Number: X-KRŽ-05/24-1
Sarajevo, 7 September 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes, comprised of Judges Tihomir Lukes, as the President of the Panel, and Azra Miletić and John Fields as members of the Panel, with the participation of the Legal Officer Sanida Vahida-Ramić, as the minutes-taker, in the criminal case against the Accused Petar Mitrović, for the criminal offense of Genocide in violation of Article 171 of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon the Appeal of the Defense Counsels for the Accused Petar Mitrović, Attorneys Todor Todorović and Vesna Tupajić Škiljević, filed from the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-05/24-1 dated 29 July 2008, at the session held on 7 September 2009, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Ibro Bulić, Defense Counsels for the Accused, Attorneys Todor Todorović and Vesna Tupajić Škiljević, and the Accused Petar Mitrović personally, issues the following

V E R D I C T

The Appeal by the Defense Counsels for the Accused Petar Mitrović is granted in part and the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24-1 of 29 July 2008 is hereby revised so as to read:

The Accused Petar Mitrović, a.k.a. Pera, son of Radivoje and Stana, born 7 February 1967 in Brežani, Srebrenica Municipality, residing in Brežani, Srebrenica, of Serb ethnicity, citizen of BiH, mechanical electro welder by profession, completed secondary school, single, served the army in Zagreb in 1986, registered in military records of Srebrenica, with no previous conviction, no other criminal proceedings are pending against him,

IS FOUND GUILTY

Inasmuch as:

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, 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 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,

Therefore, by killing members of the group of Bosniaks, he aided in having them destroyed in part on the national, ethnic and religious grounds,

Whereby he committed the criminal offence of **Genocide in violation of Article 171(a) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 31 of the same Code,**

Therefore, pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina, applying Articles 39, 42 and 48 of the CC of BiH, the Panel of the Court of BiH imposes on him the

S E N T E N C E

OF LONG-TERM IMPRISONMENT OF 28 (twenty-eight) YEARS

Pursuant to Article 56 of the CC of BiH, the time spent in custody under the Court decisions from 20 June 2005 until the commencement of the service of the punishment shall be credited towards the imposed sentence.

In the remaining part, the first instance verdict shall remain unchanged.

REASONING

PROCEDURAL HISTORY

1. Under the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 dated 29 July 2008, in the manner described under Section 1 of the Operative Part of the Verdict, the Accused Petar Mitrović was found guilty of the commission of the criminal offense of Genocide in violation of Article 171 of the CC of BiH, which the Trial Panel found him guilty of, and pursuant to Article 285 of the Criminal Procedure Code BiH (hereinafter: the CPC BiH), having applied Articles 39, 42 and 48 of the CC BIH, sentenced him to a compound sentence of a long term imprisonment of 38 (thirty eight) years.

2. The time the Accused spent in custody was credited toward the sentence of imprisonment pursuant to Article 56 of the CC BiH. Pursuant to Article 188(4) of the CPC BiH, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings.

3. Pursuant to Article 198(2) of the CPC BiH, the injured parties S1 and S2, and members of the Association *Movement of Mothers from the Enclaves of Srebrenica and Žepa* were instructed to take civil actions to pursue their claims under property law.

4. The Defense Counsels for the Accused Petar Mitrović, Attorneys Todor Todorović and Vesna Tupajić Škiljević, filed an Appeal from the Trial Verdict claiming essential violations of the provisions of the criminal procedure pursuant to Article 297 of the CPC BiH, a violation of the criminal code pursuant to Article 298 of the CPC BiH, an incorrectly and incompletely established state of facts pursuant to Article 299 of the CPC BiH, and the decision on criminal-legal sanction pursuant to Article 300 of the CPC BiH, and also a violation of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). They proposed that the Appellate Panel grant the Appeal as well-founded, revoke the Trial Verdict and order a new trial.

5. The BiH Prosecutor's Office did not appeal the Trial Verdict but filed a Response to the Appeal of the Defense Counsels proposing that the Appeal be refused as unfounded and that the Trial Verdict be upheld.

6. At the Panel session held on 7 September 2009 pursuant to Article 304 of the CPC BiH, the Defense briefly presented its Appeal and the BiH Prosecutor's Office its Response to the Appeal. They entirely maintained their averments presented in writing and the proposals.

7. Having reviewed the Trial Verdict insofar as contested, the Appellate Panel rendered the decision as stated in the Operative Part for the reasons that follow.

GENERAL CONSIDERATIONS

8. Prior to explaining each particular appellate ground, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC BiH, the Appellant is required to state in the Appeal the grounds for contesting the verdict and the reasoning behind the Appeal.

9. Since the Appellate Panel reviews the Verdict only insofar as it is contested by the Appeal pursuant to Article 306 of the CPC BiH, the Appellant is required to draft the Appeal in a manner that states the grounds for reviewing the Verdict.

10. To this end, the Appellant must specify each appellate ground for contesting the Verdict, exactly which part of the Verdict, evidence or action of the Court it challenges, and provide a clear explanation supported with their arguments.

11. Merely arbitrarily stating the appellate grounds, as well as pointing to the alleged failures during the first instance proceedings without indicating the specific basis to which the Appellant refers, does not constitute a valid ground to review the Trial Verdict. Therefore, the Appellate Panel *prima facie* refuses as unfounded the unreasoned and unclear appellate grounds.

I. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS PURSUANT TO ARTICLE 297 OF THE CPC BiH

12. The Appellate Panel first considers the reasonableness of the appellate grounds suggesting the existence of essential violations of criminal procedure provisions pursuant to Article 297(1) of the CPC BiH and finds them unfounded.

13. Article 297 of the CPC BiH prescribes the violations of the criminal procedure provisions as an appellate ground.

14. Considering the gravity and significance of the committed violations of the procedure, the CPC BiH distinguishes between the violations that, if their existence is established, create an irrefutable assumption that they adversely affected the validity of the Trial Verdict (absolute essential violations) and the violations concerning which, in each specific case, it is left for the Court to evaluate whether the established violation of the procedure had or could have had an adverse effect on the validity of the Verdict (relative essential violations).

15. The absolute essential violations of the CPC BiH are specified in items a) through k) of Paragraph 1 of Article 297 of the CPC BiH.

16. Should the Appellate Panel find the existence of any essential violations of criminal procedure provisions, it shall revoke the Trial Verdict pursuant to Article 315(1)(a) of the CPC BiH.

17. Unlike the absolute ones, relative essential violations are not specified in the Code, but they exist *if the Court has not applied or has improperly applied some provisions of this Code during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict (Article 297(2) of the CPC BiH).*

18. The Defense Counsels for the Accused contest the Trial Verdict for the alleged essential violations of criminal procedure provisions referred to in Article 297(1) of the CPC BiH. Having reviewed the appellate grounds, the Appellate Panel concludes the following:

a) Essential Violations of the Criminal Procedure Provisions pursuant to Article 297/(1)(b)of the CPC BiH

19. The Defense points to the existence of an essential violation of criminal procedure provisions referred to in Article 297(1)(b), and notes that the Judge who allegedly should have been disqualified pursuant to Article 29 (a) of the CPC BiH participated in the main trial. In the opinion of the Defense, this Judge was an injured party as a result of the criminal offense.

20. The Defense claims the basis for such objection in the fact that the Accused was found guilty of the criminal offense of Genocide committed with the intent to partially exterminate a group of Bosniaks on national, ethnic and religious basis. The Defense further states that the President of the Trial Panel, Judge Hilmo Vučinić, is a member of the same national and ethnic group of Bosniaks and that during the war he lived and worked in the Goražde enclave that was under similar uncertain conditions to that of the Srebrenica enclave and that for the stated reasons this Judge was also injured by the criminal offense at issue.

21. However, it ensues both from the case records and Annex B Section A of the Trial Verdict that during the first instance proceedings the Defense petitioned for the disqualification of the President of the Trial Panel, Judge Hilmo Vučinić, pursuant to Article 29(f) of the CPC of BiH (the existence of circumstances that give rise to a reasonable suspicion as to his impartiality), claiming the same facts and circumstances as referred to in the Appeal from the Trial Verdict.

22. Article 30(2) of the CPC BiH prescribes that a petition for disqualification may be filed before the beginning of the main trial, and if a reason for disqualification under Article 29 (a) through (e) has been learned of subsequently, the petition is filed as soon as the reason becomes known.

23. Article 32(1) of the CPC BiH prescribes that the Plenum of the Court shall decide on the petition for disqualification, while paragraph 3 of the same Article prescribes that no appeal lies against a decision granting or refusing the petition for disqualification.

24. Pursuant to the foregoing, the Plenum of the Court of BiH decided on the Petition for Disqualification under its Decision number SU-373/06 dated 8 May 2006 and rejected as inadmissible the Petition of the Defense Counsel for one of the co-accused (the petition was filed before the Decision was issued to sever the proceedings) to disqualify from the trial all Bosniak and Serb Judges. The Petition for Disqualification of the President of the Trial Panel, because during the war this Judge lived in the Goražde enclave that was in a similar situation like the Srebrenica enclave, and because he is also a Bosniak against whom the criminal offense at issue was committed, was refused as unfounded.

25. In the reasoning of the decision of the Plenum of the Court of BiH it is stated that the indicated circumstances do not bring into question the impartiality of Judge Vučinić and that in addition to him, there are two International Judges on the Trial Panel participating in the process of rendering all important decisions. It was particularly emphasized that all the decisions made during the proceedings are subject to review via the Appeals filed before the Appellate Division which is comprised of Judges of all ethnicities (in the cases where the law prescribes the right to appeal).

26. Article 318(1) of the CPC BiH prescribes that the parties, the defense attorneys and persons whose rights have been violated may always file an Appeal from the Decision rendered in the first instance, unless it is explicitly prohibited to file an Appeal under the Code.

27. Bearing in mind that Article 32(3) of the CPC BiH prescribes that no Appeal lies from a decision granting or refusing a petition for disqualification, the Defense has no statutory ground to once again file this Petition because it has been already decided by a final Decision.

28. The Appeal incorrectly refers to Article 297(1)(b) of the CPC BiH prescribing that an essential violation of criminal procedure provisions exists if a judge who should have been disqualified participated in the main trial, because this provision concerns a situation in which the reasons for disqualification existed as set forth in Article 29 (a) through (f) of the CPC BiH, but only if during the proceedings the disqualification was not addressed at all (where a Petition for Disqualification did not exist or the Judge himself did not request his recusal).

29. Therefore, bearing in mind the fact that this issue was already decided at the Plenum of the Court of BiH and that an appeal from this decision is not permissible, the Appeal of the Accused on this ground is rejected as inadmissible.

b) Essential Violations of the Provisions of the Criminal Procedure pursuant to Article 297(1)(i) of the BiH CPC, Violation of the Rights to a Defense under Article 297(1)(d) of the BiH CPC, and Violations of the Rights Enshrined in the European Convention on Human Rights and Fundamental Freedoms

30. In the opinion of this Panel, the appellate grounds suggesting the foregoing essential violations of the provisions of the Criminal Procedure Code are not founded.

31. Within the context of these grounds, the Appeal states that the decision of the Trial Panel on the guilt of the Accused is based solely and exclusively on the unlawful evidence – the statements of the Accused Petar Mitrović and Miladin Stevanović given in the investigation, that were partially corroborated by the testimony of the protected witness S4. The Defense also argues that the Reconstruction Record dated 4 October 2005 is an unlawful piece of evidence.

32. The Defense Counsel states in the Appeal that contrary to the provisions of the CPC BiH, the Trial Panel admitted the foregoing evidence although Article 273(2) of the CPC BiH specifies the exceptions from the direct presentation of evidence.

33. Within the same appellate ground, the Appeal also states that the Trial Verdict was rendered after the entry into force of the Law on Amendments to the CPC BiH modifying the provisions of Article 78 of the CPC BiH which now specifies that at the beginning of the questioning, the suspect shall be informed that his statement shall be admissible as evidence at the main trial and may, without his consent, be read and used at the main trial.

34. In addition to the foregoing, it is claimed that the Panel's decision on admissibility of the mentioned evidence was issued prior to providing the Defense with a possibility to present its evidence. Accordingly, the Appeal claims that the Panel failed to evaluate in a valid manner the mental state of the Accused at the time of giving his statements, or the circumstances under which the statements were taken.

35. It is further submitted that the statement given by the Accused in the BiH Prosecutor's Office on 21 June 2005 which was admitted into evidence, is by its content identical to the statement given by the Accused in the Public Security Center (CJB) Bijeljina on 20 June 2005, which was not admitted due to the unlawful manner in which it was made. According to the Defense, all the irregularities that existed when the Accused gave his statement in the CJB Bijeljina resulted in a series of discrepancies in his statement given in the BiH Prosecutor's Office when (in the presence of the then Defense Counsel) the grounds for suspicion with which he was charged were not presented to him.

36. In considering the presented appellate grounds, the Appellate Panel primarily reviewed the correctness of the decision of the Trial Panel to admit into the evidence the record of the statement of the Accused Petar Mitrović given in the BiH Prosecutor's Office on 21 June 2005 and the record of the statement of Miladin Stevanović given in

the BiH Prosecutor's Office on 24 June and 1 July 2005 (the statements from the investigation), although during the main trial the Accused concerned defended themselves by remaining silent.

37. The decision of the Trial Panel to accept the foregoing statements was issued on 18 April 2007 in the form of a special decision upon the Motion of the Prosecutor's Office to admit into the case records the evidence stated in the Motion to be read at the main trial (number KT RZ 10/05 dated 5 May 2006), after the Defense was given the right to comment on this Motion.

38. That Decision constitutes an integral part of the reasoning of the Verdict in which the issues of obtaining lawful statements and the possibility to use them at the main trial if the Accused defends himself by remaining silent are explained in detail.

39. In reviewing the correctness of the presented conclusions insofar as contested, the Appellate Panel determines that the Trial Panel correctly found that the statement of Suspect Petar Mitrović dated 21 June 2005 and the statement of suspect Miladin Stevanović dated 24 June and 1 July 2005 were obtained in a lawful manner. The Appellate Panel finds that no essential violations of the criminal procedure provisions to which the Defense refers were made.

40. The Trial Panel analyzed in detail all relevant provisions of the CPC BiH that were applied to this procedural situation and provided very detailed argumentation from which it drew the correct conclusions as to their lawfulness as well as their admissibility at trial. The Appellate Panel finds the analysis and ruling of the Trial Panel on this matter to be correct.

41. It is indisputable that the Accused Petar Mitrović gave two statements during the investigation – one in the CJB Bijeljina on 20 June 2005 and the other in the BiH Prosecutor's Office on 21 June 2005.

42. It is clear that the statement given in the CJB Bijeljina was taken contrary to the CPC BiH provisions since the Suspect was questioned in the capacity of a witness (with the instructions that are given to the witnesses pursuant to Article 86 CPC BiH), and not in the capacity of a suspect (for whom special procedural guarantees exist as prescribed in Article 78 of the CPC BiH).

43. The Trial Panel did not accept this statement as a lawfully obtained piece of evidence and the Appellate Panel entirely upholds the conclusion and the given reasoning.

44. Contrary to the appellate complaints of the Defense Counsels for the Accused, the statement given by the Accused Petar Mitrović on 21 June 2005 on the premises of the BiH Prosecutor's Office, as correctly determined in the Trial Verdict, was given in accordance with the CPC BiH provisions, and as such it satisfies all the formal conditions for lawfully obtained evidence.

45. That is, the Appeal claims that "all the irregularities that existed when the statement was given in the CJB Bijeljina on 20 June 2005 reflected on the statement given on 21 June 2005 in the BiH Prosecutor's Office, which resulted in a series of discrepancies in the description of the incident itself."

46. It should be primarily noted that the Appeal does not state the manner in which the irregularities from 20 June 2005 reflected on the incident that occurred on the following day, and from such a vague assertion it is not possible to establish to which "irregularities in the incident description" this claim refers.

47. In any case, in its decision to accept the statement dated 21 June 2005, the Trial Panel provided a detailed reasoning supported with arguments regarding this specific issue that the Appeal failed to properly contest.

48. In the contested decision, the Trial Panel took into account the fact that when giving the statement to the Police (on 20 June 2005), the Accused was not exposed to any threats or use of force, from which it logically ensues that during the questioning in the BiH Prosecutor's Office on the following day he had no trauma or fear whatsoever from the previous day.

49. Furthermore, on the following day, the second statement was taken from other persons and at another location, whereby the continuity between the statements as to the place and time was disrupted. Before the second questioning, a Defense Counsel was assigned to the Accused whom he consulted. The Accused was also informed of his rights and options.

50. Based on the established state of facts, the Appellate Panel concludes that the statement taken in the CJB Bijeljina, and the formal irregularities during its taking in no way affected the regularity of the procedure and the contents of the statement given in the BiH Prosecutor's Office on 21 June 2005. Therefore, it ensues that the decision of the Trial Panel to admit this evidence is correct and in compliance with the law.

51. The objection that the Accused was not informed of the grounds for suspicion against him, in the opinion of this Panel, is also unfounded. Once again, the Appeal states absolutely no piece of evidence or a fact to support this assertion, contrary to the Trial Verdict which regarding this issue gives on page 268 a convincing and proper explanation of the reasons to conclude that the Accused was informed of the grounds for suspicion against him. Therefore, the Appellate Panel finds that the Accused (the then Suspect) was informed of the grounds for suspicion against him.

52. The Trial Panel drew its conclusion based on the statement of Sabina Sarajlija, who was present during the questioning and who confirmed that the Accused (the then Suspect) was twice informed of the grounds for suspicion against him, namely once before a defense counsel was appointed to him and before he waived his right to defend himself by remaining silent, and the second time after the arrival of the Defense Counsel

when the Prosecutor, in the presence of the Suspect, informed the Defense Counsel of the charges and the grounds for suspicion, before the Suspect finally decided whether he would waive the right to defend himself by remaining silent. These assertions were additionally supported by the Suspect's statement given for the record, which reads as follows: "I understood the charges against me and I will present my defense by answering the questions".

53. Bearing in mind such established state of facts, and also the fact that the Defense failed to provide any explanation regarding the presented complaint, the Appellate Panel entirely upholds the reasoning and the conclusion of the Trial Panel that prior to giving his statement, the Accused was informed of the grounds for suspicion against him. Therefore, the Appellate Panel refuses the presented appellate ground as unfounded.

54. Furthermore, in the opinion of the Appellate Panel, the averments that by accepting the statement concerned the Trial Panel violated the Accused's right to remain silent and the right not to incriminate himself on the charges against him as protected by Articles 78, 273(2) and 281 of the CPC BiH, are not founded either.

55. Namely, Article 78 of the CPC BiH prescribes the instructions that must be given to the suspect at the questioning, which concern his rights, or obligations.

56. Pursuant to Paragraph 2 of the foregoing Article, the suspect shall be, *inter alia*, informed of the following:

> *a) the right not to present evidence or answer questions*
>
> *b) the right to comment on the charges against him, and to present all facts and evidence in his favor*

57. Article 281(1) of the CPC BiH prescribes that the Court shall reach a verdict solely based on the facts and evidence presented at the main trial. On 21 June 2005, when the Accused gave the 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.*

58. In the Appeal, the Defense incorrectly states that when the Trial Panel decided to read the records of the Accused's statements made during the investigation, it incorrectly applied Article 273(2) of the CPC BiH. The reason due to which this appellate ground is

considered incorrect is the fact that the Panel accepted the records concerned pursuant to the provision referred to in Paragraph 1 of the mentioned Article, and not Paragraph 2 to which the Defense incorrectly refers.

59. The Appellate Panel upholds the finding of the Trial Panel that it ensues from Article 273(1) of the CPC BiH that the statements given in the investigation are admissible as evidence at the main trial although the Accused defends himself during the trial by remaining silent, since he is present at the main trial and is provided with a possibility to explain or contest his prior statement.

60. This possibility for the Accused represents a right that he may but does not have to exercise. The Trial Panel was correct in distinguishing between the Accused's right to remain silent and his right to provide an explanation or to contest his prior statement. However, it is important to note that the fact that during the main trial the Accused decided to exercise his right to remain silent cannot prevent the Prosecutor from entering into evidence a statement given by the Suspect during the investigation phase in a lawful, voluntary and free manner. That is, it cannot invalidate the statement which the Prosecutor obtained in an entirely lawful manner.

61. The Appeal further claims that the Trial Verdict was passed on 29 July 2008, that is, a day after the entry into force of the Law on Amendments to the Criminal Procedure Code of BiH, amending Article 78 of the CPC BiH. Article 72(2)(c) of the CPC BiH which now expressly prescribes that during the questioning the suspect must be instructed that his statement is admissible as evidence at the main trial and that it can be read out and used without his consent.

62. It is clear that the Law on Amendments to the Criminal Procedure Code of BiH (Official Gazette, No. 58/08) was passed on 17 June 2008 and entered into force on 29 July 2008. This Law, *inter alia*, amended Articles 6, 78(2)(c), and Paragraph 3 was added to Article 273 of the CPC BiH.

63. Article 6 of the amended CPC BiH prescribes that, at the first questioning, the suspect must be informed about the offense that he is charged with and grounds for suspicion against him, and in addition to this, that *his statement may be used as evidence in further proceedings.* (emphasis added)

64. After the amendments were enacted, Article 78(2)(c) of the CPC BiH now prescribes that during questioning the suspect shall be informed of the right to comment on the charges and to present all facts and evidence in his favor, and that *if he does so in the presence of the defense attorney, the statement made shall be admissible as evidence at the main trial and may, without his consent, be read and used at the main trial.* (emphasis added)

65. The added Paragraph 3 of Article 273 of the CPC BiH now prescribes that:

> *"If the accused during the main trial exercises his right not to present his defense or not to answer questions he is asked, records of testimonies 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 for in Article 78 Paragraph (2) Item (c) of this Code. "*

66. The Appeal of the Defense contains the claim that the Trial Verdict was pronounced after the entry into force of the Law on Amendments to the Criminal Procedure Code of BiH (with the above quoted amended provisions) but fails to state that the Law concerned in fact entered into force on the same day when the Trial Panel pronounced the Verdict.

67. It ensues from the foregoing that neither the Prosecutor nor the Trial Panel could have acted pursuant to provisions that did not even exist at the time of taking the procedural action at issue (the examination of the Suspect, that is, the acceptance of evidence). Namely, pursuant to the applicable provisions of the CPC BiH, the Prosecutor was not obliged to inform the Suspect that his statement (if he decides to give it) is admissible as evidence at the man trial and may be read out and used without his consent at the main trial.

68. The Appellate Panel finds that the Trial Panel correctly determined that the instructions given were lawful and in compliance with the Criminal Procedure Code that was applicable at the time when the Panel rendered the decision to accept the Accused's statement. The subsequent amendments to Article 273 of the CPC BiH to which new and more precise text was added confirm the view of the Trial Panel.

69. The Appellate Panel also considers Article 125 of the Law on Amendments to the Criminal Procedure Code (Official Gazette number 58/08), which prescribes that:

> *In cases in which the indictment was confirmed after the entry into force of this Code, the proceedings shall be continued pursuant to the provisions of the Criminal Procedure Code of Bosnia and Herzegovina ("Official Gazette of 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), except if the provisions of this Code are more favorable for the suspect, or the accused.*

70. The foregoing provision establishes a principle, unusual for procedural laws, since the principle of prohibition of retroactivity is characteristic for the substantive criminal law. In support of this is Article 4 of the CC BiH that establishes in Paragraph 1 one of the general principles of the criminal law according to which the Code that was applicable at the time of the commission of the criminal offense shall be applied to the perpetrator – *the principle of prohibition of retroactive action of the criminal code* – ***prohibition of retroactivity.***

71. This protects the principle of legality and also the principle of legal certainty that no sanction may be imposed on any person prior to their knowledge that such action is prohibited or unlawful. This principle is also a principle of international law prescribed in the most important international documents, such as, for example, Article 7 of the ECHR and Article 15 of the ICCPR.

72. Article 4(2) of the CC BiH prescribes an exceptional possibility of retroactive application of the new, more lenient criminal code (exceptional permissibility of retroactivity when the new law is more lenient - retroactivity *in mitius*). The issue of a more lenient code (*lex mitior*) appears in the situations when the criminal offense was committed at the time of applicability of one code, but by the time a final verdict was passed the code was amended once or several times. This concerns the (obligatory) retroactive application of the new code if it is established that this code is more favorable for the perpetrator of the criminal offense at issue.

73. The existence of this provision in the substantive criminal law is quite natural and logical, particularly bearing in mind that in deciding on the application of a more lenient law to a certain group of facts, the Court has both laws (or a number of laws) in front of it, and only then does the Court evaluate which law will be applied in accordance with the mentioned principle. Such situation is not possible when procedural laws are in question, since the Court conducting the trial applies the procedural law that is applicable at the moment when the action is taken, and at that moment it cannot assume whether and in which manner in the future any provisions of the procedural law may be changed.

74. The Commentary on the CPC BiH (Council of Europe/European Commission (2005), Commentary on the Criminal Codes in BiH, Sarajevo, page 65) also supports this view and reads as follows:

> *"Contrary to the substantive law, in the procedural criminal law this issue is resolved pursuant to the provisions of the law applicable at the time of the commission of the action (the rule tempus regit actum), which means that it is not important if the criminal offense was committed before entry into force of the criminal procedure code, but that the presumptions for their taking and validity of procedural actions are determined pursuant to the code that was applicable at the time of their taking. The problem is, however, with regard to those criminal proceedings that were pending at the moment of entry into force of the new code, because any unlimited application of this code could prevent the harmonization of results of the procedural actions that were taken pursuant to the old code with the ones taken pursuant to the new code. In such cases, the old regulations would be applied to concrete cases all through their final phase or the parts started pursuant to the old code, while the new code would be applied to those parts that follow after the entry into force of the new code. This represents a compromise for the purpose of protection of the parties to the proceedings in which respect two rules exist: one, pursuant to which* ***old procedural actions do not have to be repeated because their results are valid also pursuant to the new law,*** *and the second, that the pending cases deadlines as of the day of entry into force of the*

new law must be calculated pursuant to the regulations that are more lenient to the party."

75. Accordingly, the more or less lenient character of the procedural law should be considered with regard to the application of provisions concerning the statutory time frames for carrying out a certain procedural action, namely that the law which gives the Accused (Suspect) a longer period of time to take the related procedural actions should be considered a more lenient law.

76. Such interpretation is at the same time the only logical interpretation since it does not bring into question the issue of legality of the actions that, at the time when they were taken, were entirely in accordance with the law.

77. Another unfounded complaint of the Defense Counsel for the Accused is that the Trial Panel failed to apply correctly the criteria on admissibility of the statement of the Accused Petar Mitrović since the decision on admissibility was passed before the Defense was provided with a possibility to present its evidence. Thus, according to the Defense, the Trial Panel failed to evaluate in a valid manner the mental state of the Accused when he gave the statement.

78. The order of the presentation of evidence at the main trial is prescribed by Article 261 of the CPC BiH, from which it ensues that as a rule, the evidence is presented in a manner whereby that the prosecution evidence is presented first, then the evidence of the defense, then the rebutting evidence for the prosecution (the prosecution evidence contesting the defense arguments), and the defense evidence in rejoinder (the defense evidence as a response to the rebuttal). After this, evidence whose presentation was ordered by the Court is possibly presented.

79. The foregoing statutory provision principally reflects the accusatory character of the criminal proceedings and the application of principle of the presumption of innocence from which it ensues that through the presented evidence the Prosecutor must prove the guilt of the Accused, while on the other hand, the Accused is entitled to present his evidence, but is not obliged to present evidence or to comment on the evidence of the prosecution. Because of the foregoing, the appellate complaint contesting the order of the evidence presentation is unclear, since after the presentation of the prosecution evidence, the Defense had the possibility to contest the evidentiary strength of the Suspect's statement, but it failed to do so reasonably.

80. It ensues from the Trial Verdict reasoning that when deciding on the admissibility of the Accused's statement dated 21 June 2005, the Trial Panel also considered the mental state of the Suspect, that is, his ability to understand the importance of the questioning in the investigation. In that context, the Trial Panel also considered the statements of the witnesses Sabina Sarajlija and Božo Bagarić who were present on the premises of the BiH Prosecutor's Office when the Accused was questioned and the Finding and Opinion of the expert witness, a specialist in neuropsychiatry.

81. Based on the foregoing evidence and the Record made at the questioning of the Suspect, the Trial Panel correctly concluded that at the time when he gave the statement the Suspect was calm, sufficiently rested and capable of answering questions. Such conclusions were drawn based on the Accused's conduct on the premises at the Prosecutor's Office and the statements of the foregoing witnesses, who stated that after being asked about his mental and physical condition, the Accused responded that he "*feels well and is ready to present his defense" (page 3 of the Record).* This was additionally supported by the fact that the Defense Counsel for the Accused also attended the questioning and could have intervened if she considered that her client was incapable of giving the statement.

82. The Appellate Panel also finds that the Trial Panel logically established that the report by Dr. Abdulah Kučukalić, a neuropsychiatrist, strongly supports all the aforesaid. Dr. Abdulah Kučukalić made the Finding and Opinion regarding the accountability of the Accused Mitrović, and established "*the existence of a conscious simulation and his attempt to present himself as an ill person with characteristics of quasi-dementia, who is not able to accept and understand the real situation." H*e concluded that the Accused Mitrović was able to understand the importance of the offense and that he is considered a psychically healthy person.

83. The Appellate Panel concludes that the Trial Panel correctly established that the conduct of the Accused, that is, his claim of quasi-dementia represents a failed attempt to contest the admissibility of the statement given in the Prosecutor's Office on 21 June 2005. Therefore, the Trial Panel correctly concluded that the Accused was able to understand the importance and consequences of the statement that he gave.

84. It ensues from the foregoing that the statement taken on 21 June 2005 and its subsequent admission into evidence were carried out in full conformity with the CPC BiH provisions. Contrary to the appellate assertions, no violation of the provisions of the CPC BiH that the Appeal refers to was committed.

85. The Appellate Panel also finds unfounded the appellate complaint that by the severance of the proceedings with regard to the Accused, the Trial Panel committed an essential violation of criminal procedure provisions. The Defense submits that by the severance of the proceedings the Court imposed on the Accused Petar Mitrović an obligation to testify in the case against the other Accused.

86. According to the appellate complaints, by such decision another obligation was imposed on the Accused - the obligation to testify, thus that he was forced to repeat his statement from the investigation, to incriminate himself, contrary to the provisions of the CPC BiH and the European Convention on Human Rights.

87. In deciding on this issue, the Appellate Panel considered two issues – the lawfulness and justifiability of the decision of the Trial Panel to sever the proceedings and the procedural situation in which the Accused Mitrović found himself because of that

decision, namely his obligation to testify in the cases against the Accused Stevanović and Stupar, et al.

88. It is not disputable that by its Decision dated 21 May 2008, the Court decided to sever 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 by opening separate cases against Petar Mitrović (I), Miladin Stevanović (II), and the third case against Miloš Stupar et al. (III).

89. Under the same Decision, the Accused Mitrović and Stevanović were obliged to testify in their respective cases and in the third case (Stupar et al.), and the Trial Panel guaranteed them that anything they said as a witness that could possibly incriminate them would not be used against them in their respective cases.

90. The Trial Panel's basis for severance of the proceedings was that it accepted the evidence-the statements of Petar Mitrović and Miladin Stevanović given to the BiH Prosecutor's Office in the investigation that incriminate the other Accused, directly or indirectly.

91. Pursuant to one of the fundamental rights of the Accused during the proceedings – to question the witnesses (Article 259(1) of the CPC BiH) and the right to cross-examination (Article 262 of the CPC BiH), the Trial Panel was required to provide the Accused with the possibility of cross-examination of the persons whose statements incriminated them, either directly or indirectly.

92. Since an Accused cannot be obliged to give any statement during the proceedings because he is entitled to defend himself by remaining silent, similarly the Accused Mitrović is not required to give a statement at the main trial in the case against him.

93. In this procedural situation, the Trial Panel acted correctly when it severed the proceedings since it is the statutory right and in the interest of the other Accused to cross-examine the person who incriminates them, directly or indirectly. This right is exceptionally important and as such represented a valid reason to sever the proceedings.

94. Another issue raised is the issue of procedural situation in which the Accused Mitrović found himself after the severance of the proceedings.

95. In his Appeal, the Defense Counsel calls this "a forced obligation to testify and self-incriminate". However, the Appellate Panel finds such averments ill-founded.

96. Namely, by the severance of the proceedings, the Accused Stevanović and Mitrović are no longer the Accused in each other's cases or in the case against the accused Stupar et al., the Accused are the persons who gave the statements on the criminal offense and its perpetrator.

97. Article 81(1) of the CPC BiH prescribes that witnesses are the persons who will by their statement likely provide information concerning the offense, perpetrator or any other important circumstances.

98. Pursuant to Article 81(4) and (5) of the CPC BiH, the witness shall be notified of the consequences that shall follow if he fails to appear (possibility to impose a fine or the apprehension of the witness), which means that giving a statement in the capacity as a witness is not a right but a statutory obligation, while a failure to comply with the obligation results in the statutorily prescribed sanction.

99. Accordingly, the obligation to testify is the obligation that ensues from the law.

100. Bearing in mind the content of the statement that the Accused Mitrović gave in the investigation and the fact that during the cross-examination at the main trial of the other case the Accused could say something whereby he would incriminate himself, the Trial Panel decided, simultaneously with the severance of the proceedings and the establishment of his obligation to testify in other cases, that the information obtained from the testimony of the Accused Mitrović in other cases will not be used in the proceedings against him.

101. That is, it was correctly determined in the Trial Verdict that the protection against self-incrimination concerns the existence of a real risk that the testimony could be used against the witness in the criminal proceedings in which he is charged.

102. To this end, in prescribing the right of the witness not to answer certain questions (Article 84 of the CPC BiH), the CPC BiH clearly states that the witness shall be entitled to refuse to answer such questions with respect to which a truthful reply would result in the danger of bringing prosecution upon himself (Article 84(1) of the CPC BiH).

103. Paragraph 2 of the same Article prescribes that the witness exercising the right not to answer such questions shall answer the same questions provided that immunity is granted to such witness.

104. Bearing in mind the foregoing statutory provisions, the Panel correctly concluded that the purpose of granting immunity is to protect an individual who is forced to answer certain questions to his prejudice, and that he shall suffer no detrimental consequences on that account.

105. Since the proceedings against the Accused Mitrović had already been initiated, the Prosecutor could no longer grant him immunity from prosecution, whereas by the act of severance of the proceedings the same Panel acted in all three proceedings.

106. It is true that the Trial Panel gave a guarantee that the content of the statement of the Accused Mitrović given in the capacity of a witness would not be used in the proceedings against him in order to remove the possibility of the Accused's self-incrimination. However, such a guarantee was granted to the Accused Mitrović by law,

since his testimony given in another criminal case could not be used as evidence at the main trial in the case pending against him and the Verdict may only be grounded on evidence presented at the main trial, regardless of whether the Court, due to some other circumstances, has obtained additional information.

107. For the foregoing reasons, the Appellate Panel determines that the Trial Panel provided concrete, clear and lawful reasons upon which it based its decision to sever the proceedings and summon the Accused Petar Mitrović and Miladin Stevanović to testify in each other's cases and the case against Miloš Stupar et al.. Thus, the Trial Panel did not commit an essential violation of the provisions of the criminal procedure to which the Defense unreasonably refers in its Appeal.

108. Also unfounded is the appellate complaint that due to the denial of the right to appeal the Decision to accept as proven the facts established in the proceedings before the ICTY, the principle of fairness has been violated and that accordingly the Verdict is based on unlawful evidence.

109. The Defense claims the legal ground for such a conclusion is in the provisions of the Law on Transfer of Cases by the International Criminal Tribunal or the Former Yugoslavia to the Prosecutor's Office of Bosnia and Herzegovina and the Use of Evidence Collected in the Proceedings before the Courts in Bosnia and Herzegovina (the Law on Transfer of Cases), particularly Article 1(2) and Article 318(1) of the CPC BiH.

110. The Appellate Panel notes that the foregoing complaint that "certain accepted facts represent the elements of the criminal offense of which the Accused was found guilty", is presented quite arbitrarily since the Defense Counsel fails to state at all the specific facts concerned, merely referring to them as "certain".

111. In addition, the Appeal does not contest the content of the accepted facts nor does it point to the evidence which would possibly suggest a different state of facts. The Appeal only contests the principle according to which the right to appeal the Decision did not exist.

112. Having considered this appellate complaint, the Appellate Panel establishes the following:

113. Article 4 of the Law on Transfer of Cases prescribes that, at the request of a party or *proprio motu*, the court, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY (accepted facts) or to accept documentary evidence from the proceedings of the ICTY relating to matters at issue in the current proceedings.

114. Article 1(1) of the Law on the Transfer of Cases prescribes that the provisions set forth in this Law shall regulate the transfer of cases by the ICTY to the Prosecutor's Office of BiH and the use of evidence collected by the ICTY in proceedings before the courts in Bosnia and Herzegovina, while Paragraph 2 of the same Article prescribes that

in case the provisions set forth in this Law do not provide for special provisions for the matters referred to in paragraph 1 of this Article, other relevant provisions of the BiH Criminal Procedure Code shall apply.

115. Article 318 of the CPC BiH prescribes that the parties, the defense attorney and persons whose rights have been violated may always file an appeal from 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 prescribes that a decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal from the verdict.

116. The Law on the Transfer of Cases neither prescribes nor prohibits the right to a special appeal from the decision of the Court to accept the established facts pursuant to Article 4 of the same Law. However, it also does not prescribe a special form in which this decision should be rendered, or the criteria that should be taken into account in rendering the decision.

117. Bearing in mind that the provisions of the Law on the Transfer of Cases for the issues that are not prescribed by this Law point to the application of the provisions of the CPC BiH, the Appellate Panel primarily finds it correct to decide on the established facts in the form of a decision, since the decision on this issue shall be issued after the parties present their arguments in a form of motions or responses to the motions. The decision must contain a reasoning from which it could be seen whether the proposed facts satisfied certain criteria for admissibility which the Trial Panel adopted from the ICTY case law. This Panel upholds this case law and finds it correct and lawful.

118. What remains disputable is whether such kind of solution on the established facts represents a solution on the merits, from which a special appeal would be allowed or a procedural decision that can be contested only in the appeal from the Verdict.

119. The appellate complaints allege that certain accepted facts represent at the same time elements of the criminal offense of which the Accused was found guilty and based on this it is concluded that the decision on the established facts is a decision on the merits.

120. The Appellate Panel, however, determines that the decisions on the established facts are procedural decisions from which no separate appeal is allowed but which can be appealed in an appeal from the verdict.

121. It quite clearly arises from the Trial Verdict and also from the special decision issued in this case (Decision dated 3 October 2006) that accepted therein were only those facts that were distinct, concrete and identifiable, that do not represent conclusions, opinion or oral testimony, and most importantly, that do not include legal characterizations. In addition to these, the accepted facts also satisfy the other criteria – that contain the essential ICTY findings and are not significantly changed, they do not directly or indirectly attest to the criminal liability of the Accused, they are confirmed or

established in the appellate proceedings or were not appealed, while further appeal is no longer possible, they do not ensue from a plea agreement or voluntary admission of guilt, and they originate from a case in which the Accused had a defense attorney and a possibility to defend himself.

122. Bearing in mind the foregoing, the Appellate Panel also finds that the Trial Panel correctly concluded that the established facts that were accepted by the contested Decision in their entirety satisfy the admissibility criteria and that they in no way violate the right of the Accused to a fair trial and his presumption of innocence. This is particularly so because during the proceedings these facts were treated as one of the pieces of evidence in the proceedings that the Defense had a chance to contest by counter-arguments, that is, by its own evidence.

123. Furthermore, the Motion of the Prosecutor's Office dated 4 May 2006 was refused by the same Decision to accept the facts from the Judgments IT-02-60/1-A dated 8 March 2006, IT-02-60/1-S dated 2 December 2003 and IT-02-60/2-S dated 10 December 2003 since the Trial Panel concluded that some of the proposed facts represented legal conclusions or directly or indirectly incriminated the Accused, from which it ensues that the Trial Panel made a clear and correct 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.

124. The essence of the decision on the acceptance of established facts is to contribute to judicial economy, respect the right of the Accused to be tried within a reasonable period of time and to establish a balance between the right of the Accused to a fair trial and to minimize the appearances of the same witnesses to testify regarding the same circumstances in several cases to the least necessary extent. Therefore, the decision to accept the facts is a procedural decision to adduce evidence into the proceedings, so long as this evidence (the facts in this case) satisfies the admissibility criteria.

125. Therefore, the Appellate Panel concludes that the decision to accept facts essentially represents a decision on the acceptance of evidence into the evidentiary material. The same explanation is correctly stated in the reasoning of the Trial Panel Verdict where it is noted that the established facts represent a special probative action. If a Trial Panel accepts these facts it will address them as one among other pieces of evidence presented at the main trial.

126. Bearing in mind the foregoing, it is appropriate during the proceedings to admit evidence into the case records by procedural decisions, and to evaluate this evidence in terms of its content and the evidentiary strength after the completion of the main trial when the Trial Panel has an overview of all the presented evidence and can make a free evaluation of each piece of evidence individually and in their correlation with all other pieces of evidence pursuant to Articles 15 and 281(1) and (2) of the BiH CPC.

127. Should a Court accept the view of the Defense that there exists the right to a special appeal from the decision accepting the facts during the main trial, the same principle

would have to apply with regard to the acceptance into evidentiary material of any other piece of evidence, which would imply the discontinuation of the trial proceedings until each and any such decision becomes final.

128. In addition to the fact that the Criminal Procedure Code of BiH does not so prescribe, such action would be absolutely inappropriate from the aspect of procedural efficiency and the right of the Accused to be tried within a reasonable period of time.

129. Following the aforementioned, the Appellate Panel concludes that this appellate ground is unfounded and it refused it as such.

c) Essential Violations of the Provisions of the Criminal Procedure pursuant to Article 297(1)(k)of the CPC BiH

130. The Defense also contests the Trial Verdict claiming an essential violation of criminal procedure provisions prescribed in Article 297(1)(k) of the CPC BiH The Defense claims that the Operative Part of the Verdict is incomprehensible, contradictory internally and to the reasons of the Verdict and does not contain the reasons for decisive facts.

131. In addition, the Defense also claims that in the contested Verdict there was not a careful evaluation of all the evidence individually and in their correlation with the other pieces of evidence, that the Trial Panel failed to explain the issue of probative value of "certain" proven facts and that, thereby, an essential violation of criminal procedure provisions was made that resulted in incorrect proceedings obviously being conducted against the Accused.

132. In reviewing the reasonableness of the presented appellate ground, the Appellate Panel finds that the appellate complaints presented to this end are stated only arbitrarily, without any concrete explanation as to where the alleged incomprehensibility of the Operative Part of the Verdict is reflected and in which decisive facts the Verdict is allegedly contrary internally and to the presented reasons.

133. Article 295(1) of the CPC BiH clearly prescribes that an appeal should include, *inter alia*, the grounds for contesting the verdict and the reasoning behind the appeal, which means that it is not sufficient only to state in the appeal the legal formulation of the appellate ground referred to in Article 297(1)(k) of the CPC BiH, as was done in the case at hand, but the appellate ground must be supported by concrete and clear facts and examples from the trial verdict which are said to have deficiencies.

134. Since the Appeal at issue does not contain concrete examples of the alleged violations, and since the Appellant explains the complaint regarding the manner in which the Trial Panel evaluated the evidence only with a general claim that the Trial Panel failed to explain the issue of the probative value of "certain" proven facts, the Appellate Panel could not even review the grounds for the presented appellate complaint.

135. Therefore, since the Appellant failed to specify or explain the essential violation of the provisions of the procedure to which he referred, his objection regarding this issue is refused as unfounded.

II ERRONEOUSLY AND INCOMPLETELY ESTABLISHED FACTS UNDER ARTICLE 299 OF THE CPC OF BiH

136. In reviewing the state of facts which were alleged to have been erroneously established, the Appellate Panel should apply the standard of reasonableness. In reviewing the allegedly erroneously established state of facts, the Appellate Panel, through its own analysis, will replace the findings of the Trial Panel only if it is impossible for a reasonable trier of facts to establish the contested state of facts.

137. In determining whether or not a Trial Panel's conclusion was such that a reasonable trier of facts could not have reached it, 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 the main trial is left primarily to the discretion of the Trial Panel, and that findings of fact reached by the Trial Panel must be given certain respect.

138. The Appellate Panel shall only revoke the first instance verdict if the factual error resulted in an erroneous verdict. An erroneous verdict is defined to be an utterly unfair outcome of the court proceedings, as in the case wherein the accused is sentenced regardless of the lack of evidence proving the essential elements of the criminal offence.

139. In order to prove that the verdict is erroneous, an appellant must prove that the allegedly erroneously and incompletely established findings by the Trial Panel raise a reasonable doubt about the guilt of the accused. In order for the Prosecutor to prove that a rendered verdict is erroneous, s/he must prove that, having considered the mistakes made by the Trial Panel when reaching its findings, every reasonable doubt of the Accused's guilt is eliminated.

140. Therefore, only in case that the Appellate Panel finds, 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 an 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.

141. The claims in the appeal by the defense which pertain to the allegedly erroneously and incompletely established state of facts may be summarized as follows:

142. 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 mildly retarded and a person of low intelligence.

143. In support of this argument, the defense states that the Accused faced problems even in his early young years, 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 higher intellectual operations such as anticipation, planning and reaching conclusions have not been defined in the Accused at all. 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 mental retardation, the Accused possessed neither the objective nor the subjective ability for any form of participation in the commission of the criminal offence of Genocide.

144. The appeal further argues that the Trial Panel solely grounds its conclusion of the Accused's knowledge of the existence of the genocidal plan 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.

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

146. 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 a mildly retarded person who was incapable of understanding all that, 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 capability of performing 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 as charged, 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.

147. 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 capable.

148. 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 which follows from the established state of facts. Therefore, the relevant claims in the appeal are hereby refused as ungrounded.

149. The defense also submits that the 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.

150. The Appellate Panel primarily finds 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.

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

152. The averments in the defense appeal focus on the fact that the witness S4 entered into the plea agreement, therefore, he is 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.

153. 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".*

154. 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.

155. 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.

156. The defense's claim concerning this witness' credibility is reduced to the statement that, solely, 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.

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

158. 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 which 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.

159. 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.

160. 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.*[1] *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."*

161. 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 Bosniaks whom they expected to surrender 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 which would eventually result in their execution.

[1] Dragan Kurtuma; Jovan Nikolić.

162. 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*".

163. 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.

164. 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 by the wounding of Rade Čuturić, by the imprisoned Bosniaks is not supported by the evidence. The first instance verdict analyzed this possibility as well and it clearly distinguishes between the killings which were committed in 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:

> "*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".

165. 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.

166. 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.

167. 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 someone 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.

168. 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 which 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.

169. 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.

170. 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 testimonies 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.

171. 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 ungrounded.

172. 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.

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

174. For the foregoing reasons, the claims in the appeal contesting the correctness and completion of the established state of facts are hereby refused as ungrounded.

III VIOLATIONS OF THE CRIMINAL CODE UNDER ARTICLE 298 THE CPC OF BiH

175. The Defense Counsels 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.

176. In reasoning the referenced claims in the appeal, the Defense Counsels 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.

177. 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 be applied.

178. 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 the specific perpetrator, in order to establish which law is generally more advantageous to the particular perpetrator.

179. 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)[2], 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.

[2] 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)

180. 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.

181. The Appellate Panel finds the claims in the appeal to be ungrounded.

182. Specifically, Article 3 of the CC of BiH stipulates the principle of legality as one of the fundamental principles of criminal law. The referenced Article reads as follows:

> *Criminal offences and criminal sanctions shall be prescribed only by law.*
> *No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.*

183. Article 4 of the CC of BiH stipulates the principle of time constrains regarding applicability, and reads as follows:

> *The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. 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 be applied*.

184. In Article 4a) of the CC of BiH, the Code also defines an exception from the application of Articles 3 and 4, stating the following:

> *Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.*

185. It follows from the referenced legal provisions that, in principle, the law which was in effect at the time of the commission of the offence (rule *tempus regit actum*) shall be primarily applied to the perpetrator.

186. This principle may only be departed from in the interest of the Accused. That is, only if the law has been amended so as to be more lenient to the perpetrator.

187. The defense rightfully argues that the matter of the more lenient law is to be decided on *in concreto*, that is, by comparing the old and the new law(s) with regard to the specific case.

188. However, the comparison of the text of the laws may provide a reliable answer only if the new law decriminalizes something which was a criminal offence under the old law, which clearly makes the new law more lenient.

189. In all other cases when the criminal offence is punishable under both laws, the solution is not simple at all. Therefore, it is necessary to establish all of the circumstances which may be relevant to the selection of the more lenient law.

190. These circumstances primarily relate to the provisions on sentencing and meting out or reducing the sentence (which of the laws is more lenient in that regard), measures of warning, possible accessory punishments, new measures that substitute the punishment (community service, for example), security measures, legal consequences of the conviction, as well as the provisions pertaining to the criminal prosecution, whether it was conditioned by an approval.

191. It is indisputable that the criminal offence of Genocide of which the Accused has been found guilty, was stipulated as a criminal offence 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).

192. 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".*

193. 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.*

194. 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, forms an act of the perpetration of the criminal offence of Genocide under both Criminal Codes.

195. 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.

196. Although the appeal properly refers to the foregoing legal provisions and principles, it erroneously concludes that the Adopted CC of SFRY is more lenient to the Accused from the punishment aspect. That is, that it stipulates a more lenient sanction for this criminal offence.

197. Specifically, the defense for the Accused clearly disregards the maximum punishment foreseen by the Adopted CC of SFRY for the criminal offence of Genocide – the death penalty and, with no reasoning whatsoever, it renders a conclusion that the maximum punishment for the referenced criminal offence is 15 years, and in the event of an aggravated form of the criminal offense, 20 years of imprisonment.

198. Contrary to the grievances in the appeal, which is also properly noted by the Trial Panel, the Adopted CC of SFRY stipulated the punishment of imprisonment to be less than five years or the death penalty for the criminal offence of Genocide, unlike the CC of BiH which provides for a prison term of not less than ten years or a long-term imprisonment (twenty to forty five years in prison) for the same criminal offence.

199. Although the Trial Panel properly stated these facts, it erroneously referred to the application of Article 4a of the CC of BiH in its reasoning, and stated the conclusion that

> *"[…] the principle of mandatory application of a more lenient law is excluded in prosecuting those criminal offenses which at the time of their commission were absolutely foreseeable and generally known to be in contravention of general rules of international law […]"*

and, based on that, it applied the CC of BiH to this particular case.

200. This interpretation is erroneous since Article 4a), being an exception from the application of the more lenient law, is only applicable if the more lenient law would **prevent the trial or punishment** for the acts which are criminal according to the general principles of international law.

201. It could not be possible to have a **trial or a punishment** for an act only if that act **has not been defined as a criminal offence.** That is, as an **act of the commission of a certain criminal offence**, considering that Article 3(1) of the CC of BiH stipulates that the criminal offences and the criminal punishments may only be prescribed by law.

202. Thus, for example, Article 4a of the CC of BiH is applicable to the criminal offence of Crimes against Humanity which was committed at the time when the Adopted CC of

SFRY was in effect, since the referenced law did not foresee that particular criminal offence at all.

203. The application of Article 4 of the CC of BiH would indicate that the Adopted CC of SFRY is more lenient to the perpetrators as it does not incriminate the act committed by the perpetrator at all, consequently, the perpetrator **could not be tried or punished for the referenced offence**.

204. In such a case, Article 4a of the CC of BiH, that is, Article 7(2) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) should be directly applied considering that, pursuant to Article 2/II of the Constitution of BiH, the Convention is directly applicable to BiH and has priority over all other laws. This Article does not allow, by reason of non-incrimination of certain acts which are criminal under the general principles of international law, that the perpetrators of these acts **avoid trial and punishment**.

205. Accordingly, Article 4a) of the CC of BiH provides for an exceptional departure from the principles under Articles 3 and 4 of the CC of BiH in order to ensure the trial and punishment for such conduct which constitutes a criminal offence under international law, that is, which constitutes a violation of norms and rules that enjoy general support of all nations, that are of general importance and are considered or constitute universal civilization achievements of contemporary criminal law, in a situation when such actions have not been foreseen as criminal offences in national, that is, domestic criminal legislation at the time of perpetration.

206. In this case, the law in effect at the time of the commission of the crime, as well as the law currently in effect, proscribes the criminal of offence of Genocide. Therefore, it is evident that there exist the legal requirements for the perpetrator of the criminal offence of Genocide to be tried and punished under both laws.

207. However, notwithstanding its reference to the erroneous legal provisions (to Article 4a), the Trial Panel, in this particular case, actually applied the law which is more lenient to the perpetrator, that is, the CC of BiH.

208. Specifically, when meting out the punishment, having balanced all the relevant mitigating and aggravating circumstances, the Trial Panel concluded that the necessary and proportionate penalty for the commission of the crime was 38 years of long-term imprisonment.

209. Considering that the maximum punishment for the criminal offence of Genocide is the long-term imprisonment of 45 (forty-five) years under the CC of BiH, it is evident that the intention of the Trial Panel was to impose a more severe punishment and that it was therefore oriented towards that particular maximum.

210. In comparing the respective punishments prescribed under the Adopted CC of SFRY and the CC of BiH with respect to the maximum prescribed sentence, it follows that the

adopted CC of SFRY prescribed the death penalty as the maximum punishment, while the CC of BiH foresees a long-term imprisonment (ranging from 20 to 45 years).

211. Pursuant to the foregoing, in this **specific situation**, the CC of BiH is more lenient to the Accused as it prescribes a term of imprisonment which is, clearly, more lenient than the death penalty.

212. The position of the defense is without merit as it ignores that at the time of the commission of the offence the death penalty was also a penalty for that criminal offence, thus implying that the referenced sanction may simply be eliminated from the provision of Article 141 of the CC of SFRY.

213. In such a manner, a law which actually does not exist would be applied. That is, one sanction would be eliminated and substituted by another without any explicit legal provision.

214. The Constitutional Court of BiH shared this position in its Decision AP 1785-06 in the *Maktouf* case (para. 68 and 69):

> "*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 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"*.
>
> "*In this context, the Constitutional Court holds that it is simply not possible to "eliminate" the more severe sanction under both earlier and later laws, and apply only other, more lenient sanctions, so that the most serious crimes would in practice be left inadequately sanctioned*".

215. Based on the foregoing, the Appellate Panel finds that the Trial Panel properly applied the CC of BiH as the law which is more lenient to the perpetrator in this specific case, and the Appellate Panel refuses as ungrounded the grievances in the appeal claiming the opposite.

216. With respect to the issue of whether the Accused possessed genocidal intent, the Appellate Panel finds that although the Trial Panel accurately established the state of facts, the Trial Panel made an erroneous legal conclusion in finding that the Accused possessed a genocidal intent. This resulted in the erroneous legal qualification of the form of the Accused's participation in the perpetration of the offence.

217. Specifically, the Trial Verdict states on page 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 their exposure to the broader context of the events of Srebrenica, and their basic knowledge of the genocidal plan*".

218. In considering the existence of the Accused's genocidal intent, the Trial Panel took 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.

219. Based on the foregoing, the Trial Panel eventually found that:

> "*In this case, the Panel considered evidence of the acts of the principle perpetrators (Section VI.C) and analyzed that evidence together with the general context in which the acts occurred (Section V) and the perpetrators' knowledge of that context (Sections VI.A and B).*
>
> *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).*

220. Considering the presented evidence and the factual findings of the Trial Panel, the Appellate Panel finds that no reasonable trier of facts could have reached a conclusion that Petar Mitrović possessed the genocidal intent to destroy a protected group in whole or in part.

221. Specifically, the Appellate Panel is satisfied that the Trial Panel reviewed all available, necessary evidence and determined all relevant facts related to the existence of the essential elements of the criminal offence of Genocide.

222. As already reasoned, the Appellate Panel finds that the Trial Panel did not erroneously or incompletely establish the state of facts and the Appellate Panel refuses the claim in the appeal indicating the opposite. Therefore, in this part of the verdict, the Appellate Panel will not deal with the state of facts. Instead, on the grounds of the established state of facts, the Appellate Panel will provide a proper legal qualification of the form of the Accused's participation in the perpetration of the referenced criminal offence.

223. Pursuant to the Trail Panel Verdict, the Accused Petar Mitrović was found guilty of having participated in the killings in the Kravica warehouse together with Milenko

Trifunović, Aleksandar Radovanović, Brano Džinić, Slobodan Jakovljević and Branislav Medan, wherein, according to the Trial Panel, the acts of the Accused Mitrović contributed decisively to the commission of the criminal offence, for which he was found guilty as a co-perpetrator under Article 171(a) in conjunction with Article 29 of the CC of BiH.

224. The specific actions taken by the Accused and the members of the Third Platoon of Skelani and Brane Džinić, are described in the operative part of the 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, 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 Protected 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 the villages of 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 patrols), while 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 more than one thousand 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 Branislav Medan, were at the back of the warehouse where they stood guard to prevent the prisoners from escaping through the windows"*.

225. The Trial Panel's inference that the Accused acted against the persons within a protected group has also been drawn in the Trial Verdict. The Appeal, as reasoned in the part concerning the established state of facts, did not contest this inference.

226. For the criminal offence of Genocide, it is also required to establish the existence of intent on the part of the Accused, and his awareness and relation towards the genocidal plan (the Accused must have genocidal intent).

227. Not only did the Trial Panel find that the Accused had had **knowledge** of the existence of the genocidal plan to destroy in part or in whole a protected group of Bosniak men and that he participated in their killings **with intent**, but the Trial Panel also found that he shared **the genocidal intent**.

228. The Appellate Panel holds that the Trial Panel finding on the existence of the intent of the Accused to kill members of the protected group is the only reasonable conclusion which may be rendered from all evidence presented thereof.

229. Identically, the Trial Panel conclusion that the Accused was aware of the existence of the genocidal plan which was subsequently executed is also reasonable from the presented evidence.

230. However, the Appellate Panel determines that the inference of the Trial Panel that the Accused, apart from having knowledge of the genocidal plan and the intent to kill the members of the protected group, also possessed a special intent to destroy in part or in whole the national, ethnic, racial or religious group of people, has not been proven beyond a reasonable doubt from the established state of facts.

231. Specifically, the Trial Panel's finding of the existence of the specific intent to destroy in part or in whole the protected group of Bosniak men, follows from several indirect pieces of evidence. The Trial Verdict states that more than 1000 persons were executed in the Kravica warehouse and that the Accused took part in those killings, that he knew that people he was shooting at were Bosniaks who had lived in the protected zone of Srebrenica, and that there were verbal exchanges between the prisoners and the shooters containing ethnic and religious slurs and curses.

232. Furthermore, the following is emphasized:

> *The killing proceeded in a methodical manner. Three, including 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 shooters 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, the Accused 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, the Accused 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 three 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 others, remained at the warehouse until officially relieved by another unit sent for that purpose.

233. Apart from the foregoing, the Trial Panel particularly noted that the weapons used against the unarmed men crowded into the two warehouse rooms included an M84 machine gun, which was positioned on a table at the side of the entrance, automatic rifles which were methodically reloaded and hand grenades as well which, apart from inflicting the lethal injuries, also produced explosions that were heard several kilometers away.

234. Finally, the Panel finds that:

"From the manner and character of their participation, it is apparent that the Accused did not simply intend to kill the victims; they 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. Trifunović and Radovanović, members of the Second Detachment, 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 and members of the Second Detachment, Mitrović, 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 Platoon member, 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".

235. The Appellate Panel, however, finds that all of the foregoing facts and circumstances indicate that there actually existed a genocidal plan to destroy in part or in whole a group of the Bosniak people and that the Accused did possess knowledge of the

existence of the referenced plan. However, based on the evidence presented with regard to his state of mind and his mental attitude towards the action, the Appellate Panel finds that, based on the presented evidence, it is not possible to conclude beyond a reasonable doubt that the Accused possessed or shared the special intent to destroy in part or in whole the protected group of Bosniaks.

236. As the contested Trial Verdict reasonably concludes, the Accused had knowledge of the existence of the genocidal plan even before 13 July 1995. The Appellate Panel is satisfied that such a conclusion has been reasonably corroborated by the statements of the witness S4 and the specific findings which the Accused reached during 12 and 13 July 1995, that is, upon his arrival at the Srebrenica area.

237. The Appellate Panel also finds the inference of the Trial Panel reasonable wherein it states that the Accused was aware that his detachment was involved in the second phase of the "Srebrenica liberation" task, which did not imply a military attack on the protected zone as it had already "fallen". The Accused could have clearly realized what his task would be not later than on 12 July 1995 when, in everyone's sight, some of the members of the Detachment "swept the terrain"; that is, transferred and escorted the remaining people to Potočari. Furthermore, the Accused could have clearly seen many buses and trucks with Bosniak women, children and old persons (but without men), and witness S4 confirmed in his testimony that they had discussed among themselves that the remaining men would probably be executed. The Trial Panel established the foregoing facts beyond any reasonable doubt, 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 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*".

238. Considering the foregoing, the Appellate Panel also finds that the conclusion of the Trial Panel that the Accused knew that the captured Bosniak men would be executed is the only reasonable conclusion which could be reached by a reasonable trier of facts.

239. **However, the evidence of the Accused's knowledge of the genocidal plan and genocidal intent of others is not sufficient to find him guilty of the criminal offence of genocide**. Entering a conviction for genocide, one of the most severe crimes against mankind, requires evidence that the Accused himself possessed the genocidal intent, rather than the mere knowledge of such intent by others.

240. The Trial Panel properly set a standard for proving the special intent by stating that it may be difficult to find explicit manifestations of intent by the perpetrators, but that the circumstances and facts surrounding the perpetrator's acts can establish genocidal intent beyond a reasonable doubt.

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

242. 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, that is, to decisively contribute to the deprivation of life of the captured Bosniaks.

243. Contrary to that, the circumstances and facts analyzed by the Trial Panel in Section C, 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 manner, and that he persisted in performing 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, his commitment to the perpetration of the task he was assigned, the number and age of victims, the weapons employed and even the slurs rather indicate that the Accused eagerly performed his task, but he cannot be equaled to those who took the unlawful actions with the exact aim to destroy in part or in whole the protected group.

244. It follows from the testimony of the witness S4 that, even in Srednje, the soldiers predicted the reason for their transfer to Bratunac. This witness stated in his testimony that, upon reaching Bratunac and when searching the terrain, they realized that their task would be to "kill the men and separate those infirm". According to this witness, even while in Srednje, some of the members of the Detachment 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.

245. Both witness S4 and the Accused Mitrović confirmed with one accord that, in the evening on that day, there was a rotation; that is, their platoon was replaced, allegedly by the volunteers from Serbia. 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 one hour and a half) and then other persons continued to kill the remaining survivors. Furthermore, witness S4 also stated that, before they left the referenced location, their commander Trifunović said 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 at the funeral of Krsto Dragičević and the lunch after the funeral, and he states that those present 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.

246. The Appellate Panel finds the foregoing facts important in determining the non-existence of the genocidal intent of the Accused. Specifically, lacking explicit evidence to clearly confirm the existence of the genocidal intent of the Accused, the First Instance Panel derived its conclusion on these, indirect pieces of evidence. It is necessary to take into account one of the fundamental principles of the criminal proceedings - the principle *in dubio pro reo* under which, in case of a doubt about the existence of the facts which constitute the elements of the criminal offence or on which the application of a certain provision of the criminal legislation depends, the Court shall render a decision which is more favorable to the Accused.

247. The Appellate Panel finds that the foregoing evidence (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 there existed the genocidal intent of the Accused.

248. The BiH jurisprudence has not previously dealt with the criminal offence of Genocide. Therefore, the Appellate Panel reviewed the ICTY jurisprudence concerning this special element of the criminal offence, considering that ICTY Tribunals have tried this criminal offence of genocide in several cases. This particularly includes the judgments of the ICTY Appeals Chamber in *Radislav Krstić, IT-98-33-1, 19 April 2004,* who was, inter alia, prosecuted for the same event and who was the VRS Major General and the Commander of the Drina Corps at the time when the offence was committed.

249. According to the ICTY findings, all of the crimes which followed the fall of Srebrenica occurred within the Drina Corps zone of responsibility (para. 135). General Krstić knew about the genocidal intent of some members of the Main Staff of VRS, and he also knew that the Main Staff of VRS did not have sufficient resources of its own to carry out the executions and that, without the use of Drina Corps resources, the Main Staff would not have been able to implement its genocidal plan (para. 137).

250. 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:

> "*129. Given that the subordinate Brigades continued to operate under the Command of the Drina Corps, the Trial Chamber found that 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 emphasized - 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."[214] ***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****."*

251. Although not a binding precedent to this Court, the cited positions of the ICTY Appeals Chamber are 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 Tribunal 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.

252. 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.

253. This Appellate Panel finds that, based on the presented evidence and the established state of facts, it is not possible to find such intent of the Accused beyond a reasonable doubt.

254. Precisely for this reason, the Appellate Panel is required to render a decision that is more advantageous to the Accused, that is, to find that the Accused did not have such intent.

255. 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.

256. 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 and not as a co-perpetrator, as was wrongly qualified in the Trial Verdict.

257. Accessory is defined in Article 31 of the CC BiH as follows:

> *1. Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced.*
> *2. The following, in particular, shall be considered as helping in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or goods acquired by perpetration of the criminal offence.*

258. Accessory 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.

259. The criminal offence of Genocide is by its nature specific due to the additional subjective element that must be fulfilled – genocidal intent - regarding the following acts:

a) Killing members of the group;

b) Inflicting serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group or the community 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,

must be committed with a special intent in order to be considered acts of perpetration of that criminal offence.

260. 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.

261. A person who does not share the intent to commit genocide, but who intentionally helps another to commit genocide, is an accessory to genocide.

262. Considering that all essential elements of the criminal offence of Genocide have been satisfied, except for the genocidal intent (as stated above), the Appellate Panel finds that the actions of the Accused constituted the acts of aiding in the perpetration of the referenced criminal offence.

263. 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.

264. Based on the established facts, it is possible to conclude beyond a reasonable doubt that, at the time of the offence, the Accused Petar 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 accessory.

265. 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 and 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 counsels for the Accused, revises the First Instance Verdict with regard to the legal evaluation and qualification of the offence and, at the same time it intervenes 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, which is more favorable to the Accused.

IV DECISION ON CRIMINAL SANCTION

266. With regard to the grounds for appeal from the decision on the criminal sanction, it is only in the introductory part where the appeal also includes this ground for appeal, without stating the claims in the appeal concerning the findings of the first instance verdict. Therefore, with regard to the appeal, it could not be reviewed.

267. On the subject of this claim in the Appeal, the Appellate Panel renders a decision with regard to Article 308 of the CPC of BiH (Extended Effect of the Appeal) and reviews whether the Trial Panel erred in the application of the criminal sanctions which would make the verdict unlawful, and also in view of the revision of the first instance verdict, considering that the Accused is now found guilty of the criminal offence of aiding in genocide.

268. In deciding on the punishment, the Appellate Panel found that the Trial Panel properly established all decisive facts and properly applied the law. Therefore, no errors occurred to make the first instance verdict unlawful in the section concerning the sanction. The Appellate Panel largely relied on the proper findings presented in the first instance verdict, primarily with regard to the general considerations and requirements which the law foresees to be the criteria that should be taken into account when meting out punishment, and then on the individually established facts and circumstances relevant to sentencing in this particular case.

269. Thus, the Trial Verdict properly found:

> *The purposes of sentencing are set out in both the general and special sections of the CC of BiH. Article 2 of the CC of BiH establishes as a general principle 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, human rights, and other basic values. In the case of genocide, the nature and degree of the danger will always be severe. The type of sentence the Court can legally impose in the case of genocide is limited to jail, and the range has been established as 10 to 20 years, or long-term imprisonment of between 20 and 45 years. The distinction between a 10 to 20 year sentence and a long-term sentence has consequences for the convicted person, including not only a longer period of incarceration, but also: more severe restrictions on the personal liberties of the convicted person within the prison system (Art. 152 LoE[4]); less privacy as to correspondence and telephone calls (Art. 155 LoE); and a longer mandatory sentence before consideration for parole or community privileges (Art. 44(4) CC of BiH). On the other hand, long-term sentencing also provides for more intensive and individualized treatment for rehabilitation (Article 152(3) LoE).*

[4] *The Law of Bosnia And Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures*, Official Gazette No. 13/05.

In addition to the general principle pronounced in Article 2, the CC of BiH prescribes further purposes and considerations the Court must address when determining and pronouncing a sentence. These are of two types: those that relate to the objective criminal act and its impact on the community, including the victims; and those that relate specifically to the convicted person.

Pursuant to Article 2 and Article 48 of the CC of BiH, the sanction must be necessary and proportionate to the danger and threat to protected objects and values

"*Genocide is a denial of the right of existence of 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."*[5] *Punishment of genocide is a principle "recognized by civilized nations as binding on States, even without any conventional [treaty] obligation."*[3] *The effectiveness of the 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."*[4] *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*.

Pursuant to Article 48 of the CC of BiH, the sanction must be necessary and proportionate to the Suffering of Direct and Indirect Victims

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.

The suffering imposed physically and physiologically on the direct victims was extreme. The several hundred males of all ages who were killed in the Kravica warehouse were unarmed prisoners who had been captured or surrendered to the

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

Bosnian Serbs in exchange for promises of safety. Their psychological and physical suffering during the first approximately one and one half hours of the massacre is indescribable.

Pursuant to Articles 6 and 39 of the CC of BiH, the sentence must be sufficient to deter others from committing similar crimes.

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.

Pursuant to Article 39 of the CC of BiH, the sentence must express community condemnation of the accused's conduct.

The community in this case is the people 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;[5] *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.*[6] *Genocide has been described as a crime "directed against the entire international Community rather than the individual."*[7] *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.*

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens as to the danger of crime.

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[5] *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Further Requests for the Indication of Provisional Measures, 13 September 1993, p. 440.; Vienna Convention on the Law of Treaties, *entry into force* 27 January 1980, Art. 53.

[6] *Barcelona Traction Light and Power Company* (Belgium v. Spain), Judgment of 5 February 1970, 1970 ICJ Reports 4, p. 32; *Application of Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Decision on Preliminary Objections, 11 July 1996, para. 31.

[7] William Schabas, *Genocide in International Law* (Cambridge: Cambridge University Press 2000), pg. 6.

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.

Pursuant to Article 39 of the CC of BiH, the sentence must be necessary and proportionate to the need to increase the consciousness of citizens as to the fairness of punishment.

Penalties for genocide, what 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.[8]

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 long-term 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 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.
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 (Arts. 6 and 39 of

[8] 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.

the CC of BiH); and (2) rehabilitation (Art. 6 of the CC of BiH). Rehabilitation is not only a purpose that the CC of BiH 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."

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 (Art. 48 of the CC of BiH). 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.

270. 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.

271. However, although the Trial Panel properly established all the decisive facts which must be considered in rendering a decision on the type and sentence, the Appellate Panel determines that the Trial Panel attached excessive importance to the aggravating circumstances wherein it primarily disregarded the actual contribution of the Accused to the commission of the offence, and particularly to the fact that the Accused committed the offence in co-perpetration with many other persons and that such a horrendous consequence did not result from the action of not more than a few perpetrators, which resulted in imposing an inadequate sentence upon this particular perpetrator.

272. Specifically, the Trial Panel properly notes that

> "*Whereas the maximum sentence available under law might be fair in this case, the Panel is mindful that as horrendous as this act of genocide was, there are those who committed multiple acts of genocide, as well as those whose crime was the commission of the larger genocidal plan, of which the genocide at the Kravica warehouse was but a part. Therefore the maximum sentence must, in fairness, be*

reserved for those crimes that, though qualitatively no more heinous, may quantitatively exceed even this crime."

Nevertheless, the Trial Panel imposed a sentence which was almost the maximum possible, and the Appellate Panel finds it to be greater than what should have been pronounced considering the specific circumstances to which importance should be attached when it comes to individual sentencing.

273. Furthermore, the Accused has now been found guilty as an accessory to genocide. Therefore, in deciding on sentencing the Accused, the following provisions are also relevant:

Accessory is defined under Article 31 of the CC of BiH, and paragraph 1 states the accessory's punishment:

(1) Whoever intentionally helps another to perpetrate a criminal offence shall be punished as if he himself perpetrated such offence, but the punishment may be reduced,

Article 32 of the CC of BiH - Limitations on Responsibility and Punishment of Collaborators, paragraph 1 reads:

(1) The accomplice shall be considered criminally responsible within the limits set by his own intent or negligence, and the inciter and the accessory within the limits of their own intent.

274. It follows from the foregoing provisions that the law requires the Court to pay due attention to the limitations of the Accused's intent as an accessory 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 accessory is the mildest form of co-perpetration which reflects that accessories most often support the offence committed by the perpetrator.

275. However, in this particular case, the Accused Mitrović was found to be an accessory only because, from the evidence, it could not be inferred beyond a reasonable doubt that the Accused acted with genocidal intent. However, the specific accessory actions of the Accused are at the same time the actions of co-perpetration in killings 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.

276. 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 fact that the Accused is now found guilty as an accessory, a type 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 of criminal activity, was 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.

277. Considering all the foregoing, the Appellate Panel finds that a long-term imprisonment of 28 (twenty-eight) years is a sentence which is appropriate and proportionate to the gravity of the committed offence, with regard to the circumstances, consequences, manner of commission and the specific action taken by the Accused. This includes consideration of the individual circumstances of the as the perpetrator of the action. The Appellate Panel finds that this sentence will achieve the purpose of sentencing as foreseen by law.

278. Pursuant to Article 56 of the CC of BiH, the time spent in custody upon the Decisions of this Court, commencing 20 June 2005 until his committal to serve the sentence shall be credited towards the imposed sentence.

279. Regarding the decision on costs and claims under property law, the Trial Verdict remains unchanged.

280. In accordance with the foregoing, pursuant to Article 314 of the BiH CPC, it was decided as stated in the operative part of this Verdict.

RECORD-TAKER
Sanida Vahida-Ramić

PRESIDING JUDGE
JUDGE
Tihomir Lukes

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

We hereby confirm that this document is a true translation of the original written in Bosnian/Serb/Croat.
Sarajevo, 3.11.2009
Certified Court Interpreters for English

Alisa Rajak *Snežana Vukadinović* *Branislav Banjac*