

SUD BOSNE I HERCEGOVINE



СУД БОСНЕ И ХЕРЦЕГОВИНЕ

COURT OF BOSNIA AND HERZEGOVINA

Case No.: X-KRŽ-07/382

Date: **Delivered** **23 January 2009**
 Published **17 February 2009**

Before: **Judge Dragomir Vukoje, Presiding**
 Judge Almiro Rodrigues
 Judge Azra Miletić

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MIRKO TODOROVIĆ and MILOŠ RADIĆ

APPEAL JUDGMENT

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

Mr. Adnan Gulamović

Counsel for the Appellant Mirko Todorović:

Mr. Žiko Krunić

Counsel for the Appellant Miloš Radić:

Mr. Miodrag LJ. Stojanović

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IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Panel of the Appellate Division consisting of Judge Dragomir Vukoje as the Presiding Judge and Judges Almiro Rodrigues and Azra Miletić as members of the Panel, with the participation of the Legal Officer Sanida Vahida as minutes-taker, in the criminal case against the Accused Mirko Todorović and Miloš Radić, for the criminal offense of Crimes against Humanity in violation of Article 172(1) paragraph h), in conjunction with paragraphs a), e) and f) of the Criminal Code of Bosnia and Herzegovina (the “CC of BiH”), all in conjunction with Article 29 and Article 180(1) of the same Code, deciding upon the appeals filed by Defense Counsel for the Accused Mirko Todorović, Žiko Krunić, Defense Counsel for the Accused Miloš Radić, Miodrag LJ. Stojanović, and Prosecutor of the Prosecutor’s Office of BiH, Adnan Gulamović, against the Verdict of the Court of Bosnia and Herzegovina number X-KR-07/382 dated 29 April 2008, at the session held with the presence of the Accused and in the presence of their Defense Counsel, Žiko Krunić and Miodrag LJ. Stojanović, and Prosecutor of the Prosecutor’s Office of BiH, Adnan Gulamović, on 23 January 2009 rendered the Verdict that follows.

VERDICT

The appeal of the Prosecutor’s Office of BiH is refused as unfounded while the appeals filed by the Defense Counsels on behalf of the Appellants Mirko Todorović and Miloš Radić are granted in part, and the Verdict of the Court of Bosnia and Herzegovina number X-KR/07/382, dated 29 April 2008, is hereby **revised and it is decided as follows**:

The Accused

1. **MIRKO TODOROVIĆ a.k.a. Banana**, son of Đorđe and Smilja, née Šarac, born on 15 May 1954 in Bratunac, residing in Repovac bb /no number/, Municipality Bratunac, Serb, citizen of BiH, car mechanic, literate, driver by occupation, graduated from the Vocational Secondary School, married, father of three children, served military service in 1974 in Kraljevo and Niš, no ranks, no decorations, registered in the Bratunac Military Records, average financial status, convicted by the Judgments of the Municipal Court in Srebrenica number K.414/88 of 15 December 1987 for the criminal offense referred to in Article 43 of the CC BiH with the pronounced fine in the amount of 60,000 dinars, the Judgment of the Municipal Court in Srebrenica number K.220/87 of 22 September 1987 for the commission of the criminal offense referred to in Article 81(1) of the CC SRBiH with the imposed fine in the amount of 20,000 dinars and the Judgment of the Municipal Court Osječina, number K 125/87 of 30 January 1990 for the criminal offense referred to in Article 201/5 in conjunction with Article 195(3) and 1 of the CC SRS with the pronounced suspended sentence, one year of imprisonment, two years on parole, no proceedings conducted for any other criminal offense, in custody pursuant to the Decision of the Court of BiH, number: X-KRN/07/382 as of 22 May 2007,

and

2. **MILOŠ RADIĆ**, son of Mirko and Milosava, née Todorović, born on 5 June 1959 in Srebrenica, residing in Repovac bb/*no number*/, Municipality Bratunac, Serb, citizen of BiH, car mechanic, literate, qualified car mechanic by occupation, married, father of three children, served the Army in 1989/90 in Travnik, registered in the Bratunac Military Records, no ranks, no decorations, average financial status, no prior convictions, no proceedings conducted for other criminal offense, in custody pursuant to the Decision of the Court of BiH, number: X-KRN/07/382 as of 22 May 2007

ARE FOUND GUILTY

Because:

During the armed conflict in Bosnia and Herzegovina, as part of the widespread and systematic attack by the army and police of the Republika Srpska against the Bosniak civilian population in the territory of the Municipality of Bratunac, the accused Mirko Todorović and Miloš Radić, with knowledge of such an attack, helped a group of soldiers persecute Bosniak civilians on ethnic and religious grounds by torture and killings, in the following manner:

On 20 May 1992, during the afternoon hours, in the village of Borkovac, the Municipality of Bratunac, in a group with four other members of the Army of Republika Srpska Mirko Todorović helped to find and arrest a group of 14 (fourteen) Bosniak civilians, namely Hamed Alić, Hamid Alić, Halima Alić, Maho Avdić, Hamedina Ramić, Munib Sulejmanović, Hajrudin Hasanović, Hamed Velić, Fadil Sulejmanović, Amer Ramić, Naser Sulejmanović, Muharem Salkić, Mehmed Jahić, and Ibro Džananović, who were hiding in fear of the attack by the Republika Srpska army and police in an abandoned quarry not far from the village of Borkovac, where most of them resided, and thereafter Mirko Todorović and the other soldiers escorted the captured Bosniak civilians to the house of Abdulah Sulejmanović when someone from the group of attackers killed Maho Avdić, who was at the back of the column, with a firearm, and then having arrived at the house of Abdulah Sulejmanović, together with Miloš Radić, who was already present at the house of Abdulah Sulejmanović, with rifles at the ready they secured the area and prevented the captured Bosniak civilians from leaving that location, while the other soldiers punched and kicked them all over their bodies, seized money and valuable items from them and cursed them on ethnic and religious grounds, and following the abuse, the group of Bosniak civilians was taken to a slope on a nearby creek, where they were lined up facing the creek and were shot with firearms, which is when the following persons were killed: Hamid Alić, Halima Alić,

Munib Sulejmanović, Fadil Sulejmanović, Hajrudin Hasanović, Hamed Velić, and Hamedina Ramić

Therefore,

As a part of the widespread and systematic attack directed against the Bosniak civilians, with knowledge of such an attack, the accused Mirko Todorović and Miloš Radić, as accessories, helped a group of soldiers persecute Bosniak civilians on ethnic and religious grounds by torturing and killing them, and because of these actions Mirko Todorović and Miloš Radić committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH, in conjunction with Article 172(1)(a) and (f), all in conjunction with Article 31 and Article 180(1) of the same Code.

Therefore, pursuant to the stated statutory regulations, and in conjunction with Articles 39, 42 and 48 of the CC of BiH,

the Accused Mirko Todorović is

S E N T E N C E D

TO IMPRISONMENT FOR A TERM OF 13 (thirteen) YEARS

and the Accused Miloš Radić is

S E N T E N C E D

TO IMPRISONMENT FOR A TERM OF 12 (twelve) YEARS

Pursuant to Article 56(1) of the CC of BiH, the time that the Accused Mirko Todorović and Miloš Radić spent in custody shall be credited to the imposed sentence of imprisonment starting from 22 May 2007 until 29 January 2009.

REASONING

I. PROCEDURAL HISTORY

A. The Verdict

1. Under the Verdict of the Court of Bosnia and Herzegovina X-KR-07/382, dated 29 April 2008, the Accused Mirko Todorović and Miloš Radić were convicted of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with sub-paragraphs (a), (e), and (f), and Article 29 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

2. Therefore, the Trial Panel, pursuant to Article 285 of the Criminal Procedure Code of BiH ("CPC of BiH") and Articles 39, 42, 48 of the CC BiH, sentenced the Accused Mirko Todorović to the penalty of seventeen (17) years imprisonment. Pursuant to Article 56 of the CC of BiH, the time he spent in custody, starting from 24 May 2007 until his committal to serving the sentence was credited to the sentence of imprisonment. Finally, the Accused, pursuant to Article 188(4) of the CPC of BiH, was relieved of the duty to reimburse the costs of the criminal proceedings.

3. The Trial Panel, pursuant to Article 285 of the CPC of BiH and Articles 39, 42, 48 of the CC of BiH, sentenced the Accused Miloš Radić to the penalty of seventeen (17) years imprisonment. Pursuant to Article 56 of the CC of BiH, the time he spent in custody, starting from 24 May 2007 until his committal to serving the sentence was credited to the sentence of imprisonment. The Accused, pursuant to Article 188(4) of the CPC of BiH, was relieved of the duty to reimburse the costs of the criminal proceedings.

B. The Appeals

4. Defense Counsel for the Accused Mirko Todorović, Žiko Krunić, filed an Appeal against the Verdict, requesting that the Appellate Panel uphold the Appeal, revoke the challenged Verdict, and order a retrial on the following grounds:

- 1) Essential violations of the provisions of criminal procedure, pursuant to Article 297(1)(a), (b), (d), and (k) of the CPC of BiH, and substantial violations of the principles of criminal procedure, pursuant to Article 297(2) of the CPC of BiH;

- 2) Incorrectly or incompletely established facts, pursuant to Article 299 of the CPC of BiH;
- 3) Violations of the criminal code, pursuant to Article 298 of the CPC of BiH; and
- 4) The decision on sentence, pursuant to Article 300(1) of the CPC of BiH.

5. Defense Counsel for the Accused Miloš Radić, Miodrag LJ. Stojanović, filed an Appeal against the Verdict, requesting that the Appellate Panel uphold the Appeal, revoke the challenged Verdict, and order a retrial on the following grounds:

- 1) Essential violations of the provisions of criminal procedure, pursuant to Article 297 of the CPC of BiH;
- 2) Violations of the criminal code, pursuant to Article 298(1)(d) of the CPC of BiH;
- 3) Incorrectly or incompletely established facts, pursuant to Article 299 of the CPC of BiH; and
- 4) The decision on sentence, pursuant to Article 300 of the CPC of BiH.

6. Prosecutor of the Prosecutor's Office of BiH Adnan Gulamović filed an Appeal against the Verdict on the grounds of the decision on criminal sanction as to both Accused and moved that the contested Verdict be modified and a sentence of imprisonment greater than 17 years be imposed on both Accused.

7. The Appellate Panel, pursuant to Article 304 of the CPC of BiH, held a session on 23 January 2009. The Defense and the Prosecutor presented their appeals and fully supported their respective written arguments and proposals.

8. The Appellate Panel, having reviewed the Verdict insofar as contested by the Defense appeals and the Prosecution appeal, rendered the decision as in the operative part for the reasons that follow.

II. GENERAL ISSUES

9. The Appellate Panel's decision on a contested verdict is limited to only those issues raised and argued by the parties on appeal. Specifically, Article 306 of the CPC of BiH states: "The Panel of the Appellate Division shall review the verdict only insofar as it is contested by the appeal."

10. Therefore, the Appellate Panel may not revoke or revise a contested verdict or revise the decision on the sentence on the basis of issues not raised by the parties on appeal. Nonetheless, the Appellate Panel may consider issues of general importance to the work of the Court of BiH in order to promote the efficient and fair adjudication of criminal proceedings. The Appellate Panel will not issue an opinion on or decide factual or legal issues that have not been presented and argued, but will limit itself to observations and comments of a broader nature that can provide useful guidance and promote the efficient and effective work of the Court.

11. In that vein, the Appellate Panel has identified, in the current proceedings, three issues of general importance that should be noted.

12. Firstly, the Verdict contains the grounds and reasoning necessary for a valid verdict. However, a more methodical, organized and deliberate approach would have resulted in a verdict that would have allowed both the parties and the Appellate Panel to expeditiously and efficiently identify the decisive facts established by the Trial Panel and examine the evidence and reasoning for those facts.

13. Secondly, the Verdict only contains a cursory analysis of the elements of the crimes of imprisonment, torture and persecution and the application of the elements to the Trial Panel's factual findings, while it would have been preferable to include both a recitation of the elements of the crimes and explicit findings as to each of those elements.

14. Thirdly, under Articles 285(1) and 290 of the CPC of BiH, the introductory part, the operative part and the opinion are integral parts of a written verdict, and the operative part must recite all the crimes for which the accused was convicted. While the verdict may be

appealed on the grounds of the formal validity of the operative part of the verdict, certain such formal errors may not be sufficiently serious so as to invalidate the substance of the verdict. Nonetheless, due care and attention is required to ensure that merely formal errors do not raise doubts concerning the integrity and validity of the verdict.

III. GROUNDS OF APPEAL UNDER ARTICLE 297:

VIOLATIONS OF CRIMINAL PROCEDURE

A. Standards of Review

15. A Verdict may, pursuant to Article 297 of the CPC of BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297(1).

16. A substantial violation of provisions of criminal procedure is also established when the Trial Panel during the trial or in reaching the verdict failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of lawful and correct verdict.

17. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

18. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the Verdict. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts.¹ The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the

¹ See, e.g., *Nenad Tanasković*, X-KRŽ-06/165 (Ct. of BiH), Appeal Judgment, 26 March 2008, pgs. 7-9. All references to page numbers in decisions of the Court of BiH are to the English translations of those decisions.

analysis, but will only ensure that the Verdict formally contains all necessary elements for a well-reasoned and comprehensible verdict.

19. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Verdict. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Verdict.

20. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Verdict where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Verdict and should raise alleged errors of fact under Article 299.

B. Appeals of Mirko Todorović

1. Sub-Ground One: Composition of the Trial Panel

21. The Defense for the Appellant Mirko Todorović argued that the Trial Panel was improperly composed and that the Panel members should have been disqualified from participating in the main trial. The Defense contended that the two international judges were not properly selected by state authorities and were citizens of states alleged to be biased against “the Serb people”. The Defense further contended that the Presiding Judge was not impartial due to her shared ethnicity with the victims in this proceeding.

22. The Appellate Panel concludes that this ground of appeal is manifestly ill-founded. The participation of international judges in proceedings before the Court of BiH has previously been addressed by the Constitutional Court of Bosnia and Herzegovina in its *Maktouf* decision.² The Defense failed to raise any additional issues or arguments that would cause the Appellate Panel to reconsider the application of the Constitutional Court’s conclusion in the instant proceeding. Moreover, the Defense failed to identify any specific facts or incidents that would raise a legitimate issue concerning the impartiality of the Trial Panel.³ Accordingly, this ground of appeal is dismissed without further discussion.

23. The Appellate Panel also emphasizes that any ground of appeal alleging judicial bias solely on the basis of ethnicity is manifestly ill-founded in law. Ethnicity is not and will never be considered a “circumstance that raises a reasonable suspicion as to the impartiality” of a judge under Article 29(f) of the CPC of BiH. Disqualification of a judge on the basis of ethnicity alone and without specific, individualized evidence would indisputably constitute illegal discrimination in violation of Article 26 of the International Covenant on Civil and Political Rights, Article 14 of the European Convention on Human Rights (the “European Convention”) and Article II(4) of the Constitution of BiH. In order to raise a reasonable suspicion regarding the impartiality of a judge, the party must present clear, individualized evidence of a concrete bias. Absent such evidence, the bare assertion of bias on the basis of a ground protected by human rights is manifestly ill-founded.

² *Abduladhim Maktouf*, AP- 1785/06 (Const. Ct. of BiH), Decision on Admissibility and Merits on the appeal from the Verdict of the Court of Bosnia and Herzegovina (“*Maktouf* Decision”), 30 March 2007, para. 47.

³ *See Id.*, at paras. 48, 52, 54.

2. Sub-Ground Two: Right to Defense

24. The Defense for the Appellant Mirko Todorović argued that the Appellant's right to defense under Article 297(1)(d) of the CPC of BiH and Article 6 of the European Convention was violated. The Defense argued that the structure of the Court of BiH and the ethnicity of the Prosecutor are evidence that the Appellant was denied the right to a fair trial by an impartial court.

25. The Defense argued that the judges of both the Trial and the Appellate Panel belong to one and the same court, that is, the Court of Bosnia and Herzegovina. The President of the Court is the same for them all, they use the same premises, and the Defense therefore argued that the essential two-tier quality of the trial is not guaranteed, which is a violation of the right to a fair trial as guaranteed by the provision of Article 6 of the European Convention. The Defense further argued that the fact that the Prosecutor also belongs to the Bosniak people, the injured parties in this case, completes the picture on the non-existing conditions for a fair trial, that is, the trial by an impartial court.

26. The Appellate Panel concludes that this ground of appeal is manifestly ill-founded. The structure of the Court of BiH has previously been addressed by the Constitutional Court in its *Maktouf* decision.⁴ The Defense failed to raise any additional issues or arguments that would cause the Appellate Panel to reconsider the application of the Constitutional Court's conclusion in the instant proceeding. Moreover, the Defense failed to identify any specific facts or incidents that would raise a legitimate issue concerning the impartiality of the Prosecutor, who, like the Defense Counsel, is not, in any event, an impartial participant in the proceedings. Accordingly, this ground of appeal is dismissed as unfounded.

3. Sub-Ground Three: Presence of the Appellant

27. The Defense for the Appellant Mirko Todorović argued that the Verdict violates Article 297(1)(k) of the CPC of BiH, insofar as the operative part of the Verdict is contradictory to the reasons as stated in the Verdict, and that the Verdict does not contain the

⁴ *Maktouf* Decision, para. 50.

grounds for the decisive facts. Specifically, the Defense contended that the Trial Panel failed to provide reasons for concluding that the Appellant was present when the victims were abused in front of the house of Abdulah Sulejmanović, escorted to the execution site, and then executed, particularly in light of the inconsistent testimonies of witnesses.

28. The Appellate Panel reiterates that Article 297(1)(k) is not a valid ground of appeal to contest the accuracy of the facts established by the Trial Panel. In order to conclude that the Verdict is invalid pursuant to Article 297(1)(k), the Appellate Panel must be satisfied, on the basis of a *prima facie* review, that the wording of the Verdict is incomprehensible, internally contradictory or contradicted the grounds of the Verdict or the Verdict had no grounds at all or did not cite reasons concerning the decisive facts.⁵ If, on the basis of a *prima facie* review, the Appellate Panel is satisfied that none of those conditions are met, the Appellate Panel will not invalidate the Verdict on the basis of Article 297(1)(k).

29. The Appellate Panel concludes that this ground of appeal is without merit. The Appellate Panel notes that: with respect to the Appellant's presence when the victims were captured, the Verdict recites the testimonies of survivors that the Appellant was with the soldiers who found the group of Bosniak civilians hiding in the abandoned quarry; with respect to the Appellant's presence during the abuse, the Verdict recites the testimonies of Amer Ramić, Naser Sulejmanović, and Muharem Salkić that the Appellant was present while the victims were abused by the other soldiers; and, finally, with respect to the Appellant's presence when the victims were escorted to the execution site and then executed, the Verdict recites the testimony of Naser Sulejmanović that the Appellant was present at the execution site.

30. The Verdict further explains the Trial Panel's reasoning as to why this evidence was sufficient to establish beyond reasonable doubt that the Appellant was present both during the abuse and at the execution site:

On the other hand, the Court also considered certain differences in the testimonies of the witnesses for the Prosecution, from the fact that not all survived victims saw both the Accused at the moment of execution, which is logical, considering that the witnesses stood in a line of 12 men who were forced to keep their heads bowed down, while some of them secretly looked at

⁵ See, e.g., *Nenad Tanasković*, X-KRŽ-06/165 (Ct. of BiH), Appeal Judgment, 26 March 2008, pgs. 7-9.

the ones who stood in front of them, and thus saw the accused Miloš Radić, while the others saw the accused Mirko Todorović, and even Krke.⁶

31. Finally, the Verdict explains the Trial Panel's reasoning as to why the Trial Panel did not find credible the contrary testimony of defense witnesses that the Appellant was not present:

Bearing in mind the statements of Miloš Todorović, and also of the accused Mirko Todorović himself, who are speaking about those unknown soldiers as very dangerous men who should not be even looked at, the Court considers it illogical that witnesses Miloš and Ljubiša could have easily left the group of soldiers which forced them to follow them under the threat of weapons.

The testimony of the accused Mirko Todorović himself is contradictory. He firstly states that he had to show the way to the uniformed soldier, and when they reached the house in which his neighbors had been allegedly interned, and those soldiers forbade him to see them, he simply moved away from the site, went down the forest to the main road where he found the accused Miloš Radić.

The accused Radić, however, does not mention this house, but he points out that he met the accused Mirko Todorović while walking through the creek, namely in the direction of the Sulejmanović family house.

Subsequently, however, he states that witnesses Ljubiša and Miloš Todorović could leave the group of soldiers because they walked at the back of the line, and that he himself had no chance of returning because of "such" a man, wishing nobody to face such situation.

According to this second part of his statement, the Accused did not leave the scene because he did not dare.⁷

32. Thus, the Appellate Panel considers that the Verdict is not contradictory to the reasons stated in the Verdict, that the Verdict does contain the grounds for the decisive facts, and that an essential violation of provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH was not established.

33. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

⁶ Verdict, pg. 44.

⁷ Verdict, pgs. 43-44.

34. The Appellate Panel will address in Section V.B.1, *infra*, the Defense's argument that the Trial Panel incorrectly assessed the evidence regarding this fact.

4. Sub-Ground Four: Witness Confrontation

35. The Defense for the Appellant Mirko Todorović argued that the Trial Panel committed a substantial violation of the principles of criminal procedure by permitting the witness Ljubiša Todorović to be confronted by the witness Bajro Kulovac. The Defense contends that such a procedure is not foreseen in Article 262 of the CPC of BiH, which the Defense further contends exclusively governs the giving of testimony during the main trial.

36. The Appellate Panel concludes that the Defense has incorrectly cited the law. Article 86(9) of the CPC of BiH, together with Article 262 of the CPC of BiH, governs the manner in which witnesses may be examined during trial proceedings, explicitly providing that a witness may be confronted during the course of the examination. Furthermore, under Article 239 of the CPC of BiH, it is an obligation, and then a general power, of the Presiding Judge, "to ensure that the subject matter is fully examined, that the truth is found...."

37. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

5. Sub-Ground Five: Admission of Unlawfully Obtained Evidence

38. The Defense for the Appellant Mirko Todorović argued that the Trial Panel committed a substantial violation of the principles of criminal procedure by admitting into evidence the investigative statement of Ljubiša Todorović, which the Defense argued was unlawfully obtained, as it was given under duress.

39. In admitting the investigative statement of Ljubiša Todorović as evidence and concluding that the statement was not unlawfully obtained, the Trial Panel reasoned:

The Court rendered such decision particularly bearing in mind the facts that: the interview was made on the premises of the PS Bratunac during the work hours, and that in case of any shouting and yelling, as stressed by the witness Todorović, it would be realistic to expect that any of the present policemen or

other personnel, including the wife of this witness, would check what was happening on their official premises, particularly because it is not logical that a SIPA official person acted in such unprofessional manner, as the witness tried to present the investigator.⁸

40. The Appellate Panel considers that the Defense failed to provide any evidence in support of its contention, failed to explain how the Trial Panel's conclusion was unreasonable, and failed to demonstrate how the Trial Panel incorrectly applied the law. The Defense has merely reiterated arguments made at trial, which, as seen, were reasonably answered by the Trial Panel. Moreover, the Defense failed to explain how the Trial Panel's alleged error affected the rendering of a lawful or proper verdict and invalidates the Verdict. On the other side, admitting that statement is materially essential to understand the confrontation of the witness, which is legal as also concluded above.

41. Therefore, the Appellate Panel concludes that this ground of appeal was improperly pled and fails to raise a legitimate issue for appeal, and accordingly is dismissed.

⁸ Verdict, pg. 41.

C. Appeals of Miloš Radić

1. Sub-Ground One: Accepting as Proven Invalid Established Facts

42. The Defense for the Appellant Miloš Radić argued that the Trial Panel committed an essential violation of the provisions of criminal procedure by accepting as proven facts established in the Trial Judgment in *Prosecutor v. Momčilo Krajišnik*, pursuant to Article 4 of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH ("LoTC").⁹ The Defense noted that the Judgment in that case is not a legally binding decision, as it is still in the appeals process. The Defense argued that therefore the Trial Panel should not have accepted as proven established facts from that judgment, and further, that the use of such established facts constituted an essential violation of the provisions of criminal procedure.

43. The Appellate Panel notes that it has previously considered the legality of accepting as proven established facts by ICTY judgments, pursuant to Article 4 of the LoTC.¹⁰ As the Appellate Panel concluded on each occasion, accepting as proven established facts in proceedings before the Court of BiH is undoubtedly legal and in accordance with the provisions of criminal procedure.

44. In his appeal, the Defense for the Appellant Miloš Radić did not dispute the legality of the admission and use of established facts in the abstract, but argued rather that the Trial Panel erred in accepting as proven facts established in a non-final decision, that is, in a trial judgment that is currently the subject of an appeal. The Defense contended that the admission and use of facts from such a judgment is not in accordance with Article 4 of the LoTC, which permits accepting as proven facts "that are established by legally binding decisions" and, accordingly, that accepting as proven established facts in that condition constitutes an essential violation of the provisions of criminal procedure.¹¹

⁹ *Prosecutor v. Momčilo Krajišnik*, IT-00-38-T, Judgment, 27 September 2006.

¹⁰ See, *Jadranko Palić*, X-KRŽ-06/290 (Ct. of BiH), Appeal Decision, 24 April 2008, pgs. 6-7; *Nikola Kovačević*, X-KRŽ-05/40 (Ct. of BiH), Appeal Decision, 22 June 2007, pgs. 5-6; *Radovan Stanković*, X-KRŽ-05/70 (Ct. of BiH), Appeal Decision, 28 March 2007, pg. 9; *Dragoje Paunović*, X-KRŽ-05/16 (Ct. of BiH), Appeal Decision, 27 October 2006, pg. 5. Unless otherwise noted, citations to decisions of the Court of BiH reference the page numbers in the English translation of the decisions.

¹¹ The Appellate Panel recognizes that the admitted facts from the *Krajišnik* Trial Judgment were proposed by the Defense for the Appellant Mirko Todorović. It is axiomatic that an accused is not barred from opposing evidentiary motions of his co-accused at either trial or on appeal.

45. The Defense further highlighted that other decisions concerning the admission of established facts have reached the opposite conclusion regarding facts proposed from the *Krajišnik* Trial Judgment. In particular, the Defense noted the reasoning expressed in the Decision on the Prosecution Motions to Accept Established Facts in *Sreten Lazarević et al.*, which the Appellate Panel will quote in full:

The Court notes the Appellant Krajišnik challenged in his Appeal, the fairness of the trial and alleged that the Trial Chamber erred in law and in procedure when it restricted "the Accused while he was questioning witnesses, occasionally even brutally preventing him from questioning them at all". The appellant-accused also asserted in his appeal that he was, due to ineffective assistance of counsel, precluded from offering material evidence. It appears that the appellant's legal arguments do not indicate, at least in this Court's limited review, as to what specific witnesses and material evidence the appellant-accused makes his claim. This Court cannot, however, disregard the fact that such claim of trial error, if upheld by the Appeal Chamber, may undermine the integrity of the entire *Krajišnik* Trial Judgment. The Court, therefore, considers this ground of appeal to be a direct challenge to the factual findings of that Judgment. Accordingly, all proposed facts in the second motion of the Prosecutor of which judicial notice is sought cannot be considered finally adjudicated, and, consequently, the Court cannot take judicial notice of them.¹²

46. The Appellate Panel considers that, according to the criteria applied by the Court of BiH, it is not *per se* impermissible to accept as proven facts as established (or for the ICTY to take judicial notice of adjudicated facts) from ICTY trial judgments that are the subject of a pending appeal. Specifically, among the criteria to be applied when considering facts proposed to be accepted as proven, "[a] fact must be 'established by a legally binding decision' of the ICTY, which means that the fact was either affirmed or established on appeal or not contested on appeal, and that no further opportunity to appeal is possible."¹³

¹² *Sreten Lazarević et al.*, X-KR-06/243 (Ct. of BiH), Decision on the Prosecution Motions to Accept Established Facts, 18 June 2008, pg. 3. See also, *Predrag Bastah, et al.*, X-KR-05/122 (Ct. of BiH), Decision on the Prosecution Motion to Accept Established Facts, 10 October 2008, pg. 2 (same).

¹³ *Mitar Rašević and Savo Todović*, X-KR-06/275 (Ct. of BiH), Decision on Motions to Accept Established Facts, 2 October 2007, pg. 5. See also, *Paško Ljubičić*, X-KR-06/241 (Ct. of BiH), Decision on Prosecution Motion to Accept Established Facts, 1 February 2008, pgs. 12-13 ("the fact must not be subject to pending appeal") (also see fn. 5 of that Decision for a list of established facts decisions by the Court of BiH as of 1 February 2008). See also, *Prosecutor v. Vujadin Popović, et al.*, IT-05-88-T, Decision on Popović's Motion for Judicial Notice of Adjudicated Facts, 2 June 2008, para. 6 (The fact must clearly not be subject to pending appeal or review."); *Prosecutor v. Dragomir Milošević*, IT-98-29/1-T, Decision on Prosecutor's Motion for Judicial Notice of Adjudicated Facts, 10 April 2007, para. 27 ("The fact must be finalized, meaning that it is not subject to pending appeal or review."); *Prosecutor v. Jadranko Prlić, et al.*, IT-04-74-T, Decision of Prosecution Motions for Judicial Notice of Adjudicated Facts, 7 September 2006, para. 18 ("it is accepted as conclusive

47. The Appellate Panel notes that, in his appeal against the Trial Judgment, the Appellant Momčilo Krajišnik has alleged as his first ground of appeal both ineffective counsel and violation of the principle of equality of arms.¹⁴ The Appellate Panel further notes that the Appellant Krajišnik has explicitly moved that the Trial Judgment be vacated on the grounds, in part, of those procedural errors.¹⁵

48. The Appellate Panel agrees with the reasoning in the *Lazarević* Decision that these grounds of appeal are sufficient to preclude admission of facts from the Trial Judgment pursuant to Article 4 of the LoTC. Simply, Krajišnik's appeals raise doubts concerning the trial judgment as a whole, including all facts established by the Trial Chamber.¹⁶ The Appellate Panel, in particular, recalls Judge Shahabuddeen's Partially Dissenting Opinion in *Blagojević*.¹⁷ Judge Shahabuddeen found that the Appellant Blagojević was improperly denied his right to appear as a witness in his own defense, thereby breaching his right to a fair trial, and thus concluded that the Trial Judgment as to the Appellant should have been vacated and the case remanded for re-trial.¹⁸ The Appellant Krajišnik has similarly filed an appeal alleging that his right to a fair trial was breached through ineffective counsel and violations of the principle of equality of arms, thereby raising the possibility that the Trial Judgment may be vacated and the case remanded for re-trial if the Appeals Chamber upholds that appeal.

49. The Appellate Panel further notes that the Trial and Appellate Panels of the Court of BiH are not in the position to evaluate the possible merits of such an appeal. The Court of BiH may only conduct a *prima facie* review of appeals from trial judgments of the ICTY when assessing whether a proposed fact is the subject of such appeals. Where the appellant

either because it has been confirmed by the Appeals Chamber or because it has not been the subject of a request for appeal or review by any of the parties").

¹⁴ *Prosecutor v. Momčilo Krajišnik*, IT-00-39-A, Appeal of Momčilo Krajišnik to the ICTY Judgment of 27 September 2006, paras. 1-8.

¹⁵ *Id.*, at pg. 84.

¹⁶ The Appellate Panel recognizes that the Trial Chamber in *Popović* accepted proposed facts from the *Krajišnik* Trial Judgment pursuant to Rule 94(B) of the ICTY Rules of Procedure ("RoPE"). See *Popović*, Decision on Popović's Motion for Judicial Notice of Adjudicated Facts. The Appellate Panel disagrees with that conclusion for the reasons stated. The Appellate Panel's conclusion follows solely from its interpretation and application of the relevant criteria, and should not be understood as suggesting that different standards are applicable under Article 4 of the LoTC and Rule 94(B) of the RoPE.

¹⁷ *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-A, Judgment, Partially Dissenting Opinion of Judge Mohamed Shahabuddeen, 9 May 2007.

¹⁸ *Id.*, at paras. 9-10.

has raised an appeal that, if granted, could lead to the trial judgment being vacated and the case remanded for re-trial, a *prima facie* review clearly establishes that all facts from such a trial judgment were not established “by a legally binding decision” of the ICTY.

50. Nonetheless, the Appellate Panel finds that the Trial Panel’s erroneous admission of established facts from the *Krajišnik* Trial Judgment was harmless, as it does not invalidate the Verdict. That is, while the Trial Panel improperly applied Article 4 of the LoTC, that error did not affect the rendering of a lawful and proper verdict.

51. In particular, the Appellate Panel notes that the Trial Panel specifically concluded that the existence of a widespread or systematic attack against a civilian population, as a *chapeau* element of crimes against humanity, was independently established by the testimonies of all witnesses and certain documentary evidence.

52. In fact, the Verdict reads:

The existence of a widespread or systematic attack in the territory of the Municipality of Bratunac, directed against the civilian Bosniak population, during which the incriminating event occurred, was indisputably established from all the testimonies of the witnesses, not only for the Prosecution, but also for the Defense, who were heard during the main trial, who consistently spoke about: the beginning of extraordinary events in the territory of their municipality, the establishment of joint-neighbors’ guards, the general mobilization which occurred on 16 April 1992, the arrival of paramilitary formations from Serbia and the JNA activities, and the take-away of Bosniak population to the city stadium, after which the enforced resettlement followed.

Such conclusion of the Court is supported by the documentary evidence used before the ICTY, which was accepted as relevant to this case....¹⁹

53. The Appellate Panel considers that the evidence on which the Trial Panel relied is sufficient to establish the factual basis for the *chapeau* elements of crimes against humanity being reasonably met. Thus, the factual finding as to the existence of a widespread or systematic attack against a civilian population was clearly reasonable on the basis of the admitted evidence alone.

¹⁹ Verdict, pgs. 24-25.

54. Therefore, while the Appellant Panel agrees with the legal argument presented by the Defense for the Appellant Miloš Radić, it further concludes that the Trial Panel's procedural error was harmless and does not invalidate the Verdict. Accordingly, this ground of appeal is dismissed.

2. Sub-Ground Two: Membership in Army of the Republika Srpska

55. The Defense for the Appellant Miloš Radić argued that the Trial Panel failed to corroborate its factual finding that the Appellant was as a member of the Army of the Republika Srpska ("VRS").

56. The Trial Panel found:

[B]oth the Accused were members of the Army of Serb Republic of BiH already since April 1992, which also ensues from the military ID records, namely: the military ID record for the accused Mirko Todorović, number: 338/54 of 17 August 1994 indicating that the Accused has been kept in the Bratunac military records since 15 February 1971, and that from 18 April 1992, within the Bratunac military post VP 7042 Bratunac, he participated in the war; and the military ID record for the accused Miloš Radić, number: 123997, which indicates that the Accused was kept in the Bratunac military records since 22 October 1980, and that he participated in the war from 18 April 1992 through 4 March 1994, and from 17 June 1995 through 12 September 1995, all within the Bratunac military post 7042.²⁰

57. The Verdict also states: "Dragan Blagojević and Milorad Nikolić testif[ied] about the relation of the Accused toward war events, particularly about the membership in the RS Army."²¹

58. The Appellate Panel concludes that this ground of appeal is manifestly ill-founded. The appeal itself admits that the Trial Panel reached this factual finding on the basis of its review of the Appellant's military record and testimonial evidence. Clearly, then, the Trial Panel cited the reasons for its factual finding. Accordingly, this ground of appeal is dismissed.

²⁰ Verdict, pgs. 26-27.

²¹ Verdict, pg. 36.

59. The Defense's additional arguments concerning the reasonableness of the Trial Panel's findings regarding this fact and the Appellant's knowledge of the widespread or systematic attack will be further addressed in Section V.C.3, *infra*.

3. Sub-Ground Three: Participation in Acts of Torture

60. The Defense for the Appellant Miloš Radić argued that the Trial Panel failed to cite reasons for its conclusion that the Appellant participated in the acts of torture described in the Operative Part of the Verdict and for which the Appellant was found guilty. The Defense does not dispute the Trial Panel's conclusion that the victims were tortured. Rather, the Defense contends that the Trial Panel failed to establish that the Appellant participated in torturing the victims.

61. More specifically, the Defense notes that none of the witnesses cited by the Trial Panel testified that the Appellant participated in the torture of the civilians, either by abusing themselves or any of the other victims. The Defense further highlights that the Trial Panel specifically concluded that "[t]he witnesses could have also said that the Accused abused them, seized their valuable items, that the Accused fired at them but they did not do so."²² The Defense contends that the Trial Panel's reasoning is clearly contradictory, as the Trial Panel did not find that the Appellant abused the victims or seized their valuables, yet nonetheless concluded that the Appellant was guilty for participating in the torture of those same victims.

62. The Appellate Panel concludes that this ground of appeal is without merit. Contrary to the contention of the Defense, the Trial Panel did cite its factual findings and reason its conclusion that the Appellant participated in the torture of the victims and was criminally responsible as an accomplice.

63. While the Defense was correct that the Trial Panel found that the Appellant did not abuse the victims or seize their valuables, the Defense neglected the finding that followed. Specifically, the Trial Panel concluded: "The survived victims only said what they had seen

²² Verdict, pg. 42.

the Accused had done. They are consistent in stating that the Accused stood with their cocked rifles, describing that identically as: ‘guards keeping’ [*sic*].”²³

64. Further, the Appellate Panel considers that the Trial Panel’s reasoning as to the Appellant’s participation was explicit and clear. As the Trial Panel concluded, the Appellant and the Accused Todorović “by their presence with cocked rifles... and by standing around the gathered group, enabled the remaining 4 soldiers to abuse, beat and seize valuable items from the captured civilians.”²⁴ The Trial Panel further concluded that “[t]heir behavior, although passive at first sight, had a decisive importance for the commission of this crime.”²⁵

65. Thus, the Appellate Panel concludes that the Trial Panel’s findings and conclusions are not contradictory, and that the Trial Panel did clearly set forth its reasoning with respect to its conclusion that the Appellant participated in the crime of torture. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

66. At the session of the Appellate Panel held on 23 January 2009, pursuant to Article 304 of the CPC of BiH, the parties to the proceedings and defense counsels briefly presented their appeals and responses to the appeals entirely maintaining the allegations and proposals stated therein, while the Defense for the Appellant Miloš Radić, Lawyer Miodrag Stojanović, expanded on the allegations stated in the appeal concerning the criminal offense of torture under Article 172(1), for which the Appellant was found guilty. At the session, the Defense noted that the first instance verdict, as it relates to the Appellant Miloš Radić, failed to include all the criteria relevant to the act of torture and hence failed to meet the standards set out in Article 3 of the Convention on Torture. On the other hand, on page 3 of the written appeal, it was argued that “in the Reasoning of the Verdict, there is no argumentation for the position that the accused Miloš Radić participated in the torture of civilians”; that is, “the Reasoning of the Verdict does not contain a concrete description of the acts undertaken by the accused Miloš Radić to that effect.”

²³ Verdict, pg. 43.

²⁴ Verdict, pg. 42.

²⁵ Verdict, pg. 42.

67. Pursuant to Article 304 of the CPC of BiH, parties to the proceedings and defense counsels may present their appeals at the session held before the panel of the Appellate Division, subject to the limitation that they remain within the scope of the appeal filed within a prescribed deadline in accordance with Article 292 of the CPC of BiH. This right of the parties, on the other hand, is limited by the imperative legal norm stipulated in Article 306 of the CPC of BiH, which prescribes the framework within which the panel of the Appellate Division reviews the first instance verdict.

68. Therefore, the Appellate Panel considered only those allegations in the appeal that were filed as such within a prescribed deadline and explained at the session held on 23 January 2009, and given that this particular allegation was raised outside of the statutory framework, it is considered untimely. Accordingly, the additional allegation raised by the Defense for the Appellant Miloš Radić on appeal was not taken into consideration at all.

4. Sub-Ground Four: Intent – Subjective Nexus

69. The Defense for the Appellant Miloš Radić argued that the Trial Panel failed to establish the subjective nexus between the Appellant and the widespread or systematic attack, that is, the Appellant's knowledge of the attack and that his acts are part of such attack.

70. The Appellate Panel considers that the Defense has alleged that the Trial Panel incorrectly established the Appellant's knowledge, that is, that the Trial Panel committed an error of fact rather than a formal error. In particular, the Appellate Panel notes that the Defense admitted that the Trial Panel "draws the conclusion about the [subjective nexus] following the review of the documentary evidence, the military ID record issued to the name of Miloš Radić, from which it was concluded that he was a member of the RS Army since 16 April 1992."

71. The Appellate Panel further notes that a *prima facie* review of the Verdict establishes that the Trial Panel did cite the facts upon which it relied and reason its conclusion that the Appellant knew of the widespread or systematic attack and that his acts were part of such attack. In particular, the Trial Panel stated:

The knowledge of the Accused that during the relevant period, in the territory of their Municipality Bratunac, the widespread and systematic attack was launched against civilian Bosniaks, thereby against their neighbors with whom they had extremely good-neighborly relations (as pointed out by all the witnesses, but also by the Accused themselves), ensues not only from the general situation of extraordinary circumstances which had started already in early 1992, but also from the fact that both the Accused were members of the Army of Serb Republic of BiH already since April 1992, which also ensues from the military ID records....²⁶

72. Accordingly, the Appellate Panel considers that the Defense has alleged an error of fact in this ground of appeal. The Appellate Panel will consider the alleged error of fact pursuant to Article 299 in Section V.C.3, *infra*.

5. Sub-Ground Five: Intent – The Underlying Crimes

73. The Defense for the Appellant Miloš Radić argued that the Trial Panel failed to reason its conclusion that the Appellant intended the commission of the crimes with which he was charged and for which he was convicted.

74. The Appellate Panel notes that, in arguing that the Trial Panel failed to establish that the Appellant acted with direct intent, the Defense did not identify how the Trial Panel failed to cite the facts upon which it relied and reason its conclusion that the Appellant intended the commission of the crimes for which he was convicted. Rather, the Defense contested the factual basis of the Trial Panel's conclusion, citing other evidence that the Defense contends establishes that the Appellant did not intend the commission of the crimes. Such a pleading does not address formal validity of the Verdict, that is, whether the Trial Panel provided explanation for its conclusion that the Appellant acted with direct intent.

75. Accordingly, the Appellate Panel considers that the Defense has alleged that the Trial Panel committed an error of fact, rather than an error of law, in concluding that the Appellant acted with direct intent. The Appellate Panel will address that issue pursuant to Article 299 in Section V.D, *infra*.

²⁶ Verdict, pg. 26.

IV. GROUNDS OF APPEAL UNDER ARTICLE 298:
VIOLATIONS OF THE CRIMINAL CODE

A. Standards of Review

76. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim, and explain how the error affects the decision resulting in its unlawfulness.

77. Where an error of law arises from the application in the Verdict of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

78. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

B. Appeals of Mirko Todorović

1. Sub-Ground One: Prevention of Crime

79. The Defense for the Appellant Mirko Todorović argued that the Trial Panel incorrectly concluded that the Appellant could have prevented the direct perpetrators of these crimes from imprisoning, torturing, and executing the Bosniak civilians. The Defense argues, first, that the facts establish that a certain Krke was in control of the situation and commanded the soldiers present, and that the Appellant accordingly could not have prevented the commission of the crimes. The Defense argues, second, that the Appellant was not present when the civilians were executed, and thus necessarily could not have prevented those crimes.

80. The Appellate Panel will address this contention in Section V.D, *infra*, as part of its analysis of the joint grounds of appeal pursuant to Article 299.

2. Sub-Ground Two: Persecution

81. The Defense for the Appellant Mirko Todorović argued that the Trial Panel incorrectly concluded that the Appellant was guilty of persecution as a crime against humanity, and in particular, that the Appellant acted with discriminatory intent. The Defense grounds its argument on the testimonies of defense witnesses who testified that the Appellant provided assistance to Bosniaks in the days preceding the events of 20 May 1992.

82. The Appellate Panel considers that the Defense has argued that the Trial Panel committed an error of fact in concluding that the Appellant possessed the necessary discriminatory intent. Although the Defense filed the appeal pursuant to Article 298, the Appellate Panel will consider this issue in Section V.D, *infra*, as part of its analysis of the joint grounds of appeal pursuant to Article 299.

C. Joint Grounds of Appeal

Applicable Substantive Law

83. The Defense for the Appellant Mirko Todorović and the Defense for the Appellant Miloš Radić argued that the application of the 2003 Criminal Code of Bosnia and Herzegovina by the Trial Panel in the instant proceeding violated the principle of legality and the time constraints regarding applicability of the law as enshrined in Articles 3 and 4 of that Code, specifically with respect to the application of criminal sanctions. The Defense further contends that application of the 2003 Code to the Appellant constitutes discrimination in violation of Article 14 of the Convention.

84. The Appellate Panel recalls that the legality of the application of the 2003 Criminal Code in proceedings before the Court of BiH has been exhaustively considered and addressed by the Constitutional Court in its *Maktouf* decision.²⁷ Similarly, the Constitutional Court has addressed the issue of discrimination with respect to the application of 2003 Criminal Code.²⁸ The Defense failed to raise any additional issues or arguments that would cause the Appellate Panel to reconsider the application of the Constitutional Court's conclusions in the instant proceeding. Therefore, the Appellate Panel considers that this ground of appeal is manifestly ill-founded, and accordingly is dismissed.

²⁷ *Maktouf* Decision, paras. 60-79.

²⁸ *Id.*, at paras. 80-92.

V. GROUNDS OF APPEAL UNDER ARTICLE 299:
INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. Standards of Review

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

86. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

87. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

88. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

89. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.²⁹ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible

²⁹ *M.Š.*, AP-661/04 (Const. Ct. of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

B. Appeals of Mirko Todorović

1. Sub-Ground One: Presence of the Appellant

90. The Defense for the Appellant Mirko Todorović argued that the Trial Panel incorrectly established the facts concerning the Appellant's participation in the relevant events. In particular, the Defense alleges that the Appellant and defense witnesses testified that the Appellant Mirko Todorović did not find and capture the group of hidden civilians, left the scene soon after the civilians were captured by the other soldiers, and was not present and did not participate in the imprisonment, torture, and killing of those civilians. In addition, the Defense contended that the Trial Panel did not provide valid reasons for not accepting these testimonies, and that these testimonies were corroborated in part by the testimonies of prosecution witnesses. Therefore, the Defense argues that the Trial Panel erred in finding that the Appellant participated in the imprisonment, torture, and killing of those civilians.

91. In support of its contention, the Defense specifically cited the testimonies of witnesses Hamed Alić, Muharem Salkić, and Amer Ramić. The Defense contended that none of these witnesses, all survivors of the execution, placed the Appellant at the execution site. The Defense also argued that both Hamed Alić and Muharem Salkić clearly testified that neither saw the Appellant while the soldiers abused the victims. The Defense argued that these testimonies corroborate the testimony of the Appellant Mirko Todorović and the Appellant Miloš Radić, who similarly testified that the Appellant left the scene soon after the victims were escorted to the house of Abdulah Sulejmanović. The Defense further noted that Miloš Todorović testified that he left the scene together with the Appellant Mirko Todorović and Ljubiša Todorović prior to the abuse.

92. The Appellate Panel has already addressed, in Section III.B.3, *supra*, the Defense's contention that the Trial Panel failed to provide the reasons for its conclusion that the Appellant was present during the relevant events. The Appellate Panel reiterates its conclusion that the Trial Panel identified the facts it concluded were established, explained why it concluded that those facts were established and explained why it did not find contrary evidence credible.

93. As to the allegation that the Trial Panel committed an error of fact in reaching those factual conclusions, the Defense has merely asserted that the Trial Panel erred in not accepting the testimonies of certain witnesses without identifying or arguing how those conclusions could not have been reached by a reasonable trier of fact on the basis of the evidentiary record.

94. The Appellate Panel notes, in particular, that the Defense has merely recited certain evidence and contended that it is incomprehensible that the Trial Panel did not accept that evidence or reach the conclusion suggested by the Defense. However, in order to establish an error of fact, the Defense must in addition specifically address the evidence upon which the Trial Panel relied and the Trial Panel's reasoning, clearly showing how the Trial Panel's factual conclusion was unreasonable. Where the Defense fails to do so, the Defense merely provides an alternative view of the facts and reargues its position at trial. As the Trial Panel's factual conclusions are accorded deference on appeal, the Appellate Panel will not evaluate the positions of the parties at trial, but will only consider arguments that the Trial Panel's factual conclusions are unreasonable. By failing to identify and argue how the Trial Panel's factual conclusions are unreasonable, the Defense has failed to properly raise the issue on appeal.

95. Nonetheless, having reviewed the record and the Trial Panel's findings, the Appellate Panel further concludes that the Trial Panel's factual finding that the Appellant was present during the capture, torture, and execution of the Bosniak civilians was clearly reasonable.

96. Namely, all survivor witnesses, Hamed Alić, Amer Ramić, Naser Sulejmanović, and Muharem Salkić, testified that the Appellant was among the group of soldiers who captured the Bosniak civilians hiding in the abandoned quarry.³⁰ All of these witnesses further testified that they recognized the Appellant because he was their neighbor.³¹ The testimonies of the Appellant and the defense witnesses, while contradictory to the testimonies of the survivor witnesses, do not establish that the Trial Panel's factual finding was unreasonable, particularly as the Trial Panel concluded that testimonies of the Appellant and the defense witnesses were contradictory. Accordingly, the Trial Panel's conclusion that the Appellant was present during the capture of the Bosniak civilians was therefore clearly reasonable.

³⁰ Verdict, pgs. 29-33.

³¹ *Id.*

97. The Appellate Panel further concludes that the Trial Panel's factual finding that the Appellant was present during the torture of the Bosniak civilians was clearly reasonable. The Defense has mischaracterized the testimonies of witnesses Hamed Alić and Muharem Salkić with respect to the presence of the Appellant during the torture of the civilians. Contrary to the representation of the Defense, neither witness affirmatively testified that they did not see the Appellant at the house of Abdulah Sulejmanović. In fact, Muharem Salkić testified that the Appellant was present and armed; while Hamed Alić testified that although he did not see the Appellant, he supposed that the Appellant was present because he had been present earlier when the civilians were escorted to the house. Accordingly, the Trial Panel's conclusion that the Appellant was present at the house of Abdulah Sulejmanović while the captured civilians were tortured was therefore clearly reasonable.

98. Finally, the Appellate Panel concludes that the Trial Panel's factual finding that the Appellant was present during the execution of the civilians was clearly reasonable. The Trial Panel primarily relied upon the affirmative testimony of Naser Sulejmanović that the Appellant was present at the execution site, and in its analysis reasoned with regard to this evidence:

On the other hand, the Court also considered certain differences in the testimonies of the witnesses for the Prosecution, from the fact that not all survived victims saw both the Accused at the moment of execution, which is logical, considering that the witnesses stood in a line of 12 men who were forced to keep their heads bowed down, while some of them secretly looked at the ones who stood in front of them, and thus saw the accused Miloš Radić, while the others saw the accused Mirko Todorović, and even Krke.³²

99. The Defense did not identify any pertinent evidence or sufficient considerations to establish that this conclusion was plainly unreasonable. In addition, nothing in the evidentiary record raises doubts concerning the reasonableness of the Trial Panel's conclusion. Accordingly, the Appellate Panel finds that the Trial Panel's conclusion that the Appellant was present during the execution of the civilians was clearly reasonable.

100. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

³² Verdict, pg. 44.

2. Sub-Ground Two: *Chapeau* Elements of the Crime

101. The Defense for the Appellant Mirko Todorović submitted a number of arguments related to the Trial Panel's conclusions regarding the *chapeau* elements of crimes against humanity. The Defense argued that: 1) the Appellant could not be held responsible for the widespread and systematic attack in the Municipality of Bratunac because that attack was the result of the acts of persons with more senior authority and responsibility than the Appellant, who could not influence events; 2) population transfers took place throughout the territory of Bosnia and Herzegovina; 3) the essential elements of the criminal offense of crimes against humanity include that the accused "committed" a widespread and systematic attack against a certain number of civilians; and 4) the events for which the Appellant was convicted occurred after the expulsion of the Bosniak population from Bratunac, were isolated, and do not satisfy the legal elements of crimes against humanity pursuant to Article 172 of the CC of BiH.

102. The Appellate Panel considers that these arguments are obscure and incomprehensible, and that they represent a fundamental misunderstanding of the law.

103. The Appellate Panel recalls that the *chapeau* elements of crimes against humanity describe both 1) the objective context in which the accused acted – the existence of a widespread or systematic attack – and 2) the subjective nexus between that objective context and the mental state of the accused – the accused's knowledge of the widespread or systematic attack and that his acts are part of that attack. These are fundamentally distinct inquiries that involve distinct legal and penal principles.

104. It must be emphasized that the criminal culpability of lower-level, direct perpetrators for crimes against humanity is founded upon their knowing participation in a widespread or systematic attack against a civilian population through the commission of an underlying crime. The conviction of such persons for crimes against humanity neither attributes responsibility for the attack itself nor constitutes collective responsibility for all crimes committed as part of the attack.

105. Accordingly, contrary to the suggestion of the Defense, the finding that an accused knowingly acted as part of a widespread or systematic attack against a civilian population

does not at all imply or require proof that the accused was responsible for that attack. It is therefore illogical to propose that an accused cannot be convicted of a crime against humanity on the grounds that the prime responsibility for the attack of which the accused's acts were part rests with more senior civilian and military authorities.

106. Similarly, it is equally obvious that the Appellant's convictions for the crimes of imprisonment, torture, and murder as crimes against humanity do not attribute the Appellant with responsibility for the ethnic cleansing that occurred during the widespread or systematic attack against the Bosniak civilian population of Bratunac.

107. The Defense also manifestly errs in law in proposing that the elements of crimes against humanity include the requirement that the accused "committed" a widespread or systematic attack against a certain number of civilians. The Appellate Panel recalls that "this requirement [of a widespread or systematic attack] only applies to the attack and not to the individual acts of the accused."³³ The term "widespread" refers to the large-scale nature of the attack and the number of targeted persons; while the term "systematic" refers to the organized nature of the acts of violence and the improbability of their random occurrence.³⁴

108. Moreover, even an isolated event, if linked to a widespread and systematic attack, may qualify as a crime against humanity.³⁵ "The acts [of the accused] need not be committed in the midst of that attack provided that they are sufficiently connected to that attack"³⁶. For instance, the Trial Chamber in *Kunarac* found that a crime committed several months after, or several kilometers away from the main attack, could still, if sufficiently connected otherwise, be part of that attack.³⁷

109. Finally, the suggestion that population transfers took place throughout the territory of Bosnia and Herzegovina is wholly irrelevant to the criminal responsibility of the Appellant. The Appellate Panel need not reiterate that international humanitarian law absolutely

³³ *Prosecutor v. Miroslav Deronjić*, IT-02-61-A, Judgment, 20 July 2005, para. 109; *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-A, Judgment, 17 December 2004, para. 94.

³⁴ *Kordić and Čerkez* Appeal Judgment, para. 94.

³⁵ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgment, 29 July 2004, para. 101.

³⁶ *Prosecutor v. Fatmir Limaj, et. al*, IT-03-66-T, Judgment, 30 November 2005, para. 189.

³⁷ *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001. See also *Prosecutor v. Radoslav Brđjanin*, IT-99-36-T, Judgment, 1 September 2004, para. 132.

prohibits the use of armed force against civilians and that the *tu quoque* principle offers no defense.³⁸

110. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

³⁸ See, e.g., *Mitar Rašević and Savo Todović*, X-KR/06/275 (Ct. of BiH), First Instance Verdict, 28 February 2008, pg. 45; *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, IT-96-23-A and IT-96-23/1-A, Judgment, 12 June 2002, para. 88; *Prosecutor v. Mirjan Kupreskić, et al.*, IT-95-16-T, Judgment, 14 January 2000, para. 517; *Prosecutor v. Mirjan Kupreskić, et al.*, Decision on Evidence of the Good Character of the Accused and the Defense of „*Tu Quoque*“, IT-95-16-T, 17 February 1999, pg. 3-4. See also L. Condorelli and L. Boisson de Chazournes, “Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire 'en toutes circonstances'”, *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honor of Jean Pictet* (C. Swinarski ed., Geneva/The Hague, 1984), pg. 18.

C. Appeals of Miloš Radić

1. Sub-Ground One: Presence of the Appellant

111. The Defense for the Appellant Miloš Radić argued that the Trial Panel committed an error of fact with respect to the presence of the Appellant prior to the time at which the civilians were escorted to the execution site. The Defense cited the testimony of the Appellant Miloš Radić himself that he was not present when the civilians were captured and escorted to the house of Abdulah Sulejmanović, during which Maho Avdić was shot and killed by an unknown person. The Defense further contends that the testimony of the Appellant Miloš Radić was corroborated by the testimonies of the survivors of the execution, who did not testify that the Appellant Miloš Radić was present prior to the time at which the civilians were escorted to the execution site.

112. The Trial Panel found:

...[T]he accused Mirko Todorović and Miloš Radić... showed the way to the place where their neighbors were hidden, the forest path which the soldiers from aside [*sic*] could not have known at all, and thereafter, by their presence with cocked rifles, participated in the unlawful arrest, and by standing around the gathered group, enabled the remaining 4 soldiers to abuse, beat and seize valuable items from the captured civilians, even that two of them singled out from the group a 20-year old girl Hamedina Ramić and took her to the house in which she was kept, and finally, when returning the civilians again toward the place where they had been found, again with cocked rifles, looking at them in their faces, enabled one of the soldiers to execute the group of the remaining 12 civilians.³⁹

113. Having reviewed the arguments of the Defense and the evidentiary record, the Appellate Panel agrees that the Trial Panel erred in concluding that the Appellant was present when the civilian victims were captured and escorted to the house of Abdulah Sulejmanović, during which Maho Avdić was shot and killed by an unknown person. That conclusion is clearly unreasonable, as no trier of fact, on the basis of the evidence before the Trial Panel, could have concluded that the Appellant was present during those events. Nonetheless, the Appellate Panel considers that this incorrect conclusion only with respect to this fact did not

³⁹ Verdict, pg. 42.

effect the conclusion on the guilt of the Accused, and that it did not require, as a legal consequence, the revocation of the Verdict.

114. The witnesses Hamed Alić, Naser Sulejmanović, and Muharem Salkić clearly testified that they did not see the person they later learned was the Appellant until after they had arrived at the house of Abdulah Sulejmanović. In particular, both Hamed Alić and Naser Sulejmanović testified that another group of soldiers were present at the house of Abdulah Sulejmanović when the captured civilians reached that location.⁴⁰ Both witnesses further testified that this other group of soldiers included both Novak Stjepanović, also known as Krke, and a soldier wearing a mask on his head, who all four survivors testified they later learned was the Appellant.

115. In contrast, the sole evidence that the Appellant Miloš Radić was present prior to the arrival of the captured civilians at the house of Abdulah Sulejmanović is the testimony of Amer Ramić. This witness testified that a soldier with a mask on his head, who he later learned was the Appellant Miloš Radić, was present when the group of civilians were first captured in the abandoned quarry.⁴¹

116. The mere contradiction between these witnesses does not, *ipso facto*, establish that the Trial Panel's factual finding was unreasonable. Similarly, the fact that Amer Ramić alone testified that the Appellant was present when the civilian victims were captured and escorted to the house of Abdulah Sulejmanović does not establish that the Trial Panel's factual finding was unreasonable. Rather, in order to conclude that the Trial Panel's factual finding was unreasonable, the Appellate Panel must be satisfied that insufficient evidence existed to reasonably establish that Amer Ramić was more credible than the opposing witnesses as to this issue, or that the Trial Panel failed to reason its conclusion as to this issue.⁴²

117. The Appellate Panel concludes that neither the Verdict nor the evidentiary record contain any information upon which a reasonable trier of fact could base a conclusion that the

⁴⁰ Verdict, pgs. 29, 32.

⁴¹ Verdict, pg. 31.

⁴² The Appellate Panel notes the dissimilarity between this issue and the issue of the presence of the Appellant Mirko Todorović at the execution of the Bosniak civilians. With respect to that issue, three of the four survivor witnesses provided no testimony regarding the presence of the Appellant Todorović; that is, they neither confirmed nor denied that the Appellant was present. In contrast, here the testimonies of the survivor witnesses are affirmatively in direct contradiction.

testimony of Amer Ramić as to this issue is more credible than the consistent testimonies of Hamed Alić, Naser Sulejmanović, and Muharem Salkić. In particular, the Appellate Panel notes that the Trial Panel only established generally that all four survivor witnesses provided credible testimony regarding the course of events. The Appellate Panel further notes that the evidentiary record contains no facts that would support the specific conclusion that Amer Ramić provided more credible testimony as to this issue than Hamed Alić, Naser Sulejmanović, and Muharem Salkić. Confronted, then, with the specific affirmative testimony of these witnesses and the evidentiary record, no reasonable trier of fact could have concluded beyond a reasonable doubt that the Appellant Miloš Radić was present when the Bosniak civilians were captured solely on the basis of the contrary testimony of Amer Ramić. Accordingly, the Trial Panel's conclusion that the Appellant was present when the civilian victims were captured and escorted to the house of Abdulah Sulejmanović is unreasonable.

118. Although the Defense largely focused on the presence of the Appellant Miloš Radić when the civilian victims were captured and escorted to the house of Abdulah Sulejmanović, the Defense also referenced more broadly the Trial Panel's conclusions as to the Appellant's participation in the events preceding the escorting of the civilians to be executed. In particular, the Defense appears to argue that Trial Panel erred in concluding that the Appellant was present when the civilians were abused by the other soldiers.

119. The Defense did not fully develop this argument, vacillating between suggesting that the evidence does not establish that the Appellant Miloš Radić was present when the civilians were abused and suggesting that the evidence does not establish that the Appellant participated in abusing the civilians.

120. As to the latter argument, the Appellate Panel notes that the Trial Panel, as mentioned above, specifically concluded that the Appellant Miloš Radić did not participate in abusing the civilians. As to the former contention, the Defense failed to identify how a reasonable trier of fact could not have concluded that the Appellant was present. The Appellate Panel specifically notes the testimonies of the witnesses detailed above. Accordingly, the Defense failed to establish that the Trial Panel erred in finding that the Appellant was present when the civilians were abused by the other soldiers.

121. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

2. Sub-Ground Two: Witness Inconsistencies

122. The Defense for the Appellant Miloš Radić argued that the Trial Panel failed to consider and resolve the inconsistencies between the witnesses' investigative statements and their testimonies concerning whether the Appellant was wearing a mask during the relevant events. The Defense noted that neither Hamed Alić nor Amer Ramić nor Muharem Salkić stated in their statements given during the investigative stage that the Appellant was wearing a mask during the relevant events. The Defense further noted, however, that all three of these witnesses testified at the main trial that the Appellant was wearing a mask that he later removed. The Defense argued that these inconsistencies called into question the reliability of these witnesses and that the Trial Panel should not have relied upon these witnesses.

123. The Appellate Panel notes that the Trial Panel reasoned:

The Court does not have any doubts as to the statements of the witnesses who survived the execution, particularly the identity of the Accused, while the assertions of the Defense for the accused Miloš Radić, that these statements are the result of an arrangement, which ensues from the sole fact that, allegedly, during the investigation only one survived victim said that the accused Radić had a mask on his head, while during the main trial all survived victims said so, the Court finds unfounded in their entirety, and points to the lack of logic: to wit, only an opposite situation could have brought under suspicion the testimonies of the witnesses, namely if only one survived victim had said during the investigation that the accused Miloš Radić did not have a cap – a mask, and all the others stated that he had it. If the witnesses, in a situation set up in that way, stated at the main trial that the Accused did not have a mask, this would indeed bring under suspicion the truthfulness of the testimonies of the witnesses, and also their honorable intentions.⁴³

124. Furthermore, after having thoroughly analyzed the argument of the Defense, the Trial Panel concluded:

[B]earing in mind the reactions of all the survived victims when they saw that their neighbor and friend had been hidden behind a mask, which had raised a

⁴³ Verdict, pg 42.

sort of hope in them, the Court accepted the testimonies of these witnesses in their entirety.⁴⁴

125. The Appellate Panel concludes that the Defense failed to establish that the Trial Panel's factual finding was unreasonable. The Trial Panel considered the inconsistencies identified by the Defense and was satisfied that the inconsistencies did not raise doubts concerning the facts testified to and that the testimonies of these witnesses at the main trial were more credible. The Defense did not address the Trial Panel's reasoning, but merely argued that the witnesses were not credible because of these inconsistencies. That argument is insufficient to raise an issue concerning the reasonableness of the Trial Panel's finding.

126. Moreover, the Appellate Panel considers that the analysis done by the Trial Panel is reasonable and the conclusion is logical.

127. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

3. Sub-Ground Three: Subjective Nexus

128. The Defense for the Appellant Miloš Radić argued that the Trial Panel committed a factual error in concluding that the Appellant knew of the widespread and systematic attack against the Bosniak civilian population in the municipality of Bratunac. The Defense argued that the Trial Panel established the Appellant's knowledge of such attack on the basis of his membership in the VRS at the time. The Defense challenged both these factual findings: that the Appellant was in fact a member of the VRS at the time and that because of such membership the Appellant knew of the widespread and systematic attack.

129. The Appellate Panel notes that the Trial Panel concluded:

[T]he Court established beyond any reasonable doubt that during the incriminating period the accused Mirko Todorović and Miloš Radić were members of the VRS and VP Bratunac, and that thereby they were aware of the widespread and organized attack against civilian Bosniak population, particularly against their neighbors, who are in fact the victims of the incriminating behavior of the Accused.

⁴⁴ Verdict, pg. 42.

This ensues not only from the general situation of the evidentiary proceedings, but also from the testimonies of the Accused themselves who emphasize 16 April 1992 as the day of general mobilization in the territory of the Municipality of Bratunac.⁴⁵

130. The Trial Panel further concluded:

The knowledge of the Accused that during the relevant period, in the territory of their Municipality Bratunac, the widespread and systematic attack was launched against civilian Bosniaks, thereby against their neighbors with whom they had extremely good-neighborly relations (as pointed out by all the witnesses, but also by the Accused themselves), ensues not only from the general situation of extraordinary circumstances which had started already in early 1992, but also from the fact that both the Accused were members of the Army of Serb Republic of BiH already since April 1992, which also ensues from the military ID records....⁴⁶

131. The Defense argued first that the Trial Panel erred in concluding that the Appellant was a member of the VRS at the relevant time, noting, without any reference to particular evidence, that the VRS was not legally established until 28 June 1992. However, the Defense itself admits that the *de facto* establishment of the VRS preceded the *de jure* establishment, and further admits that the Appellant was mobilized as part of the general mobilization that occurred on 16 April 1992.

132. The Defense further argued that the Appellant's military records do not establish that the Appellant was *de facto* a member of the VRS, noting that the Appellant's military records reflect only the fact that there was a general mobilization in the municipality of Bratunac on 16 April 1992.

133. The Appellate Panel considers that the Defense's argument is contradictory. The Defense admits that there was a general mobilization in the municipality of Bratunac on 16 April 1992, and that the Appellant was registered as a member of the VRS as part of that general mobilization. Whether or not the Appellant was in fact assigned military duties on that date or afterwards, it is indisputable that he was, as his military records establish, a member of the VRS, and, at least, he knew the reasons for the general mobilization.

⁴⁵ Verdict, pg. 25.

⁴⁶ Verdict, pg. 26.

134. More specifically, the Defense argued that the Trial Panel erred in concluding that the Appellant was aware of the widespread and systematic attack against the Bosniak civilian population in the municipality of Bratunac. In addition, the Defense argued that the Appellant's membership in the VRS was insufficient to establish that the Appellant knew of the widespread and systematic attack launched by the VRS in Bratunac.

135. The Appellate Panel considers that the Defense has mischaracterized the Trial Panel's reasoning. As specifically noted in the reasoning quoted above, the Trial Panel relied on both the Appellant's membership in the VRS and the "general situation of extraordinary circumstances which had started already in early 1992" in order to establish that the Appellant knew of the widespread and systematic attack.

136. The Appellate Panel concludes that the Defense has failed to establish that the Trial Panel's conclusion was unreasonable and therefore occasioned an error of fact.

137. The Appellate Panel agrees with the Defense that, as a general matter, proof of an accused's subjective awareness of the existence of a widespread or systematic attack against a civilian population should be based on more than mere evidence of membership in the armed forces perpetrating such an attack. It is difficult to sustain as a matter of law the proposition that all members of an armed force necessarily knew of the commission of a widespread or systematic attack by that armed force on the basis of their membership alone. In particular, the Appellate Panel considers that proof of subjective knowledge requires evidence that may be reasonably attributable to the individual accused. For example, evidence of notorious facts that were widely known at the time may be reasonably relied on to establish any individual's subjective knowledge. On the other hand, evidence of specific facts known only to a subset of individuals in positions of authority, such as strategic decisions, internal memoranda, and similar official or closely-held documents, generally should not be considered reliable evidence of the subjective knowledge of lower-level persons who did not have contemporaneous access to such evidence. Of course, such evidence is relevant to establishing the objective existence of a widespread or systematic attack, but the trier of fact should carefully distinguish between objective and subjective evidence when assessing the subjective knowledge of the accused.

138. The Appellate Panel further recalls, however, that it must only be established that the accused had general knowledge that there was a widespread or systematic attack against a civilian population and that his acts were part of that attack. It is not necessary, as a matter of law, to establish that the accused knew all the specific details of the attack.⁴⁷ Rather, “the accused merely needs to understand the overall context in which his or her acts took place.”⁴⁸

139. As the Verdict makes clear, the Trial Panel here did not simply rely on the Appellant’s membership in the VRS to establish his subjective knowledge of the widespread and systematic attack. Rather, the Trial Panel specifically noted that it also considered the “general situation of extraordinary circumstances which had started already in early 1992.”

140. The Appellate Panel concludes that this evidence is more than sufficient to establish that the Trial Panel reasonably concluded that the Appellant knew of the widespread and systematic attack against the Bosniak civilian population in the municipality of Bratunac and that his acts were part of such an attack.

141. Therefore, the Appellate Panel concludes that this ground of appeal is without merit, and accordingly is dismissed.

4. Sub-Ground Four: Additional Witness

142. The Defense for the Appellant Miloš Radić argued that the examination of witness Ibro Dženanović would establish that the Trial Panel committed a factual error with regard to assessing the “the testimonies of the survived witnesses given at the main trial [and] the obvious differences in their statements given during the investigation proceedings and at the main trial.” The Defense further suggested that this witness could give a more complete description of the relevant events.

⁴⁷ See, e.g., *Kunarac* Appeal Judgment, para. 102 (“This requirement [that the accused have knowledge of the attack] does not entail knowledge of the details of the attack.”); *Prosecutor v. Blagoje Simić, Miroslav Tadić, and Simo Zarić*, IT-95-9, Judgment, 30 November, 2005, para. 45.

⁴⁸ *Limaj* Trial Judgment, para. 190.

143. The Appellate Panel concludes that this allegation, even though not a clear ground of appeal,⁴⁹ is manifestly ill-founded.

144. In fact, Article 295(4) of the CPC of BiH clearly provides that “[t]he appellant must cite the reasons why he did not present [the evidence] previously.” More specifically, the appellant must show that the evidence could not, through the exercise of reasonable diligence, have been identified and presented in the main trial.

145. The Appellate Panel concludes that the Defense not only failed to cite the reasons that evidence was not presented previously, but also failed to demonstrate that the evidence could not have been found by reasonable diligence. Furthermore, the statement that “this witness could give a more complete description of the relevant events” is only a bare assertion without any foundation whatsoever. Accordingly, this ground of appeal is also dismissed.

⁴⁹ In fact, it appears that this allegation is only an element of another argument, it is not clearly identified as an autonomous ground, and it was not expressly requested as such.

D. Joint Grounds of Appeal

Criminal Liability: Contribution and Intent

146. The Defense for the Appellant Mirko Todorović and the Defense for the Appellant Miloš Radić argued that the Trial Panel erred in concluding that the Appellants were responsible as accomplices for the crime of persecution through the underlying crimes of imprisonment, torture, and murder. The Defense for both Appellants argued that the Trial Panel failed to establish the *actus reus* and *mens rea* necessary for criminal liability with respect to these crimes.

147. The Appellate Panel considers that the key issue raised by the Defense is whether the Trial Panel properly concluded that the Appellants' contributions were decisive to the commission of the crimes and that the Appellants acted with knowledge and intent.

148. The Trial Panel, in concluding that the Appellants were accomplices of the crimes of imprisonment, torture, and murder, as underlying crimes for the offense of persecution, found:

[The Accused] participated in the commission of the actions as charged, in the manner that as the local inhabitants, they showed the way to the place where their neighbors were hidden, the forest path which the soldiers from aside [*sic*] could not have known at all, and thereafter, by their presence with cocked rifles, participated in the unlawful arrest, and by standing around the gathered group, enabled the remaining 4 soldiers to abuse, beat and seize valuable items from the captured civilians, even that two of them singled out from the group a 20-year old girl Hamedina Ramić and took her to the house in which she was kept, and finally, when returning the civilians again toward the place where they had been found, again with cocked rifles, looking at them in their faces, enabled one of the soldiers to execute the group of the remaining 12 civilians. Although armed, the Accused failed to prevent the soldiers from abusing their neighbors, failed to let them leave the crime scene unnoticed, although the terrain allowed so, and failed to prevent one of the soldiers from opening the fire at their neighbors.⁵⁰

149. The Trial Panel reasoned with respect to the Appellants' criminal liability:

⁵⁰ Verdict, pg. 42.

Their behavior, although passive at first sight, had a decisive importance for the commission of this crime. Had the Accused, as asserted by the Defense, been forced to be at the crime scene, a logical issue arises as to how come that the Accused did not try to prevent the remaining 4 soldiers from their intentions. In the opinion of this Court, two armed soldiers like them, helped by 12 civilians, could have quite certainly resisted four soldiers from aside. This is in particular so bearing in mind the advantage of the terrain knowledge, which was on the side of the captured civilians.⁵¹

150. The Trial Panel further reasoned:

[The Appellants] showed the way to the place where their neighbors had been hidden, and thereafter with cocked rifles secured the terrain and prevented the captured civilians from leaving the scene (although they had a chance for that if only the Accused had let them do so), and with such behavior enabled the execution of the captured civilians.

The Accused, the Court concludes, were aware of their actions and they wanted its commission, because had they not, the Court is convinced, they could have prevented it.⁵²

151. Article 29 of the CC of BiH defines accomplice liability⁵³ as:

If several persons who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, shall each [*sic*] be punished as prescribed for the criminal offense.

152. A “decisive” contribution has been defined as a contribution “without which the offense would not be accomplished (at all or in a way as it is planned to be accomplished).”⁵⁴

153. Article 35 of the CC of BiH defines criminal intent as:

- (1) A criminal offense may be perpetrated with direct or indirect intent.
- (2) The perpetrator acts with direct intent when a perpetrator was aware of his deed but still desired its perpetration.

⁵¹ Verdict, pg. 42.

⁵² Verdict, pg. 44.

⁵³ The English translation of Article 29 of the CC of BiH uses the term “accomplice” liability. The Appellate Panel considers that this term is identical to and synonymous with the term “co-perpetrator”. Accordingly, while the Appellate Panel will use the term “accomplice”, as that language is used in the English translation of the CC of BiH, all references to “accomplice” liability in the English language version of this Verdict, should be understood as also referring to liability as a “co-perpetrator”.

⁵⁴ Commentaries to the CC of BiH, pg. 174.

- (3) The perpetrator acts with indirect intent when a perpetrator was aware that a prohibited consequence might have resulted from his action or omission to act but nevertheless consented to its occurrence.

154. By contrast, Article 31 of the CC of BiH defines accessory liability 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 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.

155. The Appellate Panel, taking into account the abovementioned legal provisions, concludes first that the Trial Panel committed an error of law in its analysis of the decisiveness of the Appellants' acts to the crimes committed by the principal perpetrators. Specifically, the Trial Panel erred in law in relying on what it considered the Appellants' failure to prevent the commission of the crimes to establish that the Appellants decisively contributed to the perpetration of the crimes of imprisonment, torture, and murder.

156. The Trial Panel first concluded that the Appellants:

participated in the commission of the actions as charged, in the manner that as the local inhabitants, they showed the way to the place where their neighbors were hidden, the forest path which the soldiers from aside [*sic*] could not have known at all, and thereafter, by their presence with cocked rifles, participated in the unlawful arrest, and by standing around the gathered group, enabled the remaining 4 soldiers to abuse, beat and seize valuable items from the captured civilians, even that two of them singled out from the group a 20-year old girl Hamedina Ramić and took her to the house in which she was kept, and finally, when returning the civilians again toward the place where they had been found, again with cocked rifles, looking at them in their faces, enabled one of the soldiers to execute the group of the remaining 12 civilians.⁵⁵

157. The Trial Panel went on to note that "the [Appellants] failed to prevent the soldiers from abusing their neighbors, failed to let them leave the crime scene unnoticed, although the

⁵⁵ Verdict, pg. 42.

terrain allowed so, and failed to prevent one of the soldiers from opening the fire at their neighbors.”⁵⁶

158. Finally, the Trial Panel reasoned with respect to the significance of the Appellants’ contribution:

Their behavior, although passive at first sight, had a decisive importance for the commission of this crime. Had the Accused, as asserted by the Defense, been forced to be at the crime scene, a logical issue arises as to how come that the Accused did not try to prevent the remaining 4 soldiers from their intentions. In the opinion of this Court, two armed soldiers like them, helped by 12 civilians, could have quite certainly resisted four soldiers from aside.⁵⁷

159. It is clear that, when assessing the decisiveness of the Appellants’ contribution to the perpetration of the crimes, the Trial Panel committed an error of law by improperly conflating the Appellants’ acts and omissions. In particular, it is clear that the Trial Panel improperly concluded that the decisiveness of the Appellants’ contribution was established by the Appellants’ omissions, rather than by the Appellants’ acts.

160. The Trial Panel established that the Appellants participated in the commission of the criminal offenses by guarding the captured civilians before and during the perpetration of the crimes. The Trial Panel did not establish that the Appellants’ omissions were culpable omissions that constituted the *actus reus* of the crimes. Accordingly, it is axiomatic that the decisiveness of the Appellants’ contribution to the perpetration of those crimes can only be assessed with respect to the affirmative culpable acts. The Trial Panel’s reliance on the Appellants’ omissions, their failure to prevent the crimes, as establishing the decisiveness of their contribution was therefore an error of law.

161. The Trial Panel did not provide any other alternative reasoning as to the elements of accomplice liability under Article 29 of the CC of BiH, namely in relation to establishing the limits of the individualized shared direct intent of the Appellants. Accordingly, the Trial Panel’s error of law invalidates the Trial Panel’s conclusion that the Appellants are guilty as accomplices for the crimes of imprisonment, torture, and murder.

⁵⁶ Verdict, pg. 42.

⁵⁷ Verdict, pg. 42 (emphasis added).

162. The Appellate Panel, having enunciated the correct legal standards, will now review the relevant factual findings of the Trial Panel and determine the Appellants' criminal liability.

163. The Appellate Panel notes that the Trial Panel made the following factual findings, *inter alia*, relevant to establishing the criminal liability of the Appellants:

- (1) The Appellant Mirko Todorović, together with a group of soldiers, found and captured the group of Bosniak civilians hiding in the abandoned quarry and escorted them to the house of Abdulah Sulejmanović.⁵⁸
- (2) The Appellants Mirko Todorović and Miloš Radić guarded the captured civilians in front of the house of Abdulah Sulejmanović while the other soldiers abused and beat the captured Bosniak civilians and seized valuable items from them. The Appellants Mirko Todorović and Miloš Radić themselves did not abuse or beat the captured Bosniak civilians or seize valuable items from them.⁵⁹
- (3) The Appellants Mirko Todorović and Miloš Radić guarded the captured Bosniak civilians as they were escorted from the house of Abdulah Sulejmanović to the execution site.⁶⁰
- (4) The Appellants Mirko Todorović and Miloš Radić guarded the captured Bosniak civilians during the execution. The Appellants Mirko Todorović and Miloš Radić themselves did not shoot at or kill the captured Bosniak civilians.⁶¹
- (5) The Appellants Mirko Todorović and Miloš Radić were present during these events, and their presence was not under duress.⁶²
- (6) The Appellant Miloš Radić was wearing a mask that he removed after arriving at the execution site.⁶³

164. On the basis of the Trial Panel's factual findings as listed above, the Appellate Panel concludes that the Appellants are guilty as accessories to the crime of persecution committed through the underlying crimes of torture and murder.

⁵⁸ See Section III.B.3, Section V.B.1, and Section V.C.1, *supra*. See Verdict, pg. 42.

⁵⁹ See Section III.B.3, Section V.B.1, Section III.C.3, and Section V.C.1, *supra*. See Verdict, pgs. 42-43.

⁶⁰ See Section III.B.3, Section V.B.1, and Section V.C.1, *supra*. See Verdict, pg. 42.

⁶¹ See Section V.B.1, *supra*. See Verdict, pgs. 42-43.

⁶² See Verdict, pgs. 42-44.

⁶³ See Section V.C.2, *supra*. See Verdict, pg. 42.

165. The Appellate Panel concludes first that the Trial Panel's factual findings do not establish beyond a reasonable doubt that the Appellants' contribution to the perpetration of those crimes was decisive. In assessing the decisiveness of the Appellants' contributions, the Appellate Panel considers that: 1) there was no evidence proving that the Appellants' personally prevented any of the captured Bosniaks from fleeing; 2) there was no evidence proving that the Appellants' directly participated in the torture or murder of the captured Bosniaks; and 3) there was no evidence proving that the other soldiers decisively relied on the Appellants' contribution to perpetrate the torture or murder of the captured Bosniaks.

166. Some witnesses suggested that, without the assistance of the Appellants, the soldiers could not have found the civilians hiding in the abandoned quarry. However, the Trial Panel did not make a factual finding as to this specific issue. Accordingly, that fact was not established beyond a reasonable doubt.

167. The Appellate Panel further concludes that the Trial Panel's factual findings do not establish beyond a reasonable doubt that the Appellants intended the commission of those crimes. In assessing the Appellants' intent, the Appellate Panel considered that: 1) there was no evidence that the Appellants knew that the civilians were to be tortured and then executed prior to the commission of those crimes; 2) there was no evidence that the Appellants had either explicitly or implicitly agreed to the commission of those crimes with the direct perpetrators; and 3) the Appellants neither directly participated in the crimes nor decisively contributed to them.

168. The Appellate Panel does conclude, however, that the Trial Panel's factual findings do establish beyond a reasonable doubt that the Appellants "intentionally help[ed] another to perpetrate a criminal offence" and are therefore liable as accessories to the crime of persecution committed through the underlying crimes of torture and murder.

169. The acts of the Appellants Mirko Todorović and Miloš Radić helped the group of soldiers in perpetrating the crimes of torture and murder. In particular, by escorting and guarding with automatic weapons the captured Bosniak civilians before and while they were first tortured and then murdered, the Appellants helped the principal perpetrators by "removing obstacles" to the perpetration of those crimes. In addition, by participating in the

capture of the Bosniak civilians from the abandoned quarry, the Appellant Mirko Todorović further helped the subsequent perpetration of those crimes.

170. The Appellants Mirko Todorović and Miloš Radić further knew from the immediate context and social and political environment that the principal perpetrators would commit the crimes of torture and murder and knew that their acts helped the principal perpetrators in the commission of those crimes.

171. The Appellants were both aware of the widespread or systematic attack against Bosniak civilians in the Municipality of Bratunac. The Appellants were both present at the house of Abdulah Sulejmanović while the captured Bosniak civilians were tortured by the group of soldiers. The Appellants were both part of the armed escort that guarded the captured Bosniak civilians to the execution site, were both present when the captured Bosniak civilians were lined up, and were both present when Mali Rašo opened fire on the captured Bosniak civilians. The Appellants both knew that by guarding and escorting the captured Bosniak civilians before and during these crimes they helped the principal perpetrators of the crimes.

172. Finally, the Appellants Mirko Todorović and Miloš Radić knew that their acts helped the commission of the crime of persecution by the principal perpetrators.

173. The Appellate Panel recalls that the elements of the crime of persecution pursuant to Article 172(1)(h) are:

- 1) the intentional and severe deprivation of fundamental rights;
- 2) contrary to international law;
- 3) by reason of the identity of a group or collectivity;
- 4) against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or sexual gender or other grounds that are universally recognized as impermissible under international law; and
- 5) in connection with any offense listed in this paragraph of this Code, any offence listed in this Code or any offence falling under the competence of the Court of Bosnia and Herzegovina.⁶⁴

⁶⁴ Cf. *Prosecutor v. Miroslav Kvočka, et al*, IT-98-30/1-A, Judgment, 28 February 2005, para. 320 (elements of crime of persecution under Article 5 of the ICTY Statute). See also, *Rašević and Todović* First Instance Verdict, pgs. 100-101 (discussing elements of crime of persecution under the CC of BiH).

174. The Appellate Panel concludes that the Trial Panel's factual finding establish beyond a reasonable doubt that the soldiers who perpetrated the crimes of torture and murder did so with the intent to discriminate against the captured Bosniak civilians on the grounds of their ethnicity and religion. The victims of the crimes were all Bosniak civilians. These crimes were committed as part of a widespread or systematic attack against the Bosniak population of Bratunac Municipality. Moreover, the soldiers shouted ethnic slurs when they captured the Bosniak civilians and while they tortured the Bosniak civilians.

175. The Appellate Panel further concludes that the other elements of the crime of persecution were established beyond a reasonable doubt. The torture and murder of the captured Bosniak civilians were intentional and severe deprivations of fundamental rights contrary to international law. The captured Bosniak civilians who were tortured and murdered were discriminated against in fact on the basis of their ethnicity and religion. Finally, the intentional and severe deprivations of fundamental rights were necessarily in connection with an offense listed in Article 172 of the CC of BiH, as they were themselves crimes against humanity. Accordingly, the Appellate Panel concludes that the Trial Panel's factual finding establish beyond a reasonable doubt that the soldiers committed the crime of persecution.

176. The Appellants Mirko Todorović and Miloš Radić knew these facts. They knew particularly that the soldiers intended to discriminate against the captured Bosniak civilians on the grounds of their ethnicity and religion. Accordingly, the Appellants knew that their acts were thereby helping other soldiers in the perpetration of the criminal offence of persecution.

177. The Appellate Panel concludes, however, that the crime of imprisonment, as a crime against humanity and underlying crime for the crime of persecution, was not committed by the Appellants or the soldiers. Article 172(1)(e) of the CC of BiH requires that the victim either be imprisoned or suffer "[an]other severe deprivation of physical liberty in violation of fundamental rules of international law". The Appellate Panel notes that under Article

172(2)(e) of the CC of BiH, the elements of the crime of torture include that the victim be “in the custody or under the control of the accused”.⁶⁵

178. Accordingly, the Appellate Panel concludes that the Trial Panel’s factual findings establish beyond a reasonable doubt that the Appellants Mirko Todorović and Miloš Radić are therefore guilty as accessories to the crime of persecution committed through the underlying crimes of torture and murder.

179. It follows from the foregoing that the Trial Panel correctly established all decisive facts, but upon the correct application of the law, a different verdict should have been reached. The Appellate Panel accordingly revised the Verdict pursuant to Article 314(1) of the CPC of BiH.

⁶⁵ The Elements of Crimes of the Rome Statute provides: “The gravity of the conduct was such that it was in violation of fundamental rules of international law.” ICC Elements of Crimes, Art. 7(1)(e)(2).

VI. GROUNDS OF APPEAL UNDER ARTICLE 300:

SENTENCING

A. Standards of Review

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

181. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

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

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

184. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

185. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

B. Appeal of Mirko Todorović

186. The Defense for the Appellant Mirko Todorović argued that the Trial Panel failed when determining the sentence to do so in view of the purposes of punishment, as required by Article 39 of the CC of BiH, and take into account extenuating circumstances, as required by Article 48 of the CC of BiH. The Defense argued that the Trial Panel failed to mete out the appropriate sanction in view of the purpose of punishment. The Defense further argued that the Court did not take into account the extenuating circumstances in favor of the Appellant, including the negative attitude of the Appellant Todorović towards the war events, since that was the reason for his being sanctioned by the verdict of the Military Court in Bijeljina, for deserting. Finally, the Defense argued that it is simply not possible that both accused, Todorović and Radić, be imposed an identical criminal sanction, which is certainly contrary to the principle of the sanction individuality.

187. The Appellate Panel concludes that this ground of appeal is moot, as, for the reasons stated above, the Appellate Panel concludes that the Verdict must be revised with respect to the Appellant's criminal responsibility. The Appellate Panel will accordingly determine the appropriate criminal sanction on the basis of the revised findings.

C. Appeal of Miloš Radić

188. The Defense for the Appellant Miloš Radić argued that the sentence imposed by the Trial Panel is too severe in light of the individual and objective responsibility of the Accused.

189. The Appellate Panel concludes that this ground of appeal is moot, as, for the reasons stated above, the Appellate Panel concludes that the Verdict must be revised with respect to the Appellant's criminal responsibility. The Appellate Panel will accordingly determine the appropriate criminal sanction on the basis of the revised findings.

D. Appeal of the Prosecutor's Office

190. The Prosecutor argued that the sentence imposed by the Trial Panel is too lenient in light of aggravating circumstances to which the Trial Panel did not attach sufficient weight. In particular, the Prosecutor argued that the imposed sentences do not correspond to the gravity of the criminal offence, the circumstances under which the criminal offence was committed, the degree of the criminal liability of the Accused and the social danger of the offence, the gravity of the consequences resulting thereof, and other circumstances in which the offence was committed and which affect the meting out of the punishment. The Prosecutor further argued that the Trial Panel improperly considered certain circumstances as mitigating circumstances.

191. The Appellate Panel concludes that this ground of appeal is moot, as, for the reasons stated above, the Appellate Panel concludes that the Verdict must be revised with respect to the Appellant's criminal responsibility. The Appellate Panel will accordingly determine the appropriate criminal sanction on the basis of the revised findings.

VII. SENTENCING

A. Law on Sentencing

192. The purposes of sentencing are set out in both the general and special sections of the CC of BiH.

193. Article 2 of the CC of BiH establishes as a general principle that the type and range of the sentence must be “necessary” and “proportionate” to the “nature” and “degree” of danger to the protected objects: personal liberties, human rights, and other basic values. The *type* of sentence the Appellate Panel can legally impose is limited to jail, and the *range*, under Article 172(1) combined with Article 42 of the CC of BiH, has been established as not less than 10 years or long-term imprisonment. The distinction between a not less than 10 year sentence and a long-term imprisonment sentence relies not only on the duration of the sentence but mainly on the consequences for the convicted person. In fact, a long-term sentence, further to a longer period of incarceration, includes: more severe restrictions on the personal liberties of the convicted person within the prison system (Art. 152 LoE⁶⁶); less privacy as to correspondence and telephone calls (Art. 155 LoE) and a longer mandatory sentence before consideration for parole or community privileges (Art. 44(4) CC of BiH). On the other hand, long-term sentencing also provides for more intensive and individualized treatment for rehabilitation (Article 152(3) LoE).

194. The Appellate Panel, in addition to the general principle, must address other purposes and considerations prescribed by the CC of BiH, when determining and pronouncing a sentence: the objective criminal act and its impact on the community, including the victims; and the convicted person.

195. The Appellate Panel, in Part I below, will analyze the criminal act itself and determine the penalty that is necessary and proportionate for the crime committed by considering the relevant statutory purposes and applying the relevant statutory considerations. In Part II below, the Appellate Panel will analyze both of the Appellants individually and determine the penalty that is necessary and proportionate for each by considering the relevant aggravating

⁶⁶ *The Law of Bosnia And Herzegovina on the Execution of Criminal Sanctions, Detention and Other Measures*, Official Gazette No. 13/05.

and extenuating statutory considerations and adjusting the previously determined sentence to reflect those considerations.

1. Necessary and Proportionate to the Gravity of the Crime

a. Danger and Threat to Protected Objects and Values

196. The sentence, pursuant to Articles 2 and 48 of the CC of BiH, must be necessary and proportionate to the danger and threat to the protected objects and values, which in the case of crimes against humanity is all of humanity.

197. The crime of persecution perpetrated through the underlying crimes of torture and murder poses a grave danger and threat to human protected values. Persecution itself directly threatens the fundamental value of non-discrimination on the basis of protected grounds, while acts of torture and murder, in particular, are grave dangers to civilians as protected persons.

b. Suffering of the Direct and Indirect Victims

198. The sentence, pursuant to Article 48 of the CC of BiH, must be necessary and proportionate to the suffering of the direct and indirect victims of the crime.

199. The direct victims of the crime of persecution for which the Accused have been found guilty are the eight civilians who were murdered and tortured, the six civilians who were tortured and the families of these fourteen victims. Their suffering was naturally great, as the victims were subjected to physical violence and some were murdered execution-style. The indirect victims include all of humanity, as crimes against humanity threaten and infringe human dignity.

c. Deterrence

200. The sentence, pursuant to Articles 6 and 39 of the CC of BiH, must be sufficient to deter others from committing similar grave criminal offenses against human dignity.

201. Prevention of crimes against humanity, namely persecution, has always been linked with impunity. These crimes must be punished, and the punishment must be sufficient to outweigh the advantages of complicity and so deter individuals in similar positions in the future.

202. In times of violent conflict, civilians, namely women and children, are the most vulnerable. Crimes committed as part of a widespread or systematic attack directed against any civilian population and designed to benefit a party to the conflict cannot be tolerated. By punishing necessarily and proportionately those individuals who already commit such acts, others involved in future conflicts will be put on notice that there is a serious price to pay for in any way engaging in the commission of these crimes. The sentence must reflect that the persons involved in a conflict continue to have the legal responsibility to obey the law. It would be impossible, for those superiors who conceive widespread or systematic attacks against civilians, to successfully persecute and terrorize an entire population without the willing criminal involvement of other individuals.

d. Express Community Condemnation

203. The sentence, pursuant to Article 39 of the CC of BiH, must express the national and international community's condemnation of the accused's conduct.

204. The community in this case is the people of Bosnia and Herzegovina and the entire world community, who have established, by domestic and international law, that crimes against humanity be unequivocally condemned and the commission of crimes against humanity be subject to effective punishment. This community has made it clear that these crimes are equally reprehensible and cannot be condoned with impunity, regardless of the side which committed them or the place in which they were committed. The legislation of Bosnia and Herzegovina reflects this same resolve. However, criminalization of this conduct is insufficient alone to show condemnation of it. In fact, appropriate penal sanctions must be imposed on those who commit these crimes in order to confirm that norms established by domestic and international humanitarian law are not merely an abstract desire or a remote aspiration.

e. Educate as to Danger of Crime

205. The sentence, pursuant to Article 39 of the CC of BiH, must be necessary and proportionate to the need to increase the consciousness of any person to the danger of crime.

206. Trial and sentencing for this activity must demonstrate that crimes perpetrated in time of war will not be tolerated anymore and may not be committed with impunity. The crime of persecution creates a danger not only to the immediate human beings victims, but also to the humanity as a whole, contributing to an atmosphere of lawlessness, where the rule of law is undermined and the persons who identify with the perpetrator of criminal violations are encouraged to act with impunity.

f. Educate as to the Fairness of Punishment

207. The sentence, pursuant to Article 39 of the CC of BiH, must be necessary and proportionate to the need to increase the consciousness of persons to the fairness of punishment.

208. Trial and sentencing for this activity must demonstrate not only that crimes perpetrated in time of war will not be tolerated, but also that the criminal justice process is the appropriate way to recognize the criminal violations and break the cycle of private retribution. Reconciliation cannot be ordered by a court, nor can a sentence mandate it. However, a sentence that fully reflects the seriousness of the criminal act can contribute to reconciliation by providing a legal, rather than violent, response; and promote the goal of replacing the desire for private or communal vengeance with the recognition that justice is achieved and favors reconciliation.

2. Necessary and Proportionate to the Individual Offender

209. The statutory requirement of fairness also requires consideration of the individual circumstances of the criminal actor in addition to the criminal act.

210. There are two statutory purposes relevant to the individual convicted of crime: (1) specific deterrence to keep the convicted person from offending again (Arts. 6 and 39 of the CC of BiH) and (2) rehabilitation (Art. 6 of the CC of BiH).

211. There are also a number of statutory considerations relevant to the sentencing purposes of specific deterrence and rehabilitation that affect the sentencing of the individual convicted person (Art. 48 of the CC of BiH).

212. These considerations include: degree of liability; conduct of the perpetrator prior to the offense, at or around the time of the offense and since the offense; motive; and the personality of the perpetrator. These considerations, as the facts warrant, can be used in aggravation or mitigation of the sentence. The point of these considerations is to assist in determining the sentence that is not only necessary and proportionate for the purposes and considerations already calculated in connection with the act itself and the effect on the community, but also to tailor that sentence to the deterrent and rehabilitative requirements of the particular offender.

213. Rehabilitation is not a purpose only imposed by the CC of BiH; moreover it is the only purpose related to sentencing recognized and expressly required under international human rights law, to which the Court is constitutionally bound. Article 10(3) of the ICCPR provides: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”

B. Accused Mirko Todorović

1. The Degree of Liability

214. The Appellant Mirko Todorović helped the group of soldiers by giving able information and guidance to find and capture the group of Bosniak civilians hiding in the abandoned quarry, and after, by escorting and guarding the captured Bosniak civilians while the soldiers tortured and murdered them. These actions clearly helped the group of soldiers to perpetrate the criminal offense of persecution by torturing and killing the captured Bosniak civilians.

2. Conduct and Personal Circumstances

215. The conduct and personal circumstances of Mirko Todorović prior to, during and after the commission of the offense present aggravating and extenuating factors relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

216. Mirko Todorović was convicted of three prior offenses before the offense under consideration, the most recent of which is nineteen years old. The Appellate Panel considers these circumstances to be aggravating.

b. Circumstances Surrounding the Offense

217. Persecution, as mistreatment of an individual or group by another individual or group, is, after genocide, one of the most heinous offenses to humanity and human rights. Mirko Todorović, by helping the principal perpetrators, participated in this mistreatment, contributing to the damage to humanity, in general, and to the human rights of the Bosniak civilians, in particular. The circumstances surrounding the offense have already been calculated, and there is no evidence of any additional circumstance that is either aggravating or extenuating.

c. Circumstances Since the Offense

218. Mirko Todorović is married and the father of three children. He has no convictions since the commission of the offense. The Court has no information of any other proceedings pending against Mirko Todorović for some other criminal offense. The Panel considers the circumstances since the offense as an extenuating circumstance.

d. Conduct During the Case

219. The Trial Panel found that Mirko Todorović behaved with decorum during the course of the trial. Mirko Todorović also behaved with decorum during the appellate proceedings. Mirko Todorović's conduct during the trial was neither aggravating nor extenuating.

3. Motive

220. Motive in this case means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the political, national, ethnic, cultural and religious identity of a group or collectivity. It was not necessary to establish beyond a reasonable doubt that Mirko Todorović intended to discriminate on ethnic and religious grounds to find Mirko Todorović as guilty as an accessory to acts of persecution. The Appellate Panel considers, moreover, that there is insufficient evidence to establish that Mirko Todorović was motivated by discriminatory motives. In any event, the intent to discriminate has already been calculated as an element of the offence, and therefore will not be calculated again as an additional factor of aggravation.

4. Personality of Todorović

221. The Appellate Panel has no evidence regarding the personality of Mirko Todorović other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore, Mirko Todorović's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

222. The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with general rehabilitation: an opportunity to be aware of the violated values, the effects of his actions on victims, to generate a sincere and deep sorrow on his past violations, and internalize the ways to improve his behavior when released so as not to return to commit other criminal offenses.

223. In addition, all prisons in BiH have the statutory responsibility to design an individual rehabilitative treatment program for the prisoners entrusted to their care, and to provide “education” to the prisoner by “modern educational methods” so that he will internalize socially acceptable values.⁶⁷ The nature of the crime of persecution perpetrated in the manner it was perpetrated by Mirko Todorović raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.⁶⁸ These statutory requirements for rehabilitation are consistent with BiH’s international human rights obligations under ICCPR Article 10(3).

6. Sentence

224. Therefore, in evaluating the relevant “circumstances bearing on the magnitude of punishment” set out in CC of BiH Article 48(1), for the reasons explained above, the Appellate Panel concludes that both extenuating and aggravating circumstances exist. The Appellate Panel considers Mirko Todorović’s criminal record as an aggravating circumstance, and his family life as an extenuating circumstance. The Appellate Panel also took into account that Mirko Todorović helped not only the torture and murder of the Bosniak civilians, but also helped find them initially. Having balanced all the relevant circumstances, the Appellate Panel concludes that the effective penalty for Mirko Todorović as an accessory to the commission of the crime of persecution is 13 years imprisonment.

⁶⁷ LoE Art. 105.

⁶⁸ LoE Art. 106.

C. Accused Miloš Radić

1. The Degree of Liability

225. The Appellant Miloš Radić helped the group of soldiers by escorting and guarding the captured Bosniak civilians while the group of soldiers tortured and murdered them. Miloš Radić was wearing a mask that he removed after arriving at the execution site. These actions clearly helped the group of soldiers to perpetrate the criminal offense of persecution by torturing and killing the captured Bosniak civilians.

2. Conduct and Personal Circumstances

226. The conduct and personal circumstances of Miloš Radić prior to, during and after the commission of the offense present both aggravating and extenuating facts relevant to considerations of deterrence and rehabilitation.

a. Circumstances Before the Offense

227. Miloš Radić does not have any record of prior criminal offense before the events at issues in these proceedings. The circumstances before the war are neither aggravating nor extenuating.

b. Circumstances Surrounding the Offense

228. Persecution, as mistreatment of an individual or group by another individual or group, is, after genocide, one of the most heinous offenses to humanity and human rights. Miloš Radić, by helping the principal perpetrators, participated in this mistreatment, contributing to the damage to humanity, in general, and to the human rights of the Bosniak civilians, in particular; moreover, when he removed the mask when arriving at the execution site. The circumstances surrounding the offense have already been calculated. However, the circumstances related to the mask show a particular contempt and devaluation of the human dignity of the victims, and that must be considered as an aggravating circumstance.

c. Circumstances Since the Offense

229. Miloš Radić is married and the father of three children. He has no prior convictions, and the Court has no information of any other proceedings pending against Miloš Radić for some other criminal offense. The Appellate Panel considers the circumstances since the offense as extenuating circumstances.

d. Conduct During the Case

230. The Trial Panel found that Miloš Radić behaved with decorum during the course of the trial. Miloš Radić also behaved with decorum during the appellate proceedings. Miloš Radić's conduct during the trial was neither aggravating nor extenuating.

3. Motive

231. Motive in this case means the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the political, national, ethnic, cultural and religious identity of a group or collectivity. It was not necessary to establish beyond a reasonable doubt that Miloš Radić intended to discriminate on ethnic and religious grounds to find Miloš Radić guilty as an accessory to acts of persecution. The Appellate Panel considers, moreover, that there is insufficient evidence to establish that Miloš Radić was motivated by discriminatory motives. In any event, the intent to discriminate has already been calculated as an element of the offence, and therefore will not be calculated again as an additional factor of aggravation.

4. Personality of Radić

232. The Appellate Panel has no evidence regarding the personality of Miloš Radić other than what was revealed by his actions before, during, and after the offenses, what could be observed from his behavior in the courtroom, and the nature of the offense itself, all of which have been considered and discussed above. Therefore Miloš Radić's personality does not constitute grounds for any additional aggravating or extenuating considerations.

5. Deterrence and Rehabilitation

233. The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with general rehabilitation: an opportunity to be aware of the violated values, the effects of his actions on victims, to generate a sincere and deep sorrow on his past violations, and internalize the ways to improve his behavior when released so as not to return to commit other criminal offenses.

234. In addition, all prisons in BiH have the statutory responsibility to design an individual rehabilitative treatment program for the prisoners entrusted to their care, and to provide “education” to the prisoner by “modern educational methods” so that he will interiorize socially acceptable values.⁶⁹ The nature of the crime of persecution perpetrated in the manner it was perpetrated by Miloš Radić raises issues for individual assessment. The LoE requires that prisoners be assessed as to their individual needs, and that treatment plans be designed to meet those individual needs.⁷⁰ These statutory requirements for rehabilitation are consistent with BiH’s international human rights obligations under ICCPR Article 10(3).

6. Sentence

235. Therefore in evaluating the relevant “circumstances bearing on the magnitude of punishment” set out in CC of BiH Article 48(1), for the reasons explained above, the Appellate Panel concludes that both extenuating and aggravating circumstances exist. The Appellate Panel considers the circumstances surrounding the offense as an aggravating circumstance and his family life as an extenuating circumstance. Having balanced all the relevant circumstances, the Appellate Panel concludes that the effective penalty for Miloš Radić as an accessory to the commission of the crime of persecution is 12 years imprisonment.

⁶⁹ LoE Art. 105.

⁷⁰ LoE Art. 106.

D. Crediting the Time in Custody of both Accused to the Imprisonment Sentence

236. The Appellate Panel notes that the First Instance Panel credited the time the Accused spent in custody to the imprisonment sentence since 24 May 2007. The case file shows that the deprivation of liberty for both Accused began on 22 May 2007. Pursuant to Article 56(1) of the CC of BiH, “the time spent in custody pending trial, as well as any deprivation of freedom related to the criminal offence shall be counted as part of the sentence of imprisonment....” Therefore, the time of deprivation of freedom to be credited to the imposed sentence of imprisonment on the Accused will be assessed from 22 May 2007 until 29 January 2009, on which day the custody of both Accused was terminated.

237. According to the foregoing and pursuant to Article 310(1) and Article 314 of the CPC of BiH, it is decided as stated in the operative part of the Verdict.

PRESIDING JUDGE

Dragomir Vukoje

Minutes taker

Sanida Vahida

REMEDY: No appeal shall be allowed against this Verdict.

*I hereby confirm that this document is a true translation of the original written in
Bosnian/Serbian/Croatian.
Sarajevo, 18 February 2009
Dinka Bevrnja
Certified Court Interpreter for English*