srebrenica whose existence was threatened by the genocidal act.

259. The suffering imposed physically and mentally on the direct victims was extreme. The several hundred men of all ages who were killed in the Kravica warehouse were unarmed prisoners who had been captured or who had surrendered to the Bosnian Serbs in exchange for promises of safety. Their mental and physical suffering during the first approximately one and one half hours of the massacre is indescribable.

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[9] Opening paragraph of the UN General Assembly Resolution 96(I), 11 December 1946.
[10] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion), 1951 Reports ICJR 16, p. 23.
[11] *Krstić,* Trial Judgment, para. 694.

(iii) The sentence must be sufficient to deter others from committing similar crimes.

260. Prevention of genocide has always been linked with punishment. The very title of the Genocide Convention makes that point clear. In order to prevent genocide, the crime must be named and the perpetrators of the crime must be held accountable and not be permitted to profit from their participation in genocide. Deterrence is of particular importance in the present case. The Accused was a direct perpetrator of the killings.

(iv) The sentence must express community condemnation of the Accused's conduct.

261. The community in this case is the peoples of Bosnia and Herzegovina, and the entire world community, who have, by domestic and international law, mandated that genocide be unequivocally condemned, and that commission of genocide be subject to effective punishment. Condemnation of genocide has been given primacy within the international community by virtue of its recognition as *jus cogens*, that is, a norm from which no derogation is permitted[12]; as well as its recognition as a norm that is enforceable *erga omnes*, by which all States are recognized as having an obligation to enforce.[13] Genocide has been described as a crime "directed against the entire international Community rather than the individual".[14] This community has made it clear that these crimes, regardless of the side which committed them or the place in which they were committed, are equally reprehensible and cannot be condoned with impunity. The legislation of Bosnia and Herzegovina reflects this same resolve. The particular crime of genocide committed in this case was carried out in a manner that is particularly reprehensible and the sentence must reflect the nation's and the world's condemnation of this activity.

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[12] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH v. Serbia*), Order of the Court on provisional measures, 13 September 1993, p. 440; Vienna Convention on the Law of Treaties, Article 53.

[13] *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February 1970, 1970 MKP Reports No.4, p. 32; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (BiH v. Serbia), Decision on Preliminary Motion, 11 July 1996, para. 31.

[14] William Shabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), p. 6.

(v) The sentence must be necessary and proportionate to the need to increase consciousness of citizens as to the danger of crime.

262. The danger of genocide lies not only in the physical destruction of those in the targeted group, but also in the soul-destroying nature of the intent with which it is carried out, and the risk of its contagion. The imposition of a penalty for this crime must demonstrate that genocide will not be tolerated, but it must also show that the legal solution is the appropriate way to recognize that crime and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the act can contribute to reconciliation by providing a response consistent with the Rule of Law. It can also promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved.

(vi) The sentence must be necessary and proportionate to the need to increase the consciousness of citizens as to the fairness of punishment.

263. Penalties for genocide, which has been labeled the "crime of crimes", have included the most serious punishment that can be imposed by national and international legal systems. National jurisdictions have imposed the death penalty for convictions of genocide, even in those states where the death penalty had been repealed or abandoned for all other crimes.[15]

264. Bosnia and Herzegovina has embraced the abolition of the death penalty for all crimes, a position that is entirely consistent with the respect for human life that makes the act of genocide so abhorrent. The murder of one person can fairly justify a sentence of 20 years of imprisonment. Participation in the murder of several hundred defenseless people in the manner evident in this case, even without genocidal intent, would fairly demand the severest of sentences available in domestic law. No penalty can adequately reflect the seriousness of depriving hundreds of persons of life, the psychological pain inflicted on their families, or the even graver crime that was committed when that deprivation of life

[15] Rwanda, considered a *de facto* abolitionist state, executed 22 offenders convicted of genocide by its domestic Court in 1997; Israel, which had abolished the death penalty for all other crimes, retained it for genocide and sentenced Adolph Eichmann to death. Schabas, *Genocide*, pgs. 396-397. The death penalty has been justified as a 'fair' sentence for the commission of genocide in recognition that those who commit a crime which has as its aim to deprive an entire group of people of their right to exist on earth have forfeited their own right to exist. *Id.*, pg. 397.

was accompanied by the aim to deprive an entire group of human beings of their right to exist. The fairness of the sentence then depends not only on the correlation between the seriousness of the crime, the harm done by its commission, and the condemnation in which it is held, but also and more specifically, on the relationship of the available sentencing options to the sentence imposed for the particular crime.

265. In the concrete case, the Panel is limited by the binding instruction of the Decision of the Constitutional Court, but it has expressed serious concerns as to whether the sentence imposed will indeed achieve the purpose of punishment for this gravest crime known to mankind, since it is not compliant with the requirements of international documents and case law in punishing the crime of genocide.

266. The statutory requirement of fairness also requires consideration of the individual circumstances of the criminal actor in addition to the criminal act. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again and (2) rehabilitation. Rehabilitation is not only a purpose that the law imposes on the Court; it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation“.

267. There are a number of statutory considerations relevant to the sentencing purposes of rehabilitation and specific deterrence that affect the sentencing of the individual convicted person. These include: degree of liability; the conduct of the perpetrator prior to the offense, at or around the time of the offense and since the offense; motive; and the personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts warrant. The point of these considerations is to assist the Panel in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

268. In deciding on the specific circumstances carrying weight in imposing a sentence on the Accused Petar Mitrović, the Trial Verdict properly found that „*the Accused Mitrović*

was a Special Police officer, trained in both combat and police work. He had no role in the command structure. As a Special Police officer at the time of the offense he had an obligation to obey the law and protect civilians in his custody", while, on the other hand, he has no previous convictions and he expressed remorse.

269. The Accused has now been found guilty as an aider and abettor in genocide, so, in deciding on sentencing the Accused, Article 24(1) and Article 25(1) of the CC of SFRY are also relevant.[16] It follows from the foregoing provisions that the law requires the Court to pay due attention to the limitations of the Accused's intention as an aider in the actions taken. It is in the Court's discretion to decide on the manner of sentencing - "as if he had committed it himself" or "also a more lenient sentence may be imposed". This indicates that the law proceeds from a position that acting as an aiding is the mildest form of aiding which reflects that aiders most often support the offence committed by the perpetrator.

270. However, in this particular case, the Accused Mitrović was found to be an aider and abettor only because, from the evidence, it could not be inferred beyond a reasonable doubt that the Accused acted with genocidal intent. However, the Accused's specific aiding actions are at the same time the actions of co-perpetration in the killing which far exceed the standard actions of an accessory in the commission of the criminal offences in relation to offenses in which "special intent" is not required".

271. Based on the aforementioned, while meting out the type and length of punishment, the Appellate Panel was mindful of all circumstances of importance in rendering a more stringent or lenient sentence, ultimately finding that the circumstances related to the mode of perpetration of the crime in question and the resulting consequences suggest that the crime was committed in a particularly brutal manner, with extremely grave consequences, which this Panel finds to be an aggravating circumstance, for it goes beyond the circumstances that necessarily make up the elements of a criminal offense, whereas the facts that the Accused is now found guilty as an aider and abettor, the mode of participation in the perpetration of a criminal offense, and that in the framework of his decisive contribution to killing the prisoners he mostly "kept guard", as a less serious form

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

of criminal activity, were taken as a mitigating circumstance, but not to the extent to justify the statutory option of imposing a less stringent punishment below the special minimum. The Panel also took into account the fact that the Accused has never been convicted in a court of law, nor is he the subject of any other criminal proceedings, as well as the fact that after being summoned by the Prosecution he also testified in other cases concerning the events that occurred in the Srebrenica territory.

272. In view of all the foregoing, pursuant to the decision of the Constitutional Court, for the gravest forms of the crime of genocide, a sentence of imprisonment for a term of 20 years may be imposed instead of the earlier prescribed death sentence. On the other hand, a prison sentence between 5 and 15 years is prescribed for less severe forms of the commission of the crime in question.

273. On the basis of the above presented findings, this Panel concludes that the crime at issue falls among the gravest forms of the commission of the crime of genocide, regardless of the fact that the Accused's actions are qualified as aiding and abetting. The Accused's acts caused the death of a large number of men, which undoubtedly indicates that the Accused must receive a most stringent sentence.

274. Considering that pursuant to the findings of the Constitutional Court, a sentence of imprisonment for a term of 20 years is a substitute to the earlier prescribed death sentence for the criminal offenses including toward maximum sentence, this Panel has imposed on the Accused the said sentence, being mindful of all the circumstances of this case. According to the Appellate Panel, the 20-year prison sentence is the only possible sentence considering the gravity of the committed crime, the circumstances under which it was committed, the circumstances thereof, the way of its commission, the concrete actions of the Accused and his personality.

275. Pursuant to Article 50 of the adopted CC of SFRY, the time the Accused spent in custody under this Court’s Decisions, running from 20 June 2005 to the committal to serve his sentence, and the time he spent in serving the sentence of imprisonment under the Verdict of the Court of Bosnia and Herzegovina, X-KRŽ-05/24-1 of 7 September 2009, running from 28 October 2009 through 18 November 2013, shall be credited towards the sentence imposed.

276. In view of all the foregoing, and pursuant to Article 314 of the CPC of BiH, the legal qualification of the crime and the decision on criminal sanction in the contested Verdict were revised, as stated in the enacting clause of this Verdict.

RECORD-TAKER	**PANEL PRESIDENT**
	J U D G E
Belma Čano-Sejfović	Azra Miletić

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