Number: **X-KRŽ-07/442**
Date: **4 October 2010**

Panel of the Appellate Division comprised of:

Judge Dragomir Vukoje, President of the Panel
Judge Hilmo Vučinić, Reporting Judge
Judge Phillip Weiner, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

vs.

PREDRAG KUJUNDŽIĆ

SECOND INSTANCE VERDICT

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

Božidarka Dodik

Counsels for the Accused, Attorneys:

Miroslav Ristić
Goran Nešković

CONTENTS

Number: X-KRŽ-07/442
Sarajevo, 4 October 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division comprised of Judges, Dragomir Vukoje, as the President of the Panel, and Hilmo Vučinić and Phillip Weiner, as members of the Panel, with the participation of the Legal Advisor, Dženana Deljkić Blagojević, as the record-taker, in the criminal case against the accused Predrag Kujundžić, for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with subparagraphs (a), (c), (d), (e), (f), (g) and (k), as read with Article 29, 30 and 31, all in conjunction with Article 180(1) and (2) of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon the Appeals of the Prosecutor's Office of Bosnia and Herzegovina and the Defense Counsels for the Accused, Attorneys Miroslav Ristić and Goran Nešković, filed from the Verdict of the Court No. X-KR-07/442 dated 30 October 2009 (First Instance Verdict), at the session of the Panel held in the presence of the Prosecutor of the BiH Prosecutor's Office, Božidarka Dodik, the accused Predrag Kujundžić and his Defense Counsels, Attorneys Miroslav Ristić and Goran Nešković, pursuant to Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), on 4 October 2010 issued the following

VERDICT

The Appeal of the Prosecutor's Office of Bosnia and Herzegovina **is refused as ungrounded** and the First Instance Verdict **is upheld in its acquitting part**.

The Appeal of the Defense for the Accused Predrag Kujundžić is partially granted and the First Instance Verdict **revised in the convicting part, that is, in Section 1 and 3 of the operative part, and in the part concerning the sentence in as much as:**

I

The accused Predrag Kujundžić

IS GUILTY

Because:

On 10 May 1992, after several hours of an artillery attack by the units of the Army of the so-called Serb Republic of BiH on the village of Grapska, Doboj municipality, participating in the attack with a formation of the military police of which he was in charge and with a task to secure Major Milutin Stanković by supporting the infantry attack on this village and collecting the weapons seized from the men that had been separated from women and children, after which attack the civilians who survived and did not manage to escape were forcibly resettled from the village by being bussed to the town of Kostajnica, and then the

women, children and the elderly were transported to the territory controlled by the Army of BiH, while the able-bodied men were deprived of liberty and detained in the *Bare* barracks.

Therefore, within the widespread and systematic attack against the non-Serb civilian population in the Doboj municipality, knowing of such an attack, as the commander of the unit called *Predini vukovi*, he aided and abetted in the forcible resettlement of the population,

whereby he committed

the criminal offence of Crimes against Humanity in violation of Article 172(1)(d), in conjunction with Article 31 and Article 180(1) of the CC BiH.

Pursuant to Article 284(c) of the CPC BiH, the Accused is:

ACQUITTED OF CHARGES

That:

On 12 July 1992, together with other units of the armed forces of the so-called Srpska Republika of BiH, and paramilitary formations, commanding his unit, the so-called *Predini vukovi*, he participated in the inhuman treatment of 50 civilians of Bosniak and Croat ethnicity whom the members of his unit and the unit called Red Berets took out of the *Perčin disco* building, in which they were unlawfully detained, and were used as human shields in the settlement of Makljenovac during active combat operations between the units of the BiH Army and the units of the RS Army; in the way that he failed to take the necessary and reasonable measures to prevent such action, although he was aware that these civilians were treated in a prohibited manner and that they would be exposed to a life threatening situation, since he could see them walking in front of the units and combat vehicles of the Serb units in the direction of the positions of the Army of BiH, lined up in five lines comprised of ten detainees each, stripped off their upper parts of the clothes and with their hands cupped behind their heads; and at least 17 civilians were killed on that occasion, namely: Anto Kalem, Ramiz Hamidović, Safet Hamidović, Arif Omerčić, Mehmed Omerčić, Hasib Omerčić, Zijad Ahmić, Hasan Ahmić, Bećir Šehić, Ešef Ahmić, Senad Ahmić, Mehmedalija Kadić, Hasib Kadić, Muhamed Zečević, Meho Mujanović, Halid Mujanović, Muhamed Husanović, and the bodies of Anto Kalem, Ešef Ahmić, Hasan Ahmić, Zijad Ahmić, Ramiz Hamidović, Hasib Kadić, Halid Mujanović, Muhamed Husanović, Meho Mujanović, Arif Omerčić, Hasib Omerčić, Mehmed Omerčić, Bećir Šehić and Muhamed Zečević were exhumed from the mass grave in the place of Makljenovac during 1998, while the bodies of Senad Ahmić, Safet Hamidović and Mehmedalija Kadić have not been found to this date and they are reported as persons unaccounted for.

Therefore, during the widespread and systematic attack against the non-Serb civilian population in the Doboj municipality, knowing of such an attack, as the commander of the unit called *Predini vukovi*, he knew about and did not prevent: killings and other inhuman crimes committed with the intention of inflicting great sufferings, serious physical injuries and damage to health, **whereby he would have committed the criminal offence of**

Crimes against Humanity in violation of Article 172(1)(a) and (k), in conjunction with Article 180(2) of the CC BiH.

For the actions described in Sections 1, 2, 4, 5 and 6 of the operative part of the First Instance Verdict of **which he was found guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with the actions under**:

- subparagraph d), in conjunction with Article 31 and Article 180(1) of the CC BiH as regards Section 1 of the operative part of the Verdict;
- subparagraphs e) and k), in conjunction with Article 29 and Article 180(1) of the CC BiH as regards Section 2 of the operative part of the Verdict;
- subparagraph g), in conjunction with Article 30 and Article 180(1) of the CC BiH as regards Section 4 of the operative part of the Verdict;
- subparagraph g), in conjunction with Article 29 and 30, and Article 180(1) of the CC BiH as regards Section 5 of the operative part of the Verdict;
- subparagraph k), in conjunction with Article 29 and Article 180(1) of the CC BiH as regards Section 6 of the operative part of the Verdict;

the Accused

IS SENTENCED

to long-term imprisonment of 17 (seventeen) years.

Pursuant to Article 56 of the CC of BiH the time which the Accused spent in custody as from 10 October 2007 onwards shall be credited towards the sentence.

The First Instance Verdict remains otherwise unaltered.

REASONING

The Course of the Proceedings

1. By the Verdict of the Court of Bosnia and Herzegovina (Court of BiH) number X-KR-07/442 dated 30 October 2009, the Accused Predrag Kujundžić was found guilty of the actions described under Sections 1, 2, 3, 4, 5, 6 of the operative part of the Verdict by which he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with subparagraphs a), d), e), g) and k), in conjunction with Articles 29, 30 and 180(1) and (2) of the Criminal Code of Bosnia and Herzegovina (CC BiH).

2. For the referenced criminal offense, the First Instance Panel sentenced the accused to long-term imprisonment of 22 (twenty two) years, to which sentence, pursuant to Article 56 of the CC BiH, the time which the Accused spent in custody as from 10 October 2007 onwards was credited. By applying Article 188(1) of the CPC BiH, the accused must reimburse the costs of the criminal proceedings in the convicting part of the Verdict.

3. At the same time, the accused is acquitted of the charges that he committed the act of killing under Article 172(1)(a) of the CC BiH, in conjunction with Article 180(1) of the CC BiH, and the act of torture under Article 172(1)(f) of the CC BiH, in conjunction with Article 180(2) of the CC BiH.

4. Pursuant to Article 198(2) of the CPC BiH, all aggrieved parties are instructed to take civil action to pursue their claims under property law.

5. The BiH Prosecutor's Office and the Defense Counsels for the accused Predrag Kujundžić, Attorneys Miroslav Ristić and Goran Nešković, all timely filed their appeals from the Verdict.

6. The BiH Prosecutor's Office filed an appeal for the incorrectly and incompletely established state of facts set forth in Article 299(1) of the CPC BiH and the decision on sentence set forth in Article 300(1) of the CPC BiH, moving the Appellate Panel of Section I for War Crimes of the Court of BiH to grant the Appeal as grounded in its entirety, revoke the contested Verdict in the acquitting part and order a trial after which the accused will be found guilty of all the underlying acts as charged against him in the Indictment and sentenced to a long-term imprisonment.

7. The Defense Counsels for the accused Predrag Kujundžić, Attorneys Miroslav Ristić and Goran Nešković, filed an appeal for essential violations of the criminal procedure set forth in Article 297 of the CPC BiH, violations of the Criminal Code set forth in Article 298 of the CPC BiH, incorrectly or incompletely established state of facts set forth in Article 299 of the CPC BiH. The Defense moved the Appellate Panel to grant the appeal in its entirety, alter the contested Verdict in its convicting part by acquitting the accused of the charges or order a new trial before the Appellate Panel.

8. The Defense for the accused submitted its response to the appeal of the BiH Prosecutor's Office, objecting to the grounds and arguments of the appeal, and moved the Appellate Panel to refuse the appeal as ill-founded.

9. At the Panel session held on 4 October 2010, pursuant to Article 304 of the CPC BiH, the parties and the Defense Counsels briefly presented their respective appeals and the responses, and entirely maintained their arguments and proposals presented in writing.

10. After reviewing the contested Verdict within the grounds and arguments of the appeal, the Panel of the Appellate Division (Appellate Panel, Panel) decided as stated in the operative part for the reasons to follow:

General Considerations

11. Prior to providing reasoning for individual grounds of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC BiH the appellant must include in the appeal both the legal grounds for contesting the verdict and the reasoning behind the appeal. Since pursuant to Article 306 of the CPC BiH the Appellate Panel reviews the Verdict only within the limits of the grounds of appeal, the appellant is obliged to draft the

appeal in such a manner that it can serve as the basis for reviewing the Verdict. To this end, the appellant must concretize the grounds of appeal for his contesting the Verdict. The appellant must also specify the contested part of the Verdict, evidence or action of the Court, and provide a clear explanation with arguments in support of the ground of appeal at issue.

12. A mere impartial indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes, does not constitute a valid ground to review the First Instance Verdict. Therefore, the Appellate Panel will *prima facie* dismiss as ungrounded all unreasoned and unclear grounds of appeal.

I ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE

I.1 General Remarks

13. The Appellate Panel primarily addressed the grounds of appeal pointing to the existence of essential violations of the criminal procedure provisions set forth in Article 297(1) of the CPC BiH. The Appellate Panel concluded that these grounds are ill-founded.

14. As the grounds of appeal, the essential violations of the criminal procedure provisions are prescribed in Article 297 of the CPC BiH and specified in subparagraphs a) through k) of paragraph 1 of Article 297 of the CPC BiH.

15. Given the gravity and importance of violations of the procedure, the CPC BiH differentiates between the violations which, if their existence is established, create an irrefutable assumption that they negatively affected the validity of the rendered Verdict (absolutely essential violations) and the violations for which the Court evaluates, in each specific case, whether the established violation had or could have negatively affected the validity of the verdict (relatively essential violations).

16. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations exist if during the main trial or in rendering a verdict the Court did not apply a provision of this law or the Court applied this provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict (Article 297(2) of the CPC BiH.

17. Should the Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the First Instance Verdict pursuant to Article 315(1)(a) of the CPC BiH.

I.2 Defense arguments of the appeal concerning the essential violations of the provisions of the criminal procedure

18. In their appeal, the Defense Counsels indicated the following violations of the provisions of the criminal procedure:

19. The defense noted that Judge Šaban Maksumić should have been disqualified from the first instance proceedings in which he participated. The defense submits that it has raised this particular objection, however, by its procedural decision of 27 August 2008, the Panel dismissed the petition on the ground of being filed beyond the deadline prescribed under Article 30(2) of the CPC, and referred to the arbitrariness of the arguments in the petition, because the fact that someone held judicial office in both 1992 and nowadays does not automatically imply his impartiality. However, the defense is of the view that, by such a decision, the Court violated the right of the Accused to a fair trial since everyone is entitled to be tried before an impartial court.

20. The Appellate Panel finds this grievance in the appeal ungrounded. First and foremost, this Court's 24(7) Panel has already decided on that petition during the proceedings and rendered a relevant decision on 27 August 2008. Having analyzed it, the Panel found that the decision-making procedure upon the petition for disqualification was conducted in compliance with the provisions of the CPC of BiH (Article 30(2) and Article 32(4) of the CPC BiH), and that the defense claims on the alleged partiality of Judge Maksumić due to his holding judicial office during the war in BiH and being a Bosniak have already been discussed and proper arguments provided thereof. The Appellate Panel does not hold that the appeal refers to different and new circumstances, other than those already analyzed and reasonably dismissed as not being such that could give rise to a suspicion about the partiality of Judge Maksumić.

21. Furthermore, Article 29(a) through (e) of the CPC BiH prescribes absolute reasons for the disqualification of a judge. If these reasons existed, the judge could not perform his judicial duties. Already upon a superficial analysis of the filed petition for disqualification of Judge Maksumić, and this argument of the appeal, it is obvious that no reason existed to disqualify Judge Maksumić.

22. Furthermore, the defense states that the contested verdict was based on the evidence on which a verdict cannot not be based. In the Verdict reasoning para 26, the Court accepted the facts adjudicated in the ICTY case against *Duško Tadić* (IT-94-I-T) referring to the Accused who came from Prijedor, while the adjudicated facts pertain to the Doboj region. By accepting these facts, the Court transferred the burden of proof onto the Accused, while the facts themselves have no relevance to the case against the Accused.

23. The Prosecutor's Office noted in its response that the Trial Panel grounded the acceptance of the adjudicated facts on the Law on Transfer of Cases and the Use of Evidence Collected by ICTY. Also, the principles and criteria foreseen in both national and international jurisprudence applicable to such cases have been adhered to.

24. The grounds of the appeal pertaining to this alleged violation of the CPC of BiH provisions are unfounded. By its procedural decision rendered during the proceedings, the

Trial Panel decided to accept certain facts as proven as authorized by Article 4 of the Law on Transfer of Cases by the ICTY to the BiH Prosecutor's Office and the Use of Evidence Collected by the ICTY in the Proceedings before the Courts in BiH. Therefore, these are findings that legally have a probative value under the CPC of BiH. Also, the established facts proposed by the defense as well have been accepted. The facts proposed by both parties were evaluated under the criteria established by the ICTY Chamber in the case *Prosecutor vs. Vujadin Popović et al*. (IT-05-88-T), which criteria have been used in assessing the reasonableness of a motion that some facts from the already adjudicated cases before ICTY be accepted in the cases tried before this Court. Furthermore, the defense also moved the Court to accept certain facts, which the Panel accepted and used in the Verdict (paragraph 28). It is true though that the facts proposed by the Prosecutor's Office were also accepted in the case (Verdict, paragraph 26).

25. These facts were used in the part reasoning the general elements of the criminal offence of Crimes against Humanity, that is, in the part reasoning a "widespread attack" (paragraph 170) and stating that crisis staffs were organized in self-established Serb autonomous provinces in the BiH territory in order to take over the functions of the authorities and it was also found that camps were established in the territories controlled by the Serb forces. Although these facts were accepted as established, the Trial Panel did not rely on them only in the course of proving them, but it also relied on other evidence, documentation, and witness testimonies. Specifically, not one of the established facts refers to the status of the Accused and his responsibility. Even if the defense's objection were reasonable in stating that these facts transferred the burden of proof to the Accused, the fact that these accepted facts were not decisive or of primary importance in the Verdict as well cannot be disregarded, given that they only marginally corroborate the findings already established during the proceedings and have no essential or abstract relevance to the responsibility of the Accused. Therefore, the objection by the defense stating that, by accepting these facts, the Trial Panel essentially violated the provisions of the criminal procedure is ungrounded.

26. The defense also notes that the Verdict is incomprehensible, internally contradictory and in contradiction with its grounds, and lacks reasons concerning the decisive facts.

27. The Appellate Panel notes that this grievance of the appeal is imprecise and lacking specific objections referring to the part and the legal or factual findings with regard to which the Verdict is incomprehensible and contradictory. Therefore, this ground of the appeal cannot even be considered, since it is not grounded on specific facts as to the violation of the procedure.

28. The next grievance of the appeal concerns the objection to the formal correctness of some of the accepted documentary evidence. Thus, the defense is of the view that, in the part concerning the command responsibility, the Verdict is grounded on a piece of evidence on which, under the provisions of this Code, a verdict cannot be grounded. In the reasoning of the Verdict, paragraph 249, relevant to the command responsibility of the Accused, that is, the conclusion that he was the company commander, the Verdict refers to Exhibits T 40, T 132 and T133, being the company lists, however, in the reasoning of the Verdict under section 2 of the operative part referring to the presence of the Accused in Čivčije, the Verdict is grounded on Exhibit T 41 which was obtained from the ICTY. Although the Defense does not contest the possibility to accept evidence under Article 8 of the Law on

the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, which stipulates that certified copies shall be used in proceedings before the courts and shall be treated as if they were obtained by the relevant national authorities, the Defense submits nevertheless that, in the spirit of the equality of arms principle, the following documentary evidence should also have been evaluated: T-40, T 132 and T 133, because it is not evident from the documents whether those were some incomplete draft documents and in which manner they were produced. Also, with regard to the document T 41, which is an official note, the defense was not provided with the opportunity to check the data entered into the notes through direct or cross examination; consequently, the Verdict should not have been grounded on this evidence.

29. The Appellate Panel notes that these documents merely corroborate the witness testimonies and the evidence presented by the defense with regard to the referenced circumstances. Exhibits T 132 and T133 are the PSC Doboj payrolls for the months of May and June 1992, which clearly indicate that the Accused Kujundžić was entered into both lists under reference number 1 of the 13th Company.

30. With regard to Exhibit T 40, it represents the list of military formations and the list of members of the X Company on which the Accused takes the top spot.

31. With regard to Exhibit T41, this document in itself is not of particular importance for the criminal responsibility of the Accused, nor are the other documents contested in the appeal, because they were not individually decisive in the establishment of his responsibility, considering that the facts stated in these documents were also corroborated by the witnesses listed in the Verdict, which details will be further elaborated in the Verdict bellow, in the part dealing with the contesting of the factual findings.

32. Exhibit T 41 may only be interpreted with regard to the accused's character, because this Official Note indicates that he was an important authority in that area and shows the attitude of others towards him. In addition, many witnesses testified about the accused's personality, stating that he was the leader of the unit "known among the people as Predo's Wolves".

33. According to the Appellate Panel, the Trial Panel provided valid reasons for the soundness of the argument on the accused's belonging to and his command role in the formation "Predo's Wolves" as established in the Verdict while, from the legal aspect, the Appellate Panel finds that these pieces of evidence are not inconclusive, as the defense suggests in its appeal. All of these pieces of evidence have been certified with an ICTY electronic stamp and were used in the contested Verdict pursuant to Article 8 of the Law on Transfer of Cases. Furthermore, the Appellate Panel finds that the Trial Panel also used them in its Verdict only as supporting evidence and that the documents were presented to the defense witnesses Zoran Dević, Zoran Đekić, Đorđe Kujundžić and Žarko Gavrić who did not raise the issue of their authenticity.

34. With regard to the quality of these pieces of evidence, there is no doubt that their authenticity was properly evaluated. This is particularly so as it is evident in the Verdict that the Trial Panel evaluated these pieces of evidence equally to the documentary evidence of the defense, especially Exhibit O 84 to which the Verdict refers concerning the status of the

Accused. The arguments pertaining to the status of the Accused as presented in paragraphs 233 through 237 of the contested Verdict are upheld by the Appellate Panel in their entirety.

35. The defense also noted that the Court refused to examine the expert witness for the defense, Dr. Milan Stojaković, about the circumstances surrounding the accused's impotence and sexual ability to commit the criminal offence under counts 4 and 5. The defense refers to the ICTY case (*Kupreškić and others*) concerning the standards for identification of the accused in cases which include testimony of only one witness. According to these standards, the Court must pay due attention to the arguments presented by the defense, specifically with regard to the credibility of the witness. Therefore, since the defense was not allowed to have the expert witness Stojaković examine the Accused with regard to the foregoing circumstances, it was also deprived of the possibility to verify the credibility of witnesses 2 and 4, which resulted in the incompletely established state of facts and a miscarriage of justice with regard to the Accused.

36. Having considered the reasons provided in the appeal concerning the defense's averments about the accused's sexual impotence and the reasons stated in the contested Verdict, the Appellate Panel finds the defense's objections ungrounded in this respect.

37. Primarily, the defense submits that the accused's sexual impotence is a consequence of his being wounded. To this end, Dr. Ljubomir Curkić, expert witness for the defense, was examined about this circumstance and provided his findings and opinion at the main trial on 9 March 2009.

38. According to the expert witness, the Accused sustained injures in the form of an entry-and-exit wound in the thorax and flank areas, without injury to internal organs. He also stated that, after leaving the hospital, the Accused was unable to perform major physical activities for a period of 15 days. The expert witness stated that there was no injury affecting the functional ability of his back and muscles.

39. The Panel stated in the contested Verdict that the Findings and the Opinion of Dr. Curkić was quite sufficient and that it did not provide sufficient grounds for an additional expert evaluation of the sexual inability of the Accused.

40. The Appellate Panel is satisfied that the arguments of the defense did not actually include sufficient grounds for a neuropsychiatrist to provide his opinion about that matter. If further examination and expert evaluation was required, it should have possibly then be done by an urologist, rather than by a neuropsychiatrist, who could only base his conclusion about the Accused's possible sexual inability on what the latter would say to him about his sexual inability at the relevant time. Besides, the documentary evidence derived from the Indictment clearly indicates that the Accused fathered his third child in 1994, which is also, to a certain extent, in contradiction with his claimed sexual impotence.

41. The defense also claims a violation of the principle of equality of arms and the provisions of Article 14, 99(2) and 269 of the CPC, because the Court refused to allow the expert witness Stojanović to examine Witness 2, with regard to whom he actually gave his testimony, considering that the Prosecution was allowed to hire their expert witness – a neuropsychiatrist and psychiatrist, who examined Witness 2.

42. The Appellate Panel observes that the team of expert witnesses hired by the Prosecutor's Office performed the psychiatric examination and psychological evaluation of the aggrieved party - female witness 2, and diagnosed a serious and complicated form of posttraumatic stress disorder as a result of most severe rape-related traumas and her brother's death. Also, it follows from the finding of Dr. Stefan Rudelich of 10 June 2005 that this witness was diagnosed with PTSD and a depression disease, and it was established that the aggrieved party has been medically treated since 2004 for the reason of being repeatedly raped in BiH while a minor.

43. It also follows from the First Instance Verdict that the expert witness Stojaković provided his findings and opinion about Witness 2 based on the earlier medical documentation related to this witness and also based on the findings and the opinion of the team of experts hired by the Prosecution. True, the Trial Panel did not grant the motion by the defense proposing that this expert witness personally examine the witness, because it was mindful of the fact that the witness was a victim of rape and that a repeated examination and psychological analysis would expose her to further unreasonable traumatisation.

44. Having analyzed the First Instance Verdict in this part, the Appellate Panel noted that the First Instance Verdict stated that, with regard to this count of the Indictment, the Prosecutor's Office hired a team of expert witnesses from the Clinical Centre of the University of Sarajevo in order to provide their findings and opinion on the mental health of Witness 2, and they were tasked with establishing whether the mental health of Witness 2 was affected, and if so, what the nature, type, degree and durability of the health deterioration were, and also to provide their opinion if such condition of hers is a consequence of the experienced trauma. In this regard, the expert team was supposed to offer their findings and opinion and to state if, at the time of perpetration of the criminal offence, she could understand the nature of the acts and, considering her emotional and mental condition, whether she was capable of testifying.

45. Upon the examination, the team inferred that the witness suffered from a serious and complicated form of posttraumatic stress disorder which was manifested through extremely intensified psychological alertness, constant reliving of serious traumatic experiences, a sense of humiliation, inferiority, distrust in people and destroyed sexual identity. With regard to the events that Witness 2 experienced and which were the subject matter of the Court's decision the expert witness Doc. Dr. Alma Bravo Mehmedbašić noted that the aggrieved party – Witness 2 behaved in a manner characteristic for the victims of rape. She also noted that the experienced trauma took place in 1992 and 1993, however she began to undergo medical treatment only after the war when she felt free.

46. Dr. Stojaković attempted to challenge the diagnosis received by the aggrieved party – Witness 2, stating that this syndrome cannot last for 2 years and, if so, then it is not PTSD but a permanent change of personality, which would be incompatible with her work and social ability. It is not probable that a person suffering from clinical depression can be in a profession she is engaged in. According to him, it is only possible that the aggrieved party – Witness 2 suffers from some other mental illness.

47. It is stated in the First Instance Verdict that the expert witness Stojaković mainly commented on the conclusions and opinions of the Prosecution expert witnesses, without

bringing forward any conclusions of his own. The Trial Panel states its reasons for not allowing the expert witness Stojaković to re-examine and interview Witness 2 in the Verdict paragraphs 103-106 according to which the defense motion to examine Witness 2 was dismissed because yet another interview and psychological analysis would expose the witness to additional and further trauma, which it found unjustified given the circumstances of the case.

48. With regard to the objections by the defense, the Appellate Panel observes that the defense insists on the examination because it believes that the expert witness Stojaković could possibly find that, considering her serious mental condition, she would not be able to stand trial, thus not being a reliable witness either.

49. With regard to the grievance in the appeal from this part, the Panel does not agree with the arguments stated in the First Instance Verdict. As stated in the Verdict indeed, the findings and opinion of the expert witness for the defense are based on the comments on the previously provided findings of the team of expert witnesses for the Prosecution, without bringing forward any conclusions of his own. This is so quite logically, because the expert witness for the defense could not bring forward his own conclusions considering that he did not have the opportunity to personally observe and realize the overall condition of Witness 2. Practically, the expert witness for the defense provided his findings and the opinion on the findings and opinion of the Prosecution team of expert witnesses. The Appellate Panel finds the objection by the defense justifiable in stating that, by refusing to allow the defense expert witness to examine Witness 2 in person, the Trial Panel violated the principle of equality of arms, and the Appellate Panel therefore disagrees with the arguments stated in the Verdict that the examination of the witness would not be justified given the circumstances of the case, regardless of her condition. In this manner, the defense was put in an unequal position in terms of the collection of evidence.

50. However, the Appellate Panel is of the view that this violation cannot be deemed to be an absolute but a relative violation, because the outcome of the finding was not essentially disturbed, nor is it of such a nature so as to question the validity of the Verdict itself.

51. In addition, as follows from the First Instance Verdict, the aggrieved party – Witness 2 began to receive her medical treatment in 2004 (the finding of Dr. Stefan Rudelich and the medical documentation of the Psychiatric Clinic in Zagreb from 2005, Exhibit T 101). Therefore, it follows from the foregoing that both the expert witnesses for the Prosecution and doctors in Germany and Zagreb diagnosed the aggrieved party – Witness 2 with PTSD, and that the witness had been diagnosed with this disorder even before the proceedings against the Accused commenced. Therefore, even if the credibility of expert witnesses for both Prosecution and the Defense could be questioned, this fact and the fact that Witness 2 has been permanently receiving medical-pharmacological therapy are neutral indicators that Witness 2 is a person who has experienced serious traumas, from which she is still recovering.

52. That the Trial Panel's omission is of a relative nature is particularly justified by the fact that, in the end, both parties asked the expert witnesses to give their opinions on this witness's credibility. That was supposed to be their final conclusion. However, the Appellate Panel hereby notes that it is only the Court that is entitled to provide a final

evaluation of the witness credibility which, in no way whatsoever, is, or can be, the task of any expert witness. Generally speaking, expert witnesses may only provide sufficient factual indicators based on which the Court may draw a conclusion on a certain issue or finding. The contested Verdict provides sufficient reasons for taking the findings by the Prosecution expert witnesses' team as a valid indication of her mental state. Therefore, the Panel finds that, although justified, the objection by the defense concerning the fact that the examination of the aggrieved party by the expert witness was not allowed, was but a relative procedural violation that is not of such importance for the findings in the Verdict to result in the Verdict revocation.

53. Besides, this expert witness provided his Findings and Opinion on 4 March 2009 and the witness testified on 27 August 2008, that is, after her testimony and after the Trial Panel could independently receive an impression on her character and on the credibility and reliability of her testimony. Therefore, the value of the mere expert evaluation of the aggrieved party – Witness 2 by the expert witnesses for both parties is of secondary importance for the finding on the accused's responsibility because, although two sections of the sentencing verdict are grounded on her testimony, the conclusion on the accused's responsibility is grounded on other evidence. The Appellate Panel shall provide the reasons for which it considers that the Trial Panel drew a proper conclusion from her testimony in the part of the reasoning which pertains to the grievances in the appeal related to this testimony.

54. The defense also raises the issue of violation of the criminal procedure provisions because the Court refused to examine the witnesses for the defense, Vinko Topalović and Dragan Ostojić. Both these witnesses live abroad. Dragan Ostojić lives in the R Slovenia, and Vinko Topalović in the USA. Both of these witnesses are relevant to Section 5 because, according to the arguments of the defense, one of them lived with Witness 2 in the relevant period of time, within which period of time the incriminated actions with which the Accused has been charged were perpetrated, while the other witness took the actions towards Witness 2 with which the Accused Kujundžić has been charged. The defense believes that the Court was obliged to give the defense equal possibility as to the access to evidence because, due to the limited means, the defense was not able to obtain the statements of these witnesses, and therefore the Court should have exercised its authority to summon these persons to testify.

55. This grievance of the defense's appeal is ungrounded. It is evident in the contested Verdict that the Trial Panel adopted the motion by the defense to examine Vinko Topalović and Dragan Ostojić as witnesses; however, they were not examined because they did not comply with the summons to testify. After many attempts to contact them and after they accepted to testify, they eventually failed to contact the relevant Court Service and the Court therefore left the possibility for them to testify if the defense manages to so arrange.

56. Apart from the national Code provisions, the Court also referred to the provisions of Article 14 of the Law on International Legal Assistance and Article 8 of the European Convention on Mutual Assistance in Criminal Matters, which expressly stipulate that there is no possibility to coerce a person who fails to respond to the court summons to testify.

57. The possibility for the defense to examine these witnesses remained open, therefore this grievance in the appeal by the defense, stating that the Court did not ensure the testimony of these witnesses, cannot be deemed grounded for the foregoing reasons.

58. The defense brings up an essential violation of the provisions of Articles 14 and 47 of the CPC of BiH, because the Prosecution did not disclose the statements of the witnesses to the defense. This concerns the statement of Witness 32 who stated at the main trial that he had made a statement before the Investigative Judge of the Cantonal Court in Zenica, which statement remained undisclosed to the defense. Also, the defense states that the Court grounded its findings on the statement of Witness 6, while the Prosecution disclosed to the Defense the statements this witness gave to the BiH Ministry of Security. However, this witness also made a statement before the Higher Regional Court in Dusseldorf, in the case against Nikola Jorgić, which testimony is relevant for the defense.

59. In its response to the appeal, the Prosecution noted that the grievance in the defense's appeal was incorrect in stating that the referenced statements had not been disclosed to them. According to the Prosecution, after the Indictment was confirmed, the defense was enabled to review the entire Prosecution file, and all of the statements made by the referenced witnesses were forwarded to the defense along with the Indictment.

60. The defense did not further contest the response by the Prosecutor's Office claiming that the statements had not been delivered, therefore the Appellate Panel is satisfied that this grievance of the appeal is ungrounded and that it should be dismissed.

II INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS

II.1 General Remarks

61. In relation to all sections of the operative part establishing the responsibility of the accused, the defense contested the correctness of the state of facts. According to the defense, the state of facts concerning the responsibility of the accused for the underlying acts was incorrectly established and an incorrect conclusion drawn based on such findings.

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

63. In determining whether a Trial Panel's conclusion was such that no reasonable trier of fact could 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 trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

64. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a

grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

65. In order to prove that there was a miscarriage of justice, the appellant must show that the allegedly incorrect and incomplete state of facts established by the Trial Panel casts a reasonable doubt on the guilt of the accused. For a Prosecutor to prove that there was a miscarriage of justice, the Prosecutor must show that, after taking into account the errors made by the Trial Panel in establishing the state of facts, any grounded suspicion was eliminated as to the guilt of the accused.

66. Therefore, only if the Appellate Panel concludes that no reasonable trier of fact could reach the contested factual findings and that such an error of fact resulted in the miscarriage of justice shall the Appellate Panel grant the appeal filed pursuant to Article 299(1) of the CPC BiH by stating that the state of facts was incorrectly and/or incompletely established.

67. Article 299 of the CPC BiH prescribes when a verdict can be contested for the incorrectly and/or incompletely established state of facts. Decisive facts are established directly based on evidence or indirectly from other facts (circumstantial evidence or control facts). Only the facts established by the verdict can be considered as existing. Regardless of the existence of decisive facts, conclusions on their existence must always be drawn, or else no state of facts can be established (incompletely established state of facts). If a certain decisive fact has not been established in the manner in which it actually existed in the reality of an event, then an incorrectly established state of facts exists.

68. The Panel of the Appellate Division will provide an evaluation as to whether the state of facts has been incorrectly established in relation to the facts and the findings appealed by the Defense. For such an evaluation, the applicable standard is to evaluate, based on the grounds of appeal, whether a certain decisive fact matches the results of the evidence adduced.

II.1.1 Section 1 of the Operative Part of the First Instance Verdict

69. The accused was found guilty because on 10 May 1992, after several hours of an artillery attack by the units of the Army of the so-called Serb Republic of BiH on the village of Grapska, Doboj municipality, participating in the attack with other units, participated in the infantry attack on this village, leading the members of his unit *Predini vukovi*, after which attack the civilians who survived and did not manage to escape were forcibly resettled from the village by being bussed to the town of Kostajnica, and then the women, children and the elderly were transported to the territory controlled by the Army of BiH, while the able-bodied men were deprived of liberty and detained in the *Bare* barracks.

70. The accused was acquitted of charges that in the circumstances described in Section 1 of the operative part of the convicting part of the verdict he wounded Witness 2 and deprived the life of minor D.D.

71. The appeals of both the defense and the prosecution contest the correctness and completeness of the established state of facts with regard to this section of the operative part

of the First Instance Verdict. Therefore, the Appellate Panel will in the text below analyze the grounds of the appeal of both parties.

72. With regard to this section, the First Instance Verdict is mostly based on the testimonies of the Defense witnesses, namely witness Cvjetin Sarić. This witness testified that he knew that the accused had participated with his unit in the action in Grapska. The Verdict is also based on the testimony of witness Žarko Gavrić (driver in the unit which was under the accused's command). This witness testified that on 10 May 1992 around a dozen of members of his unit had been located near a fountain at the entrance to the village of Grapska. Witnesses Slobodan Đukić, Dragoljub Milutinović, Zoran Đekić and Obren Lazić, all members of a squad of the accused's unit, testified about Kujundžić's presence on this critical day when men had been separated from women, resettled and taken away, when he collected the then seized weapons, and loaded them onto a vehicle. Witnesses Srđan Bogdanović and Dragoljub Milutinović testified that the task of his unit was to secure Major Stanković on the referenced day.

73. The Defense denies that the accused, as commander of his unit, participated in the attack on Grapska. The Defense submits that witnesses Srđan Bogdanović, Vojislav Sarić and Dragoljub Milutinović did not confirm that they had participated in the attack on Grapska, but that during the entire armed attack they were deployed at a check point outside of Grapska. Witness Pero Tubić also testified that after the attack Major Stanković came to the village above the main road escorted by two police officers and driven in a personnel carrier. The defense submits that the First Instance Panel incorrectly concluded that these were police officers from the accused's unit. Witness Slobodan Đukić saw the accused at the check point near the fountain loading the surrendered weapons from a pile. Witness Zoran Đekić confirmed that in the police he received the weapons from the accused. Accordingly, the Court erroneously established the fact that the accused had personally participated in the separation of the people that were taken to Kostajnica while the able-bodied men were taken to Bare.

74. The defense submits that the accused saw the attack of Serb soldiers directed against the armed population, but that his actions did not constitute part of the attack nor did he actively participate in the conflict. The appeal suggests that the prosecution adduced no piece of evidence whatsoever to confirm that the accused had personally separated people. He also did not participate in the transport of the population nor was aware of the plan or the intent of resettlement. Also, the defense submits that the Court should have used the Judgment of the Higher Regional Court Dusseldorf, FR Germany, versus Nikola Jorgić of 30 April 1999, and that it should have been used as the case law. Under this verdict, a sentence was imposed on the person who had separated and resettled civilian Bosniak population.

75. For all the foregoing, the defense submits that the state of facts was incorrectly established when the First Instance Panel established the existence of evidence on the participation of the accused as a participant in the resettlement of Bosniak civilians, and in the attack on the village of Grapska, whereby the elements of the criminal offense of Crimes against Humanity were not satisfied. As to this part, the appeal is partially well-founded.

76. First and foremost, it is indisputable that an attack was launched against Grapska on 10 May 1992. Also, it is indisputable that part of the population of Grapska (women and children) was resettled to Kostajnica, while the men were taken to Bare. However, the defense contested the character of the attack (arguing it was a legitimate military operation). The First Instance Verdict itself explains the existence and the character of the attack by referring to a number of the witnesses for both the Prosecution and the Defense[1] who had explained the manner in which the attack was carried out and its consequences. Paragraphs 161 through 259 of the First Instance Verdict explain in detail the elements of a widespread and systematic attack against the civilian population as a general element required under Article 172(1) of the CC BiH. The policy of launching the attack and the role of the accused were also described. According to the Appellate Panel, these arguments were established beyond a reasonable doubt and based on the evidence. Therefore, the defense failed to contest these conclusions with arguments.

77. With such state of facts, the Appellate Panel finds that the First Instance Court presented sufficient factual findings to be able to conclude beyond a reasonable doubt that the criminal acts charged against the accused indeed took place during the widespread and systematic attack of the military and the police of the then Serb Republic BiH launched against the civilian population.

78. When it comes to the knowledge of the accused about the attack and the connection of his acts with the attack, customary international law prescribes that the perpetrator must be aware of the existence of an attack against the civilian population and that his acts must fall within the scope of the attack, or at least he must take a risk that his acts become part of the attack. Also, he must be aware of the nexus between his acts and this context[2], which the defense contests. What the defense considers an incorrectly established fact in the appeal is the fact that the accused actively participated in the conflict and in the separation of men from women, and that by his acts he committed the criminal offense as established in Section 1 of the operative part of the First Instance Verdict.

79. The role of the accused was already addressed. Therefore, the Appellate Panel will not again consider the same arguments. The defense witnesses who had been members of the unit under the accused's command[3] testified that in the beginning of the war activities the accused had under his command a unit of the 1st Ozren Light Infantry Brigade. The company that was under the accused's command was engaged in securing Major Stanković[4]. Therefore, it can be concluded that at the relevant time the accused took part in the events that included the attack on Grapska, but also the other surrounding areas of Bukovačke Čivćije, Mala Bukovica, Dragalovci, Kotorsko and Ševarlije. The defense did not contest the widespread and systematic nature of the attack. According to the Panel, the mass-scale of the attack is explained in detail in paragraphs 178 through 190 of the Verdict.

---

[1] Obren Lazić, Božo Lazić, Srđan Bogdanović, Vojislav Sarić, Radivoje Gojković, and also the witnesses for the Prosecution „2", „4", „22", „34", „8", Žarko Gavrić and Emsud Herceg Mirza Lišinović, Redžo Delić, Sead Kikić, Žarko Gavrić, Edin Hadžović, Enver Šehić, Hasan Mustafić, witness 14, witness 6 paragraphs 172-190;

[2] The ICTY case, Appellate Panel, Kunarac et al. p. 102;

[3] Dragoljub Milutinović, Srđan Bogdanović, Vojislav Sarić and Cvijetin Sarić;

[4] Paragraph 271 of the First Instance Verdict – testimony of witness Srđan Bogdanović, Vojislav Sarić, Dragoljub Milutinović;

80. As to the findings in Section 1, although the Verdict stated that the accused had personally participated in the separation of men from women and children and controlled the weapons surrender, the defense legitimately indicates that, when it comes to the direct participation of the accused, it was not proved that by his acts he had given a decisive contribution to the commission of the criminal offense. As it follows from the evidence, the accused led a military police unit with a task to secure Major Stanković. He was located at the entrance in the village itself. He was present during the attack, when the buses arrived and drove away the population, that is, the overall events related to the actions of forcible resettlement were carried out in his presence. He was also seen collecting the seized weapons and distributing it around the police station[5].

81. The described actions for which reliable evidence exists do not have the character of the underlying acts. The accused did participate in the attack on Grapska in the manner as described herein. However, no piece of evidence exists to show that his acts reached the degree of decisive contribution.

82. The First Instance Panel did not give credence to these witnesses for the Defense, finding their testimonies uncorroborated by details and concrete facts. On the other hand, however, the First Instance Panel concluded that the accused too participated in the attack on Grapska and in the forcible resettlement. In doing so, the First Instance Panel provided no reliable reasons on the grounds of which it had drawn such a conclusion. Paragraphs 274 through 296 of the Verdict provided descriptive details with no piece of concrete evidence about the accused's involvement in the attack itself and the transportation of the population. Even paragraph 293 stated that he personally participated in the separation of men from women and the control of the weapons surrender. The only witnesses who brought the accused in connection with these acts are the witnesses „2" and „4". These witnesses testified that on the referenced day the accused personally deprived the life of minor D.D. and wounded Witness „2" in the village. The other witnesses referenced in the First Instance Verdict provided no reliable and precise information about the presence of the accused in the village itself. They are rather based on the assertions that the accused's unit known as *Predini vukovi* was located near the fountain at the entrance in the village and that the accused was present there during the loading of the weapons.

83. Bearing in mind the actions taken by the accused, the Appellate Panel finds that the accused participated in the commission of the referenced criminal offense as an accessory, not a co-perpetrator, as incorrectly qualified in the First Instance Verdict.

84. Article 31 of the CC BiH defines the accessory as:

> *(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*

[5] Witnesses Slobodan Đukić and Zoran Đerić;

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.

85. Accessory as a form of complicity means a support intentionally provided to someone to commit a criminal offense, including the actions enabling some other person to perpetrate the criminal offense.

86. The following established facts ensue from the conducted evidentiary proceedings. On the critical day, the accused commanded over a military police unit. They participated in the attack on the village of Grapska, while providing security for Major Stanković who led the attack. The accused was at the entrance in the village and he collected the weapons from the villagers and transported it to the police station. The defense did not contest these facts either, but argued that the guilt of the accused for the forcible resettlement of the civilian population could not be based on these facts.

87. However, defense witnesses Žarko Gavrić and Dragoljub Mičunović consistently confirm that they were located at the entrance in the village of Grapska, that the accused was also there, that Major Stanković called the villagers from the armored personnel carrier to surrender and that the villagers were passing them by (women and children), that buses came and drove away the villagers.

88. A large number of the villagers of Grapska boarded the buses in the immediate vicinity of the military police and the accused. Therefore, the accused clearly saw that the civilians were separated and bussed away. The mere presence of the military police and the accused with other members of the military participating in the attack contributed to the commission of the criminal offense.

89. Based on the facts established, the First Instance Panel drew an incorrect legal conclusion on the participation of the accused in the forcible resettlement of the population. Therefore, pursuant to Article 314(1) of the CPC BiH, and having partially upheld the appeal, the Appellate Panel revised the First Instance Verdict in terms of the legal evaluation and legal qualification of the offense.

90. The BiH Prosecutor's Office also filed an appeal regarding this section. The appeal stated that by the partial acquittal of the accused of the charges that he had killed minor D.D. and wounded Witness „2" the First Instance Court incorrectly established the decisive facts in the case. However, according to the Appellate Panel, the appeal of the Prosecution is ungrounded.

91. In the First Instance Verdict, the accused was acquitted of the charges for the mentioned actions because the identification of the accused by the witnesses "2" and "4" is questionable. These two witnesses were the only witnesses who had testified in favor of the prosecution regarding the referenced charges. The conclusion of the First Instance Panel is correct to this end. Minor D.D was killed, while Witness „2" was wounded in her right forearm, that is, in Grapska itself. The Appellate Panel established that no witness, as stated earlier in the text, testified that he had seen the accused in the village of Grapska personally to separate the men from the women. Witness 4 described that „a soldier was inviting the

villagers by megaphone to surrender", while witness Pero Tubić and Dragoljub Milutinović testified that Major Stanković had passed through the village in the personnel carrier calling the people via megaphone to surrender.

92. In addition to the foregoing, it is important to note that at the time of these incidents, when minor D.D. was killed and Witness 2 wounded, both these witnesses (2 and 4) did not know the accused from before the war, but only subsequently learned that the person who had allegedly fired was the accused. Such allegation can rightly cast doubt on the reliable assertion that the identification of the accused is sufficient for the establishment of responsibility of the accused.

93. The witnesses 2 and 4 are the only witnesses who described the incident. The Appellate Panel points to the correct argumentation of the First Instance Court regarding the identification of the accused: "The Panel has in mind the specific situation in which the witnesses "2" and "4" were (due to a close relationship with the victim). The Panel also took into account that specifically in the described circumstances it is not realistic to expect that the witnesses could memorize all the details that they indicated during their testimony….Through a natural process of unconscious reconstruction, even the most sincere witnesses can convince themselves that a certain matter could happen. The Panel accepts that these two witnesses sincerely believed that what they had described really happened in the manner as they described, but the Panel cannot exclude a very understandable and natural possibility that it was but their own reconstruction of the incident"[6]

94. By the appeal filed, the prosecution did not bring into suspicion the argumentation of the First Instance Court regarding the unreliable identification of the accused in relation to the killing of D.D. and the wounding of witness 2. Therefore, in relation to the acquitting part of the Verdict in this section, the Prosecution appeal should be dismissed as ungrounded.

II.1.2 Section 2 of the Operative Part of the First Instance Verdict

95. In Section 2 of the operative part of the contested Verdict, the accused was sentenced as a co-perpetrator of other inhuman acts that had caused in men mental and physical sufferings in front of the local center in the village of Bukovačke Čivćije. Kujundžić himself was sentenced for having beaten two inhabitants, former JNA officers. He was also sentenced because with his acts he had participated in severe deprivations of freedom.

96. The defense submits that the accused could not have participated in these acts because he was unable to participate due to his health condition as a result of an injury that he had sustained when he was wounded. The defense also contests the identification of the accused by the Prosecution.

97. In relation to the grievances concerning Section 2, in the part establishing the participation of the accused in the abuse of two soldiers in the center of Čivćije in front of

[6] Paragraph 310, page 69 of the First Instance Verdict.

the local center, the First Instance Verdict is mostly based on the testimonies of the witnesses „16“, and „20” and witness Ibro Spahić, but also the witnesses „8“, „32“, Edin Memić and Nezir Bečić. The first group of witnesses, “16” and the others, testified that the accused had come to the critical place subsequently, while his brother had already been on the spot. The other group of witnesses, „8“ and the others, testified that both the accused and his brother Nenad had been at the crime scene all the time.

98. The First Instance Panel gave convincing reasons about the personal participation of the accused in the abuse of two members of the former JNA. The First Instance Panel refers to the testimony of Witness 16 who had known the accused from before. The defense contests this testimony, noting that he did not know him well at all, referring to the question concerning the „incident” in February 1992 when the witness responded to the defense question concerning the acquaintanceship with the accused. The witness responded that he recognized the accused 80%.

99. However, the contested Verdict refers to this situation in paragraph 337 and provides reasonable and justified explanations to conclude that this witness can testify with certainty that the accused is the person about whom he testified in relation to this section of the Verdict. Even in the contested Verdict it is further explained in paragraph 338 why the Panel holds that this witness can be given credence. It is so because of the lack of personal motive and vindictiveness, which gives to this testimony a particularly clear factual strength. The Appellate Panel also upholds this view.

100. In addition to the foregoing, the Appellate Panel also notes that this witness testified that on one occasion the accused had saved hodja Nezir Bečić, which the witness Nezir Bečić himself confirmed.

101. The defense further contests the testimonies of the other witnesses because they did not know the accused personally. They brought the accused into relation with the incriminations concerning the abuse based on the indirect information about his identity. Also, the defense submits that the inconsistencies as to whether the accused had been at the crime scene or whether he came subsequently, are sufficient to bring into question the credibility of the testimonies of the Prosecution witnesses.

102. When it comes to the inconsistencies of the testimonies of the witnesses as to whether the accused was at the crime scene all the time or whether he came in a white golf, the Appellate Panel also agrees that this issue can be interesting and that to a certain extent it could diminish the possibility to establish the truth about the fact of the time when the accused was present at the critical location, but only if, for example, inconsistencies between only one witness as opposed to a group of witnesses existed. However, in the case at hand, a number of witnesses are stating both. This reflects only the fact that a number of witnesses did not see the same, namely, could not see the same with certainty due to different circumstances (position, focus of attention, etc.). Ultimately, this is irrelevant for the issue of the accused’s responsibility. It is important that all witnesses testified about his presence at one point of time and about his actions.

103. Witness 16 also described the manner in which two members of the JNA had been beaten. Witness 32, one of the victims, described in an identical manner how the accused

had treated him and his colleague on a critical occasion. This testimony is entirely consistent with the testimony of Witness 16.

104. The identification of the accused by Witness 16 is also corroborated with the identification by witness Muharem Hamidović who was detained in the *Perčin disco* camp after the incident in front of the Culture Center in Čivčije when he had the opportunity to see the accused while he performed labor in a field owned by a police officer. The defense also contested the identification of the accused by this witness. However, the witness described the accused and recognized him in the courtroom when he testified.

105. The reason to contest the testimony of witness Ibro Spahić is also the reliability of identification, given that this witness learned about the identity of the accused only subsequently, and that the accused Kujundžić understood this after hearing that the driver of the truck by which the Muslim detainees had been transported to the *Perčin disco* camp had addressed the accused by his surname „Kujundžić." However, this witness described the accused in the same manner as witness Muharem Hamidović and Witness 20, like a corpulent man with black hair. Witness Spahić stated that he had subsequently met the accused Kujundžić, but also his friend Golub. From the other testimonies in the case, it has already been established that the accused was frequently accompanied by one Golub Maksimović. The defense referred to the testimony of the driver Momčilo Kovačević who was named by witness Ibro Spahić, in which he denied that on the critical occasion he had transported Muslims to the *Perčin* disco camp. However, when the gravity of this incrimination is taken into account, quite a reasonable dilemma arises as to whether the witness would consciously testify that upon the order of the accused he is responsible for the transport of civilians to the location where they would be unlawfully detained.

106. When it comes to the establishment of the incrimination that the accused personally participated in the severe deprivation of freedom, the Verdict based the conclusions on the responsibility of the accused directly on the testimony of witness Ibro Spahić. This witness testified that the accused Kujundžić had ordered the bus driver who had come to pick up the gathered men, to drive them to the hangar, to which the bus driver responded having addressed him by his last name and asking which hangar; and the accused specified the hangar; and indirectly on the testimonies of the witnesses 8, 16, 20, Edin Memić and Emsud Herceg.

107. Also, the defense submitted that the defense witnesses had not seen the accused on the critical occasion on the critical location (witness Ratko Trifunović). Witness Đorđo Kujundžić stated that he knew that the action in Čivćije had been led by Nenad Kujundžić with members of the special police unit from Banjaluka. This was also confirmed by the defense witness Slobodan Jaćimović.

108. However, the First Instance Panel did not give credence to these witnesses, as explained in paragraphs 354–357. The Appellate Panel also upheld these arguments, given that their testimonies are at least problematic from the aspect of the earlier factual findings that had been confirmed by a number of witnesses. The Panel finds this rather indicative. For example, witness Ratko Trifunović testified that on the critical occasion he had not seen that something was happening at all in the center of the village of Čivćije and that „nobody harmed anyone there"; witness Živko Kuzmanović testified that he was not able to see

anything from the bus because it was raining and the windows were blurred. The other witnesses for the defense examined with regard to these circumstances denied the presence of the accused Kujundžić. They in fact testified that the unit of the accused's brother, Nenad Kujundžić, was the one that was present there.

109. However, these testimonies too do not deny the participation of the accused. This is so because the prosecution witnesses also testified that during these events the accused was together with his brother Nenad. That the civilians had been indeed abused in the center of the Čivčije village was confirmed by a number of witnesses who themselves were victims on the referenced day in June 1992.

110. When it comes to the health inability of the accused during his recovery period after he was wounded, the defense refers to the finding of Dr. Ljubomir Curkić that the accused was not capable of any physical efforts due to his health for 10-15 days after leaving the hospital. It follows from the documentary evidence (Exhibit 47) that he left the hospital on 25 May 1992 after his injury was treated.

111. However, the objection of the defense concerning the accused's health inability for the actions charged against him in this section is not grounded. After being wounded on 20 May 1992, the accused was medically treated until 25 May 1992 (Exhibit 47). The doctor's recommendation is that he should not take physical efforts in the following fifteen days. This is the period which ends around 10 June 1992, which can be considered as the ultimate end of the accused's recovery period. The incriminating incident occurred on 12 June 1992, which is two days after the end of the anticipated recovery period. However, even if these allegations were accepted as relevant, that the accused indeed was not able to do anything except for easy walking and speaking, that the accused indeed was not capable of harder physical efforts, it does not exclude the possibility of his presence in Čivćije on 12 June 1992. This is so because the conclusions regarding this incrimination are based on the testimonies of the eye-witnesses who confirmed that the accused had been there and acted in the manner as described in the operative part. Therefore, according to the Appellate Panel, the defense objection to the accused's health inability is ungrounded.

112. The contested Verdict also referred to Exhibit T41. This Official Note speaks about the presence of the accused in Čivčije. It was made by a person unknown to the defense. The appeal stated that the defense was not able to cross-examine this person. Therefore, it constitutes a piece of evidence on which the Verdict could not have been grounded. However, if the reasoning of the First Instance Verdict (p. 358) is analyzed, it is obvious that the Verdict is not based solely on this piece of evidence, albeit it is used as supporting evidence. To this end, the reasons of the Verdict are sufficient because this document addresses a general impression that the accused left, about his character, and not about his responsibility for these actions.

113. In relation to this section and section 3 of the operative part of the contested Verdict, after the expiration of the deadline for filing an appeal from the First Instance Verdict rendered on 30 October 2009, the defense submitted on 30 September 2010 a proposal of new evidence in support of the grounds of appeal concerning this section and section 3 of the operative part of the Verdict. Therefore, the proposal of new evidence was not submitted

with the timely filed appeal but subsequently, eleven months after the First Instance Verdict was rendered.

114. First and foremost, the Appellate Panel addressed two procedural situations related to the defense submission proposing new evidence. It was firstly considered whether this was the evidence which, in addition to due diligence and caution, could not have been submitted earlier, and whether the new evidence could even be considered despite being submitted beyond the deadline for filing the appeal.

115. Article 292(1) and (2) of the CPC BiH prescribes that an appeal against the First Instance Verdict can be filed within 15 days after the day of delivery of its copy in writing, and that the deadline for filing an appeal can be extended for additional 15 days. The defense submission was obviously filed beyond the deadline given that it was submitted eleven months after the First Instance Verdict was rendered. However, the defense submitted that this was a key piece of evidence denying the guilt of the accused.

116. Being led by the principle of fairness and bearing in mind that a strictly formal approach to the acceptance and consideration of potentially key evidence in the criminal proceedings, in favor of the accused, might be to the detriment of the accused and result in rendering an incorrect verdict, and also that the accused is not entitled to file an appeal, the Appellate Panel found it justified to consider these proposals for adducing new evidence.

117. This conclusion of the Appellate Panel concerns only the case at hand due to the specific circumstances of the case. It certainly does not mean taking a general view that all proposals of new facts and evidence are *a priori* accepted following the principle of fairness. Each individual situation when new evidence is being proposed beyond the deadline prescribed for filing an appeal will be decided in accordance with the concrete circumstances of the case.

118. Article 295(4) of the CPC BiH prescribes that: "New facts and new evidence, which despite due attention and cautiousness were not presented at the main trial, may be presented in the appeal …"

119. In relation to section 2, within the presentation of new evidence, the defense proposes that witness Predrag Radulović be summoned and heard. This witness testified in the *Stanišić* and *Župljanin* cases before the ICTY in May and June 2010. Therefore, it is obvious that these testimonies were given after the First Instance Verdict was rendered in October 2009. Therefore, this reasonably justifies why these testimonies were not available to the defense earlier.

120. The defense insists on the testimony of this witness. The defense submits that this witness would testify about the participation of the Special Police unit from Banja Luka on 12 June 1992 in the attack on the village of Čivćije, which unit was under the command of one "Japanac". The defense submits that Exhibit T41 – Official Note, partially referred to by the Verdict, was made with the intent to conceal the participation of the person whom Witness 32 had also described as a person with "slanted eyes". Witness 32 also testified that on the critical day he had been present on the critical location in the village of Čivćije, and

the person with a nickname "Japanac" was Radulović's assistant in the National Security Service in Banja Luka.

121. Having reviewed the submission containing an explanation of a possible testimony of witness Radulović, the Appellate Panel holds that the summoning of this witness is irrelevant for establishing the responsibility of the accused. The referenced submission of the defense does not explicitly point that this witness testified about the accused Kujundžić, his presence and the acts on the critical day in the village of Čivćije. The Appellate Panel notes that these testimonies constitute part of the proceedings against other accused persons and that his testimonies are related to the establishment of possible responsibility of the person called „Japanac".

122. In its submission, the defense addresses a mere conjecture and an ungrounded dilemma as to the „realistic" intent of the author of the referenced Official Note (T41). The defense proves with nothing a special and important correlation between the accused and one „Japanac" based on which it would be possible to exclude the presence of Kujundžić. This is so merely because „Japanac" and possibly his unit from Banja Luka also participated in the criminal acts charged against the accused in this case.

123. The defense contests the testimony of Witness 32. The defense submits that in the statement given during the investigative proceedings the witness did not state that the accused abused him, but that it was an unidentified soldier and lieutenant with „slanted eyes". However, the explanation given by the witness in his testimony, that a mistake was made in writing the record and that the lieutenant with slanted eyes commanded over the soldiers securing the place where the brothers Kujundžić abused them, seems quite understandable and reasonable and does not bring into question the reliability of the conclusion about the actions of the accused.

124. Therefore, it can be seen from the foregoing testimony that this witness testifies that both the accused and the person with „slanted eyes" were present at the critical place. Therefore, according to the Appellate Panel, a hearing of this witness would not reveal new facts to the Court, nor would the facts about which this witness would testify result in making a different conclusion from the one already drawn regarding this section and the responsibility of the accused. For the foregoing reasons, the defense proposal to hear witness Predrag Radulović is dismissed as an irrelevant piece of evidence.

II.1.3 Section 3 of the Operative Part of the First Instance Verdict

125. Under Section 3 of the operative part of the contested Verdict, the accused was sentenced because he participated in the inhuman treatment of 50 civilians of Bosniak and Croat ethnicity whom the members of his unit and the unit called Red Berets took out of the establishment *Perčin disco,* in which they were unlawfully detained, and who were used as human shields in the settlement of Makljenovac during active combat operations between the units of the BiH Army and the units of the RS Army; in the way that he failed to take necessary and reasonable measures to prevent that, although he was aware that these civilians were treated in a prohibited manner and that they would be exposed to a life threatening situation, and at least 17 civilians were killed on that occasion.

126. In the appeal, the defense does not contest the incident itself that took place in Makljenovac on 12 July 1992. The defense contests the identifications by witness Edin Hadžović and Witness 34 on which this section is mostly based as the direct evidence about the participation and the presence of the accused in the circumstances described in Section 3 of the operative part of the Verdict.

127. The defense contested the participation of the accused in the manner established by the Verdict. After the expiration of the deadline for filing an appeal, the defense submitted new evidence in support of the grounds of appeal in the submission, about which the arguments were already provided in paragraphs 113-117 of this Verdict.

128. The Appellate Panel has reviewed the transcripts proposed by the defense concerning this section, namely: the testimonies of Edin Hadžović, Obren Petrović, the witnesses JF 005, 006, 007, 008, 009 in the ICTY cases Jovica Stanišić-Frenki Simatović, the testimony of Edin Hadžović in the ICTY case Stanišić-Župljanin.

129. In this regard, the Appellate Panel finds that the defense appeal is grounded in the part that specifically contests that the accused was present when the men were taken out from the *Perčin disco* camp as a human shield, and that on the critical day he allegedly stood by a Praga gun (self-propelled anti-aircraft gun) at Makljenovac while combats were taking place, talked via a Motorola radio and approved soldiers to use them as a human shield.

130. The Appellate Panel will explain several disputable conclusions from this section which cast doubt on the existence of responsibility of the accused.

131. First and foremost, the Appellate Panel notes that it is not disputable that this incident indeed took place and resulted in the death of 17 detainees in the manner as established by the Verdict. It is also indisputable that the 10th Company of the Security Services Center Doboj that had been under the command of the accused was sent as a last reserve to the location of Makljenovac on 12 July 1992.

132. The First Instance Verdict established that on the critical day the accused was present at the referenced location and practically led the Company, having ordered soldiers to use the detained men from the *Perčin disco* as a human shield on the front lines, and that he saw the detainees moving toward the opposite party.

133. Furthermore, it was established that witness Edin Hadžović saw the accused "on the critical day at the frontline, standing by Praga and speaking via Motorola radio. Having finished his conversation via Motorola radio, the accused approved the soldiers to use the detainees as a human shield." The witness also testified that on this day the accused wore a camouflage uniform and a red beret. The conclusion drawn by the Panel on the overall responsibility of the accused is that he was aware of the unlawful acts of his subordinates but failed to prevent them from their intentions to commit these acts.

134. The identification of the accused in the contested Verdict is supported with the arguments concerning the fact that Hadžović knew the accused from before. This is additionally supported by the testimony of Witness 34.

135. The conclusions drawn by the First Instance Panel do not ensue from the testimony of witness Hadžović given on 23 June 2008 before the First Instance Panel. In his testimonies before the Court of BiH, the witness was not specific that it was exactly the accused Kujundžić who spoke over the Motorola radio and ordered "that the detainees be used as a human shield". Therefore, the conclusion drawn from his testimony is unreliable.

136. This witness testified that at one moment, at the location where they had been gathered prior to going to the "human shield", he saw the accused on the left side, standing by the Praga as he says,[7] that Milutin Blašković stood in front of him and that they waited for approval from Andrija Bjelošević for the human shield. From this part, but also from the rest of the referenced transcript, the Appellate Panel concluded that it could not be asserted with certainty that the accused spoke over the Motorola radio and that he ordered that the detainees be used as a human shield.

137. The same witness clarified his averments in his testimony in the *Stojanović* and *Župljanin* case before the ICTY on 26 April 2010. The defense proposed these transcripts in the new evidence. In the referenced testimony, witness Hadžović clarifies that both the Red Beret unit and the Predo's Wolves unit were present at the location where the detainees from the Perčin disco camp were gathered. He also testified that he heard an order by one Golub, also known as Crnogorac, that the detainees should be released and used as a human shield, that Andrija Bjelošević gave his approval and that Milutin Blašković spoke over the Motorola radio. The witness described Golub as a skinny person, in a camouflage uniform wearing a red beret, and with a visible scar on his right cheek.

138. A reasonable doubt was cast on the averment that the accused spoke over the Motorola radio and gave the order that the detainees be released into a human shield. The doubt concerning the correctness of the conclusion that the accused was present at the referenced location during these events additionally underlined the contradictions concerning the person called Golub. This is so because obviously it was Golub who led the Red Berets formation, and not Kujundžić's Deputy, Golub Maksimović, as mentioned by the witnesses 2 and 4, Kazimir Barulčić and Zoran Dević, and also the fact that during the entire evidentiary proceedings no witness testified that Kujundžić had a red beret.

139. Appellate Panel holds that the confirmation of the identification provided by witness Hadžović, made by Witness 34, on whose testimony the First Instance Panel relies, is not reliable. Pursuant to the Verdict, this is the second person who eye-witnessed the presence of the accused. However, being a circumstantial piece of evidence, this evidence cannot be sufficiently reliable so as to infer that the accused was present there. Witness 34 testified that on the critical day he saw the accused in front of the *Perčin disco* camp in the presence of a girl. However, the identification of Witness 34 is based on the information obtained from a detainee that the person who had appeared in the *Perčin disco* was the accused. He was told so by one of the detainees who had been detained with him in the *Perčin disco* a couple of days prior to the incidents on Makljenovac.

140. If we add to all the foregoing dilemmas also the fact that it follows from the evidence that the men from the *Perčin disco* were taken toward Makljenovac in the afternoon hours (witnesses 32, 16, 34, 8, Ibro Spahić, Edin Hadžović), that the accused's

[7] Page 40/41 of the testimony transcript dated 23 June 2008;

brother was wounded between 14.00 and 15:00 hrs as confirmed by the defense witnesses Slobodan Jaćimović and Dragiša Marković, while witness Vlado Petrović additionally testifies that he was with the accused on 12 July after 17:00 hours until the following day on 2 – 3 hrs after midnight when his brother returned from the Banjaluka hospital to which he had been sent from Doboj for surgery. Therefore, the defense explanation that the accused was not on the frontlines but with his brother is reasonable.

141. The Appellate Panel does not agree that the testimony of witness Petrović is contradictory to Exhibit T136. It follows from Exhibit T136 that Nenad Kujundžić underwent a surgery at around midnight 12 July. However, the witness did not specify the hour nor was it indicated in the document T136. However, in any case, this can mean that the surgery was actually carried out on 13 July if it was after midnight. Therefore, the testimony could in no way be contradictory to Exhibit T136.

142. The Appellate Panel finds that it cannot be reliably inferred from all the foregoing facts that the accused was present when the detainees were taken to be used as a human shield, because of which he cannot be expected to prevent these acts. It was not proved whether he had the awareness of the plan with the detainees and whether he was indeed able to prevent these acts.

143. For all the foregoing, the Appellate Panel concluded that the Prosecution evidence adduced in relation to this Count of the Indictment and also the facts ensuing from this evidence were not of such a quality that they can prove beyond a reasonable doubt the actual act/omission of the accused regarding these actions. Because of this, no decision on his guilt can be rendered with certainty. Therefore, having applied the *in dubio pro reo* principle, the Appellate Panel decided to acquit the accused on this count of the Indictment pursuant to Article 284(c) of the CPC BiH and alter the First Instance Verdict pursuant to Article 31481) of the CPC BiH.

II.1.4. Section 4 and Section 5 of the Operative Part of the First Instance Verdict

144. Under Section 4 of the operative part of the Verdict, the accused was sentenced based on the principle of individual responsibility for the criminal offense of Crimes against Humanity – Persecution in conjunction with the rape of Witness 2 and inciting others to rape which resulted in the rape of Witness 4; under Section 5 he was sentenced pursuant to the principle of individual responsibility as a co-perpetrator and an instigator of the same offense in connection with the acts of sexual enslavement.

145. With regard to this section, the defense submits that the witness did not know Witness 2 at all until December 1992. The conclusion of the Court about the responsibility of the accused is incorrect because the identification by the witnesses 2 and 4 for these acts is the same identification as for the act of deprivation of the life of minor D.D and the wounding of Witness 2, for which the Court established that the accused was not responsible for. Therefore, an issue arises as to how credence was not given to one part of the testimony of the witness, while it is asserted that the other part of the testimony is reliable.

146. The defense further submits that their testimonies are contradictory and differ in essential facts, while the First Instance Court incorrectly and incompletely explains the differences in the testimonies. The appeal also submits that due to his being wounded in May 1992 the accused was temporarily incapable of harder physical efforts that are certainly required in order to force a person into a sexual intercourse, and that expert witness Stojković asserted based on the medical history of the injured and the wounds of the accused (injury from 1982 and wounds from 1992) that the accused might be impotent.

147. The First Instance Court based the conclusions about the responsibility of the accused under this section on the testimony of Witness 2 who was injured by the criminal offense, and on the testimony of Witness 4 who eye-witnessed the rape. The First Instance Panel found that these witnesses testified in a detailed and convincing manner based on which it can be reliably concluded that the responsibility of the accused existed for the actions established in both these sections of the Verdict.

148. The Appellate Panel analyzed with particular caution the testimony of Witness 2 since it is the only direct piece of evidence for the acts of the accused, supported with the testimony of Witness 4.

149. This witness was noticeably traumatized during her testimony, but completely convincing and certain about the identity of the perpetrator. She gave detailed descriptions of the events and persons from this period and connected them with the feelings that she had at the time. Only a person who actually survived the events she describes can have such descriptions and impressions.

150. Secondly, it is very certain that the raped person will remember the face of the rapist. In the case of Witness 2, who spent the following months with him, there is no dilemma or doubt into her assertion regarding the identification of the accused. Even if her testimony was brought into question, her testimony is in its key parts supported with the testimony of Witness 4 who was present there during the rape and who was also raped by another person that accompanied the accused.

151. The statements given during the investigation (T10 and T11) are also principally identical or consistent with the testimonies and with each other. Witnesses 2 and 4 describe in the same manner the beginning of the attack on Grapska, the killing of minor D.D, the healing of the wounds of Witness 2 in the Doboj hospital, the arrival of the accused, the description of the accused, the description of the person who accompanied him. All descriptions of the events have a reasonable continuity that is similar both in the statements given during the investigation and the testimony at the main trial.

152. It is true that certain discrepancies in details exist. The defense indicated this both in the first instance proceedings and the appellate proceedings, for example regarding the number of soldiers who entered the room, or whether after being raped Witness 4 had an unbuttoned dress on her, or did not have it at all. However, as explained by the First Instance Court in the First Instance Verdict (p. 484), these are the details that must be considered having in mind the elapse of over 15 years. Therefore, the Appellate Panel agrees that it is quite reasonable to expect that certain differences will exist in the

testimonies. This is so because identical testimonies, repeated in an identical manner and without even minor discrepancies, can appear as learned and harmonized testimonies.

153. In the appeal, the defense also points to the discrepancies in the testimony of Witness 2 and the documentary evidence that does not match with regard to the place of baptism and the date of change of the full name of Witness 2. Therefore, the defense submitted the evidence on the change of the full name and the certificate of baptism for which Witness 2 clarified that „she was not surprised at all that the documents are different because those men then held all the power ".

154. Even if the defense submissions were accepted that Witness 2 changed her name in December and not in the summer of the same year, and that she was baptized in Derventa, and not in Bijeljina as she asserted, all this does not change the fact that credence can be essentially given to the witness, namely that she changed the name and was baptized. An issue arises as to why Witness 2 does not posses these documents from before, if the personal ID card, the excerpt from the register of births and the certificate of baptism were issued on the same day of her baptism, that is, when she changed her last name? The defense did not provide even an indication of response to this. The Appellate Panel holds that these differences do not essentially bring into question the credibility of the essence of the witness's testimony that is relevant for the establishment of the responsibility of the accused.

155. Another issue emphasized by the defense is the fact that the Panel characterized differently the unified testimony of the witnesses 2 and 4 who had testified about the circumstances referenced in Sections 4 and 5, but also in Section 1 of the operative part of the verdict. The First Instance Panel gave credence to one part of the testimony (for Sections 4 and 5), while it gave no credence to the other part of the testimony (for Section 1). Such conclusion is upheld in this Verdict because one should differentiate between the testimony which is an apparent fiction and the testimony which has no intention to avoid the truth, but lacks a realistic possibility to be credible.

156. In the case at hand, the testimonies of the witnesses 2 and 4 in relation to Section 1, the killing of minor D.D. and the wounding of Witness 2, do not have realistic possibilities to be reliable. This is so because there was no additional evidence for Section 1, while the circumstances described in Section 1 took place abruptly, the faces and actions interchanged continually, a large number of people were affected by the events that occurred during the attack on Grapska, general chaos and panic existed everywhere. Therefore, it is not reliable if the witnesses had sufficient time during which they could memorize in detail the appearance of the accused. For this reason, in relation to Section 1, their testimonies could not be taken as reliable with regard to the identification. This is the conclusion also upheld by the Appellate Panel.

157. Unlike these circumstances, the circumstances in which the accused used to come to the house of the witnesses 2 and 4 on a daily basis during a certain period of time, the months which Witness 2 was forced to spend in sexual enslavement with the accused constitute a reliable platform based on which the witnesses can get to know the accused and subsequently identify him. Therefore, the testimonies of the witnesses 2 and 4 in relation to Sections 4 and 5 and the identification of the accused are reliable.

158. The identification of the accused for the act of rape can be explained in the same manner. The witnesses related this identification to the attack on Grapska when they had allegedly seen him there first, and subsequently recognized him during the other events. However, the identification of the accused at the time of commission of the rape is additionally supported with the piece of evidence concerning the presence of one Golub on the critical day when the rape was committed, whom Witness 4 describes identically like Witness 22 and witness Žarko Gavrić.

159. All the foregoing suggests that the conclusion of the First Instance Panel about the participation of the accused in the referenced offense is correct. In his manner, the objections of the defense that the accused knew Witness 2 only since December and the objections concerning his physical inability as a result of his wounds are ungrounded and cannot be accepted. The defense failed to contest these submissions by its evidence.

160. Furthermore, the statements of Witness 2 and the testimony given during the trial constitute a clear review of severe offenses that inevitably caused severe traumatic consequences for the victim. It was also noted during the testimony that the victim was extremely vulnerable and shaken with the refreshed memories.

161. In relation to Section 5 of the operative part of the Verdict under which the accused is sentenced that after he raped Witness 2 he kept her in sexual enslavement, the defense firstly objected that the accused had not known Witness 2 at all until December 1992. The defense further points to the testimony of the witness Milenko Bilić. This witness stated that he had lived with Witness 2 for almost two months. Therefore, the responsibility of the accused for sexual enslavement is excluded for this period. The next issue due to which the credibility of the witness is undermined according to the defense is the fact that Witness 2 testified that a day after the rape she was taken to the AMD Doboj where the accused waited for her. It follows from the evidence that he took over the duty of the Director of AMD Doboj no sooner than on 1 February 1993.

162. The conclusion of the First Instance Court that the accused had control over Witness 2 is based on the fact that he forced her to read at the Radio Doboj who was to blame for the outbreak of the war, to wear a cross around her neck, a camouflage uniform and a red beret. These are certain findings that the First Instance Court considered as evidence of slavery and control over Witness 2. The conclusions are based on the analysis of only two witnesses so the defense objects in the appeal that no other witness corroborated these allegations.

163. The responsibility of the accused for these acts is explained in the Verdict paragraphs 536 – 539. In the appeal, the defense in fact raises the same objections and insists that the Panel review the conclusion of the First Instance Panel not accepting the defense thesis that the relationship between the accused and Witness 2 was on a voluntary basis and that she attempted to continue being on good terms with both the accused and Vinko Topalović.

164. However, as also reasoned in the First Instance Verdict, paragraph 536, Witness 2 was in fact a child at the time when these events took place. The possibility to oppose the accused or anybody else is in such circumstances reduced to minimum. Also, the possibility that she used the referenced manipulations is not in accordance with her maturity and age.

On a number of occasions, the witness stated that she had felt enormous fear. During the testimony, she was very distressed. Anyway, had the relationship with the accused been voluntary and had they been on good terms, the accused would not have subjected her to the experiences she had gone through since the spring of 1992.

165. The team of experts who had analyzed her mental state diagnosed a severe form of PTSP in Witness 2. Therefore, it is not logical that if she had really been in such a relationship with the accused that she would be so traumatized due to all the experiences that she survived. The defense, *inter alia*, contested the acceptance of the finding and opinion of the team of expert witnesses for the Prosecutor's Office. The defense submits that accepting this opinion and not accepting the opinion of expert witness Stojaković is erroneous. This is so because the finding of the prosecution expert witness is incomplete since the defense expert witness used for his analysis abundant and various materials that were not used by the prosecution expert witnesses, and reached a different conclusion, namely that the trauma of the aggrieved Witness 2 could not have appeared during the war, but only subsequently. The defense submits that such a diagnosis cannot generally be connected with the personality of the aggrieved party who performs such jobs which cannot be performed by a person with a severe trauma.

166. The Appellate Panel already determined that the fact that the defense expert witness was not allowed to examine Witness 2 constitutes a relative violation, but not of such importance to bring into question the conclusion of the contested Verdict about the guilt of the accused. In paragraphs 43 through 53 above, the Appellate Panel already gave its evaluation of these findings. Finally, it provides a review of the mental state of the witness and explains certain reactions during the testimony. However, for the establishment of the responsibility *per se* of the accused, the opinion of the expert witnesses is not relevant. This is so because an impaired mental state of the victim is not prescribed as a separate element of the criminal offense. The opinion of an expert witness is taken as a relevant piece of information and it *per se* does not affect the conclusion on the responsibility of the accused in the case at hand.

II.1.5. Section 6 of the Operative Part of the First Instance Verdict

167. The accused Kujundžić was found guilty because he treated in an inhuman way Bosniak civilians in the way that, on arrival at the Central Prison in Doboj, where the protected witness "6" was detained, he forced him to play the "Russian roulette" using the accused's pistol; during 1993, together with 5 unidentified soldiers, he came to the apartment of the protected witness "14", where they physically abused him.

168. In the appeal, related to section 6 of the operative part of the Verdict and the abuse of Witness 6, the defense contests that the incident took place at all and that Witness 6 is the only witness regarding these circumstances. The defense contests the motive of the witness to tell the truth and submits that the First Instance Court should have paid more attention to his testimony in the operative part of the Verdict.

169. It is firstly contested that the referenced event took place in the Central Prison in Doboj, because the witness asserted that it had taken place in the PSC Doboj.

170. The defense then brings into question the findings regarding the status of the accused because until July '92 the accused was a member of the military police. Therefore, an issue arises as to why he would come to the PSC.

171. The defense submits that the operative part of the Verdict is contradictory to the testimony of the witness who testified that the accused had not slapped him, but that it had only been „a slight hit over the face, from which he did not feel any physical but mental pain."

172. The defense tries to further discredit Witness 6 by stating that in August 2006 he gave a statement to the BiH Ministry of Security in which he did not mention this incident with the accused. Only subsequently, when the examination adjourned in August resumed, in the statement dated 12 October of the same year, did the witness mention the accused and this incrimination.

173. Finally, in relation to this section of the operative part of the contested Verdict, the defense submits that Witness 6 gave a statement also in the case against *Nikola Jorgić* that had been conducted in the SR Germany and that, in relation to this case, this witness testified that Nenad Kujundžić had abused him. However, it cannot be concluded from the defense arguments whether in the referenced testimony this witness denied the actions of the accused and indicated Nenad Kujundžić as the perpetrator of those actions, or the witness also testified about being abused also by Nenad Kujundžić. According to the Appellate Panel, the acts of the accused and the incident itself about which Witness 6 testified do not exclude the abuse of the witnesses in the Central Prison also by other persons because he spent several months there.

174. Having considered all the foregoing grievances, the Appellate Panel concludes that the findings in this part of the contested Verdict are based on reasonable conclusions supported by the facts.

175. The objection that the witness stated that the abuse by the accused took place in the PSC Doboj, and not in the Central Prison, is not an objection that excludes the existence of the criminal responsibility of the accused. If the testimony of Witness 6 is analyzed, it is obvious that the witness stated that he had been brought to the Central Prison and that the beatings and the abuse of him and the other detainees took place inside the compound of the Secretariat of Internal Affairs or on the premises thereof. The witness even called this place, the Central Prison to which he had been brought, a camp, and stated that he spent around several months there. It follows from the questions that he was asked by the prosecution that the Central Prison was indeed located in the very building of the Secretariat of Internal Affairs.

176. When it comes to the objection that Witness 6 was not slapped by the accused as determined in the contested Verdict, the witness stated that the accused had slapped him, but that it was „a mild slap on the face that caused no injury" because "probably after so severe abuse and all that the man felt this slap as nothing.[8]" Therefore, it is clear from the testimony of the witness himself, and based on a reasonable conclusion, that such a blow constitutes a slap for the witness and can be of different intensity.

[8] Transcript of the testimony of Witness 6, p. 104/105 dated 27 June 2008.

177. Furthermore, the defense tries to discredit the witness by stating that when he gave the statement in 2006 to the Ministry of Security, in the first examination in August of the referenced year, the witness failed to state that these incriminating actions happened to him and that the accused participated in them. However, the Appellate Panel notes that the testimony of Witness 6 is abundant with details and that the failure to mention the accused in the first part of the statement in August 2006 does not necessarily have to mean anything since he is subsequently mentioned in the part in which the witness explained that he experienced the incriminating actions in which the accused participated.

178. Also related to the foregoing is the objection that the defense was not presented with the statements given by this witness in the case against Jorgić in the FR Germany, in which he described that the accused's brother Nenad had taken him in front of the cell and abused him. However, this particular statement was not even admitted into evidence. It is an indisputable fact that during the time he spent in the Central Prison the witness was subjected to constant beatings and abuse by different individuals. The mere mentioning that the accused's brother had abused him as indicated in the statement does not affect the correctness of the conclusion of the First Instance Panel that the accused is guilty of the incriminating actions charged against him, and that this witness also experienced other separated abuses.

179. When it comes to the incident concerning the abuse of Witness 14, the appeal also contests this incident by stating that the conclusion of the First Instance Panel regarding the responsibility of the accused is erroneous and incomplete.

180. The defense objected to the entire Section 6 of the operative part of the Verdict, that the Verdict did not at all address the facts concerning the status of the accused in which he acted when he allegedly committed these acts, whether he was a member of the military, the police or paramilitary units. Also, it was not clarified why the accused had allegedly abused Witness 14, and whether the discriminatory intent was clearly determined. The defense also contests the truthfulness of the averments of Witness 14 and argues that his testimony is contradictory to the statement that he had given during the investigation.

181. In the contested Verdict, the First Instance Panel based the conviction on the testimony of Witness 14 as a direct piece of evidence, and on the circumstantial evidence concerning the personality and the character of the accused and the reputation of the Predo's Wolves unit.

182. The Appellate Panel analyzed the testimony of Witness 14. The witness described in detail the arrival of the accused in his apartment with a number of persons. He stated that among them he only knew Predrag Kujundžić from before. He also knew that during the war he had worked in the „Autoprevoz" Company. The Appellate Panel finds that the Verdict provided sufficiently convincing reasons based on which it can be justifiably and with reasonable arguments concluded that the responsibility of the accused exists for the actions referenced in this incrimination and that the testimony of Witness 14 is reliable.

183. The objections raised by the defense were already addressed in the First Instance Verdict. The Appellate Panel does not find that by these objections the defense brought into

question the conclusions of the First Instance Verdict. The only issue particularly raised by the defense is the issue of discriminatory motive in the acts of the accused against Witness 14 and whether these acts qualify as the elements of persecution.

184. In relation to this, the elements of persecution in the acts of the accused were reasoned in paragraphs 585 through 596 of the First Instance Verdict. The Appellate Panel finds that the arguments given by the First Instance Panel are justified, and that it can be justifiably and reasonably concluded that it is exactly discrimination that was the motive for the accused to treat badly Witness 14. The fact that Witness 14 is a Bosniak, and that the continuity of the acts committed by the accused runs contrary to the rules of international law against non-Serbs during the entire period since the beginning of war, speak in support of the fact that the ethnicity different from the accused's ethnicity was the basic motive for his actions. This particularly refers to the actions against Witness 6 whom the accused personally knew well and about whom Witness 6 stated that he had considered him and his family as friends.

185. That the testimony of this witness is sincere the Panel concluded also based on the fact that in addition to the incident about which the witness testified, the witness also testified that during his entire presence in Doboj he did not have any similar experiences and was not abused. He even stated that he had seen the accused during the war, that they had known each other by sight, but that until then he did not experience any similar inconveniences caused by him.

186. Furthermore, during the first instance proceedings, ample evidence was adduced about the authority of the accused. Witnesses for both the prosecution and the defense testified about his authority. The very name of the unit *Predini vukovi* speaks sufficiently about the authority of the accused in the Doboj territory. This authority enabled the accused to enter unobstructedly the premises of the police building in Doboj and his contacts with Witness 6 while he was detained in the Central Prison in Doboj.

187. Regarding the status of the accused at the time of commission of the criminal offense referenced in section 6 of the operative part of the First Instance Verdict, the Appellate Panel emphasizes that it is entirely irrelevant whether the accused was a member of the military or civil police or some other military or paramilitary formation at the time. Witnesses 6 and 14 testified that at the time of the commission of the criminal offense the accused was in uniform and armed. The behavior of the accused toward these witnesses was a part of the overall negative behavior of the accused in relation to the non-Serb population in the territory of the Doboj Municipality from spring 1992 to autumn 1993.

188. The Appellate Panel does not accept the grievances of the defense and finds that with regard to this section the First Instance Verdict is correct and based on grounded reasons.

II.1.6. Count 4 of the Indictment – Acquitting Part of the First Instance Verdict

189. The accused is acquitted of the charges that on 19 July 1992 the members of his unit, so-called *Predini vukovi,* came to the *Perčin disco* camp and exposed the detained non-Serb

civilians to a several hours long torture and inhuman treatment by punching and kicking them, hitting them with chains, batons, cables and other items all over their bodies, thereby inflicting on them severe physical injuries; they forced several detainees, including Edin Memić, to eat soap, forced them to beat each other, particularly insisting that close family members beat each other, thus they forced protected witness "8" to beat his cousin; the Accused knew about all these actions, but did nothing to prevent them, or to punish the perpetrators, whereby he would have committed the act of torture as referred to in Article 172(1)(f) of CC of BiH, in conjunction with Article 180(2) of CC of BiH.

190. The accused was charged that on 19 July 1992 he failed to prevent members of his unit *Predini vukovi* from abusing and torturing non-Serb civilians from the *Perčin disco* camp. For the establishment of his responsibility, no element of awareness of the actions of his subordinates was satisfied based on which he would be obliged to prevent such actions and punish the perpetrators.

191. The prosecution filed an appeal by stating that regarding this incrimination the First Instance Panel did not establish the facts correctly. This is so because it could be concluded from the circumstances of the case that the accused knew or at least had reason to know that crimes were committed by members of his unit.

192. The prosecution appeal indicates that on the critical day the Orthodox religious service "sedmina" /*trans. note*: *seven days upon the death*/ was held for the accused's brother that was attended by both the accused and members of his unit. According to the Prosecution, the accused „could not but observe" the anger, hatred and the vindictiveness of his subordinates toward the detained non-Serbs. According to the prosecution appeal, the accused „had to be aware of personal characteristics" of his subordinates. The prosecution also referred to Exhibits T35, T41 and T42, from which it ensues that the entire unit was violent and that even the legal authorities did not dare to oppose them.

193. The prosecution concludes that the fact that not even after the arrival in the *Perčin disco* camp after the crimes had been committed by his subordinates did the accused ask any questions, speaks in support of the fact that he had already known everything and that he was „intentionally blind". In the end, the standard "had reason to know" is sufficient to establish the existence of responsibility.

194. The prosecution appeal is not grounded. Indeed, based on the testimonies of the witnesses-victims 16, 8, 10, Edin Memić, Ibro Spahić and Emsud Herceg the First Instance Panel established that the abuse in the *Perčin disco* camp did occur. However, in paragraphs 468 and 469 of the contested Verdict it was clearly explained why the responsibility of the accused for these acts was not established. No piece of evidence whatsoever was adduced based on which it could be undoubtedly concluded that the accused knew or had reason to know of the actions of his subordinates and that he could prevent the commission of the offense; that is, no piece of evidence was adduced that the accused subsequently learned about this offense so as to take action to punish those responsible.

195. None of the witnesses saw the accused at the location. There is no evidence on his presence. Also, there is no evidence about the accused's control over the *Perčin disco* camp itself or that he had certain powers there. The prosecution argument that this could be

concluded based on the circumstances of the case, if it were accepted, would mean that this Court can base its conclusion on an assumption that is not based on a concrete, lead piece of evidence.

196. All the evidence adduced indicates that the abuse did exist, but also that other units were entering the *Perčin disco* camp in addition to the *Predini vukovi* unit. The Appellate Panel notes that the standard of establishing the facts in the criminal proceedings is based on the principle of establishing a fact beyond a reasonable doubt, while any doubt as to the existence of decisive facts the Court must resolve in the manner that is more favorable for the accused.

197. Finally, as it follows from the contested Verdict, the facts and the circumstances from which the knowledge of the accused would ensue were not stated in this count of the Indictment. Also according to this Panel, this count of the Indictment is based only on the facts concerning the actions of members of the unit of the accused, citing the legal grounds for the accused's responsibility. However, the standard required for bringing proper charges, as stated in paragraph 471 of the contested Verdict and also concluded by this Panel, is that the facts and the circumstances from which ensue the elements of the required criminal offense must be concretized. In the case at hand, in the operative part of the Indictment, it should have been indicated under this count in which manner the accused knew or could have known about the commission of the criminal offenses by his subordinates (information about the surrounding, his presence, details about his behavior that could be related to his knowledge of the incident but also his failure to punish the perpetrators, etc.), which would, categorized as a legal standard, constitute all the elements of the required criminal offense based on the command responsibility pursuant to Article 180(2) of the CC BiH.

198. Due to all the foregoing, the Appellate Panel finds that in relation to this section, the facts were correctly established and based on such things and available evidence a complete conclusion drawn. Therefore, the prosecution appeal related to this part is dismissed as ungrounded.

III VIOLATION OF THE CRIMINAL CODE

III.1 The first part of the complaints concerning the application of substantive law

199. Under the First Instance Verdict, the Accused Predrag Kujundžić was found guilty of the criminal offense Crimes against Humanity in violation of Article 172(1)(h), in conjunction with the acts referred in subparagraphs d) in conjunction with Article 29 and Article 180(1) of the CC BiH, in relation to Section 1 of the operative part of the Verdict; subparagraphs e) and k) in conjunction with Article 29 and Article 180(1) of the CC BiH in relation to Section 2 of the operative part of the Verdict; subparagraphs a) and k), in conjunction with Article 180(2) of the CC BiH in relation to Section 3 of the operative part of the Verdict; subparagraph g), in conjunction with Article 30 and Article 180(1) of the CC BiH in relation to Section 4 of the operative part of the Verdict; subparagraph g), in conjunction with Articles 29 and 30, and Article 180(1) of the CC BiH in relation to Section

5 of the operative part of the Verdict; subparagraph k), in conjunction with Article 29 and Article 180(1) of the CC BiH in relation to Section 6 of the operative part of the Verdict.
200. The accused is found guilty because during the period from spring 1992 until autumn 1993, within a widespread and systematic attack of the army and the police of the so called Serb Republic of BiH, later Republika Srpska, and the paramilitary formations directed against the civilian non-Serb population of the Doboj municipality, knowing of such attack, as the commander of the unit called *Predini vukovi* /Predo's Wolves/, which acted within the military until July 1992 and then within the police forces, he committed, incited and knew, but not prevented: killings, severe deprivations of physical liberty in contravention of the fundamental rules of international law; sexual slavery; rapes; persecution of non-Serb civilian population on political, national, ethnical, religious and cultural grounds; and other inhuman crimes committed with the intention of inflicting great suffering, severe physical injuries and health damage.

201. In the appeal, the defense states that the existence of constituent elements of the criminal offense of Crimes against Humanity was not proved. Firstly contested is the finding in the First Instance Verdict that the accused knew about the widespread and systematic attack on the civilian population, and that his actions were part of the attack, because the accused was never a commander, but the chief of a Military Police unit. At the time of the conflict in the village of Grapska on 10 May 1992, the accused's task was to secure the JNA Command led by Major Milovan Stanković.

202. Contrary to the argument in the First Instance Verdict, the defense submits that there was no widespread attack, but a legitimate military action directed exclusively against military targets. Therefore, all the foregoing circumstances that took place suggested in no way any violation of international humanitarian law. This means that the accused could not have been aware of the unlawfulness of such an attack.

203. Also, it is not clear why the accused is being brought into connection with the incidents in the village of Bukovačke Čivćije and Kotorsko given that these places were in the zone of responsibility of the Krajina Corps, which launched the military action „Koridor" during June 1992, and also with the village of Ševarlije in relation to which another person has already been convicted by a final verdict.

204. As established in the contested Verdict, the attack itself during which the criminal offense charged against the accused was committed, is characterized as a widespread and systematic attack launched against the civilian population. The evidence on which this conclusion is based is abundant, and the arguments of the First Instance Panel in that regard are detailed (paragraphs 161-194). First and foremost, paragraph 161 of the contested Verdict provides a definition of the act itself of the attack. According to the Appellate Panel, the events that took place in Grapska and the entire Municipality of Doboj indeed constitute an act of violence given that the result and the consequences of such attack are destroyed religious objects in the territory of the entire municipality, shelled and burnt houses, mass-scale expulsion and killing of the civilian population. Therefore, in this case, there can be no discussion about a legal military action if it is directed at the above mentioned civilian objects and population.

205. That the attack was both systematic and widespread ensues from the testimonies of a number of the prosecution witnesses[9] who described the events in Doboj at the political scene that preceded the attack, primarily the repercussions of ethnic divisions that were reflected on the employment of non-Serb population, namely that there was a mass-scale firing of all non-Serbs from their work posts. According to these witnesses, all this took place during the period from the autumn of 1991 through the spring 1992. Simultaneously with these events, the military from Serbia and Montenegro came to the territory of the Municipality. The local Serb population organized its own military and the police. The military of Srpska Republika occupied Doboj entirely. The entire Muslim population was invited to surrender the weapons, which would then guarantee their security. Grapska was shelled in May, and thereafter the villages of Kotorsko, Ševarlije, Dragalovci, Bukovačke Čivćije, and eventually the city of Doboj itself.

206. The defense contested none of these facts, although it considered these events as a legitimate military action to unblock the road. However, according to the Appellate Panel, the First Instance Panel correctly concluded based on all the foregoing circumstances that all the events in the territory of the Municipality Doboj constituted a widespread and systematic attack against the civilian population.

207. From the evidence adduced, as correctly concluded by the First Instance Court too, the attack on the non-Serb population included the entire territory of the Municipality of Doboj and the time period from the spring 1992 to the autumn 1993. During 1992, Bosniak and Croat civilians were kept in prisons where they were exposed to physical and mental abuse.[10] Furthermore, during the autumn 1993, the non-Serb population in Doboj was exposed to abuse in their homes by the Serb forces.[11] By its appeal, the defense failed to cast doubt in a quality manner on these two conclusions of the First Instance Panel.

208. As to the connection of the accused with the attack, as contested by the defense, the commission of this crime requires to be established if the accused is aware of the attack and that his acts fall within this attack, that is, whether they could become part of the attack.

209. The First Instance Court related the accused to the attack based on his membership in the formations that participated in the attack. The accused committed the referenced crimes together with members of military, police and paramilitary groups that participated in the widespread and systematic attack in the territory of the Municipality of Doboj. The actions taken at the time in the territory of the Municipality of Doboj were a part of the overall events and cannot be separated in any way from the context of the attack. These actions were committed exclusively against non-Serbs, as ensues from all the prosecution evidence adduced.

210. The defense did not contest the fact that the accused was a commander of a military police unit and a member of the Army of Republika Srpska. In fact, the defense argues that on 1 July 1992 this unit became a part of the 10th Company of the CSB Doboj, after which the accused was no longer the commander of the unit.

[9] The witnesses mentioned in paragraph 172 of the First Instance Verdict.
[10] Testimony of Witness 6.
[11] Testimony of Witness 14 and 24.

211. Based on the evidence adduced by both the prosecution and the defense, it is clear that the accused was the commander of the military police unit in the 1st Ozren Light Infantry Brigade since October 1991 and commanded over the unit until 1 July 1992. Since the defense did not contest this fact, the Appellate Panel does not find it necessary to explain this fact any further.

212. In fact, the defense contests the command status of the accused in the events referenced in the Indictment that took place on 12 July and 19 July 1992 concerning the *Perčin disko* building. According to the Prosecution, command responsibility exists on the part of the accused for these incidents.

213. It is important to emphasize that the Appellate Panel altered the First Instance Verdict and acquitted the accused of the charges that he committed the criminal offenses under Section 3 of the operative part of the First Instance Verdict. This section concerns the command responsibility of the accused for the killings and other inhumane acts (human shield) that took place on 12 July 1992. Also, the Appellate Panel upheld the acquitting part of the First Instance Verdict for the incident that took place on 19 July 1992 which also concerned the command responsibility of the accused.

214. Since the accused has been acquitted of the charges for both these incidents, any further consideration of the command status of the accused in these events is legally irrelevant. Therefore, the Appellate Panel finds unnecessary to further address the arguments of the defense appeal regarding the command status of the accused in the events described in the Indictment concerning the *Perčin disco* building in July 1992.

215. The defense further contests that the intent of the accused to commit the underlying act of persecution and the intent to persecute the victims on political, racial or religious grounds were proven. The Appellate Panel finds these arguments ungrounded.

216. The arguments concerning the persecution are explained in detail in paragraphs 585-600 of the First Instance Verdict. The Appellate Panel upholds these arguments in their entirety. As concluded by the First Instance Court: "The Panel concludes that all described actions exactly had, as their intention, the discrimination of the victims on the grounds of this identity, which undoubtedly is contrary to the rules of international law. Such conclusion is based on the described words and actions of the Accused during the perpetration of the referenced crimes referred to in particular sections of the Operative Part of the Verdict."[12] The defense arguments of the appeal failed to contest in any way such conclusion regarding the discriminatory behavior of the accused.

III. 2 The second part of the grounds of appeal concerning the application of substantive law

217. The defense submits that in this case the Criminal Code of the SFRY[13] should have been applied instead of the CC BiH because this Code was applicable at the time of the

[12] Page 139, par.597 of the First Instance Verdict.

[13] See: Decree with the force of law on the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia that was adopted as the Republic law during the imminent danger of war or during the state of war (Official Gazette of the RBiH

alleged commission of the criminal offense. At the same time, this Code is also a more lenient law to the perpetrator.

218. The defense notes a number of cases that were conducted before the lower instance courts in which the CC SFRY was applied. The defense considers it inacceptable that one party to the proceedings (the BiH Prosecutor's Office) determines the jurisdiction of the court, thereby enabling discrimination against citizens on national, religious, political, racial or other grounds.

219. The defense grounds of appeal regarding the application of substantive law are ungrounded in their entirety.

220. It is indisputable that at the time of commission of the offense charged against the accused, which satisfies the essential elements of the criminal offense of Crimes against Humanity in violation of Article 172(1) of the CC BiH, the referenced criminal offense was not prescribed as such by the criminal law that was in effect at the time (CC SFRY).

221. It is also indisputable that, pursuant to the principle of legality, no one shall be sentenced for the offense that prior to its commission was not prescribed by law or international law as a criminal offense, and for which a punishment was not prescribed by the law[14]. Pursuant to the principle of time constraints regarding the applicability of the criminal law, the law that was in effect at the time of commission of the criminal offense shall be applied to the perpetrator of the criminal offense, and 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.[15] However, Article 4a of the CC BiH, as rightly referenced to by the First Instance Verdict, prescribes that Articles 3 and 4 of the CC BiH 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. With such legislation, Article 7(2) of the ECHR and Article 15(2) of the ICCPR were adopted, and exceptional departures from the principles set out in Article 4 of the CC BiH enabled.

222. The First Instance Panel rightly indicates that the foregoing concerns this particular case because it addresses the incrimination involving violations of the rules of international law. At the critical time, the criminal offense of Crimes against Humanity constituted a criminal offense both from the aspect of customary international law and the aspect of principle of international law. The First Instance Panel provided detailed and exhaustive arguments which are, according to the Appellate Panel, valid and correct in their entirety. Therefore, this Panel upholds them in their entirety.

No.6/92) and the Law on Confirmation of the Decrees with the Force of Law (Official Gazette of the RbiH No. 13/94).

[14] Article 3 of the CC BiH: „*(1) Criminal offences and criminal sanctions shall be prescribed only by law. (2) 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.*"

[15] Article 4 of the CC BiH: „*(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. (2*) *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.*"

223. Furthermore, the Appellate Panel finds correct the view of the First Instance Panel that BiH, as a successor state of the former SFRY, has ratified the ECHR and the ICCPR, and that these international documents are obligatory for BiH, and given that they prescribe the obligation to put on trial and punish persons for any commission or omission that constituted a criminal offense at the time of its commission pursuant to general principles of international law, which the crimes against humanity indisputably are, the grounds of appeal contesting the decision of the First Instance Panel in this regard are ungrounded in their entirety, and are therefore dismissed as such.

224. The defense appeal indicates that the CC SFRY was more lenient to the perpetrator in relation to the applied code. The Appellate Panel notes that due to the fact that at the time of commission of the criminal offense the CC SFRY did not legally prescribe crimes against humanity as a separate criminal offense, it *prima facie* ensues that the CC BiH could be a more lenient law. However, as already stated, Article 7(2) of the ECHR and Article 15(2) of the ICCPR, that are identical to Article 4a of the CC BiH, exceptionally allow departures from the principle of legality and do not prevent the trial and sentencing of the accused in this specific case. Therefore, pursuant to the existing system of sentencing, the First Instance Court was able to impose an appropriate sanction for the criminal offense prescribed by international law. Such procedure is identical to the case law of the European Court of Human Rights where the requirements of the principle of legality under Article 7 of the ECHR were reviewed and in which the sentences imposed nowadays for the offenses committed during the period when such actions were not sanctioned as a criminal offense were never brought into question.[16]

225. Therefore, the appellate argument of application of a more lenient law and the applicant's referring to other cases in which the law that was in effect at the time of the commission of the criminal offense was applied is not a relevant or grounded complaint.

IV DECISION ON THE CRIMINAL SANCTION

226. An appeal from the decision on sentence can be filed on two different grounds, as prescribed in Article 300 of the CPC BiH.

227. The appeal from the decision on sentence can be filed first and foremost based on the fact that the Trial Panel did not apply the relevant statutory provisions in meting out the punishment.

228. On the other hand, the appeal may contest the decision on the sentence because the Trial Panel exercised its discretionary powers in determining the appropriate sentence.

229. The BiH Prosecutor's Office filed the appeal stating that the accused should have been sentenced to a longer time in prison. According to the prosecution, this is so because the First Instance Panel did not give sufficient importance to the aggravating circumstances as opposed to the mitigating ones, and also incorrectly evaluated the circumstances of his earlier life and his conduct after the commission of the criminal offense.

[16] Kolk ans Kislyiy vs. Estonia, No.23052/04 and No.24018/04 ECHR 2006/1
Penart vs. Estonia, No.14685/04 ECHR 2006-I

230. However, having considered the defense appeal, the Appellate Panel did not find it proved that the accused is responsible for the commission of the acts referenced in Section 3 of the contested verdict, the result of which is the killing of 17 detainees from the *Perčin disco* camp.

231. With such state of facts, the Appellate Panel does not agree that the First Instance Court gave insufficient weight to the aggravating circumstances, bearing in mind the weight of these underlying acts and the earlier imposed punishment, which it finds correctly meted out. However, the punishment imposed by the verdict of the Appellate Panel must be adjusted to the new and final findings about the acts committed.

232. By the First Instance Verdict the accused was sentenced to 22 years of long imprisonment. The Appellate Panel emphasizes that the Trial Panel has a wide margin of discretionary power in determining an appropriate punishment because the Trial Panel is in the best position to weigh and evaluate the evidence adduced at the main trial. Accordingly, the Appellate Panel will not interfere with the findings of the Trial Panel about the aggravating and the mitigating circumstances, nor with the importance that was given to these circumstances, except if the appellant does not prove that the Trial Panel abused its wide discretionary powers.

233. In the appeal, however, the Prosecution did not prove that the Trial Panel had given weight to unimportant and irrelevant issues when it initially meted out the punishment against the accused, and that it had not given weight or sufficient weight to relevant issues, that it made an obvious error in relation to the facts to which it had applied its discretionary powers, or that the decision of the Trial Panel was unjustified to such an extent, or simply unfair, so that the Appellate Panel could infer that the Trial Panel did not use its discretionary powers in an appropriate manner. Therefore, as to the initially imposed sentence, the Appellate Panel finds that the appeal of the BiH Prosecutor's Office is ungrounded in this regard and that an adequate punishment was imposed.

234. However, it was established during the appellate proceedings that the First Instance Panel had incorrectly established the responsibility of the accused for the acts referenced in Section 3 of the operative part of the Verdict, and that the form of commission in Section 1 of the operative part of the First Instance Verdict (accessory) differs from complicity, so that it must be determined adequately which punishment is appropriate for all the remaining actions.

235. Although it is difficult to grade and compare the duration of sentence in terms of the number of years in relation to the number of persons deprived of their lives, the Appellate Panel had to take into account the consequences of the actions in order to correctly establish an adequate punishment for all other acts within the scope of the responsibility of the accused.

236. The sentence of 17 years in prison, meted out by this Panel, reflects entirely the severity and the type of the criminal offense that essentially constitutes a violation of both national and international legislation. In its entirety, this offense has a special gravity also from psychological, moral and religious aspects, in relation to the victims themselves and their families. In meting out the punishment of imprisonment, the Panel took into account

the level of responsibility of the accused as a leader of a military formation, who was at the relevant time a role model for his subordinates and influenced them as a motivating and encouraging factor as he was a bad example for them. The continuity of the acts *per se* that were taking place during a certain period of time should also be taken into account, the period being connected with the overall ill-treatment of all non-Serbs in the territory of the Municipality Doboj, against the backdrop of which the acts of the accused were not an exception.

237. For all the foregoing, the Appellate Panel found that the sentence imposed in this Verdict, from the aspect of social condemnation, and from the aspect of general and special prevention, and also generally for the purpose of demonstrating fairness in punishing the perpetrator of such a grave criminal offense, is rather justified. Pursuant to the above stated, and in accordance with Article 310(1), in conjunction with Article 314 of the CPC BiH, it was decided as stated in the operative part of the Verdict.

Record-taker:
Dženana Deljkić Blagojević

PRESIDENT OF THE PANEL
JUDGE
Dragomir Vukoje

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