Number: X-KRŽ-08/488
Sarajevo, 29 January 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes comprised of Judge Azra Miletić as the President of the Panel, and Judges Hilmo Vučinić and John Fields as members of the Panel, with the participation of Legal Advisor Dženana Deljkić - Blagojević as the Record- taker, in the criminal case against the accused Ivica Vrdoljak for the criminal offense of War Crimes against Civilians in violation of Article 173 (1) item c) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC BiH), deciding upon the Appeal by the attorney Krešimir Zubak, defense counsel for the Accused, filed from the Verdict of the Court of BiH, No. X-K-08/488 of 10 July 2008, after the session held in the presence of the Prosecutor of the BiH Prosecutor's Office, Vesna Ilić, the accused Ivica Vrdoljak, and his defense counsel, attorney Krešimir Zubak, pursuant to Article 310 (1), in conjunction with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC BiH), issued on 29 January 2009 the following:

V E R D I C T

The Appeal by attorney Krešimir Zubak , defense counsel for the accused Ivica Vrdoljak is refused as unfounded and the Verdict of the Court of Bosnia and Herzegovina, No. X-KR-08/488 of 10 July 2008 is upheld.

R e a s o n i n g

a) Introduction

By the Verdict of the Court of Bosnia and Herzegovina (BiH), No. X-KR-08/488 of 10 July 2008, the accused Ivica Vrdoljak was found guilty of the criminal offense of War Crimes against Civilians in violation of Article 173 (1) item c) of the CC BiH, for which he was imposed a sentence of imprisonment for a term of five (5) years. By the First Instance Verdict, pursuant to Article 188 (4) of the CPC BiH, the Accused is relieved of the duty to reimburse the costs of criminal proceedings. Furthermore, pursuant to Article 56 of the CC BiH, the time that the Accused spent in custody as of 29 November 2007 shall be credited towards the sentence as imposed.

The Defense Counsel for the Accused filed an appeal on the following grounds prescribed under Article 296 of the CPC BiH: an essential violation of the criminal procedure provisions, a violation of the criminal code, incorrectly and incompletely established state of facts, and proposed to the Appellate Panel of the Court of BiH to uphold the Appeal and revise the First Instance Verdict by acquitting the Accused of the charges due to the lack of evidence, that is, to uphold the Appeal, revoke the contested Verdict, and schedule a new trial.

On 15 September 2008, the BiH Prosecutor's Office submitted its response to the Appeal filed by attorney Krešimir Zubak emphasizing that the Defense Appeal is unfounded in its entirety and that the Court should refuse it.

During the public session of the Appellate Panel held on 30 January 2009, the Defense for the Accused, and also the BiH Prosecutor's Office, maintained their appellate claims, that is, the response to the appeal respectively, that were earlier delivered to the Court in writing.

After a review of the contested Verdict concerning the appellate claims of the Defense Counsel pursuant to Article 306 of the CPC BiH, the Appellate Panel of the Court of BiH decided as stated in the operative part due to the following reasons:

b) Appellate ground: an essential violation of the criminal procedure provisions (Article 297 (2) of the CPC BiH)

In the explanation of this appellate ground, the Defense Counsel for the Accused states that in the contested Verdict, the Court did not accept a number of the Defense evidence comprised of the Witness Examination Records for Čedo Prodić, Momir Lazić, Luka Patković and Radojica Garić that were made based on their statements given to the District Prosecutor's Office in Doboj or the Basic Court in Derventa. Concerning these Records, the Defense Counsel emphasizes that they were presented as evidence during the main trial, to which neither the Prosecutor nor the Trial Panel had any objections whatsoever. The Defense Counsel further points to the fact that these Records were the the Prosecution evidence that the Defense presented to the Court and that served to the Defense as the basis for cross-examination of the Witnesses with a view to proving the lack of credibility on their part. Therefore, the Defense Counsel opines that the present case involves the application of Article 273 (1) rather than Article 273(2) of the CPC BiH as interpreted by the Court in the First Instance Verdict. It is further pointed out that the Court allowed the Defense to present these Records to the Witnesses at the main trial, that the Witnesses confirmed that these were their statements, and that the Witnesses could not explain why there were differences in their statements. In the opinion of the Defense, this is a proof of the lack of credibility of these witnesses and a clear proof that the Court, having aduced this evidence at the main trial, could not evaluate them as inadmissible in deciding about the guilt.
For all the foregoing, as stated in the Appeal, the Court made an essential violation of the criminal procedure because it has incorrectly applied Articles 281 and 273 of the CPC BiH, which, as the Defense Counsel further asserts, affected the lawful and correct rendering of the Verdict.
In the response to the Appeal, the Prosecutor points out that this does not concern the essential violation of the criminal procedure provisions, and that the right of the Accused to a fair trial is not diminished by the fact that the statements were not admitted into evidence. These are the records made before the applicable Criminal Procedure Code of BiH entered into force, and these records cannot be used as evidence at the main trial since they were not made in accordance with the applicable CPC BiH. Furthermore, the Prosecutor asserts that during the cross-examination, these witnesses were presented with their earlier (disputable) statements and that at the main trial the witnesses had an opportunity to confirm or deny the statements' authenticity and to explain possible earlier discrepancies in relation to the

content of their testimony provided at the main trial. This practically means that at the main trial, the Court was informed about all the circumstances and that in rendering the Verdict it took into account the credibility of those witnesses even if it did not admit into evidence their earlier statements.

In considering this appellate ground, the Appellate Panel starts from the arguments of the First Instance Court referred to on pages 5 and 6 of the contested Verdict and the fact that the First Instance Court did not evaluate the following evidence on which it based its Verdict: Record of the District Prosecutor's Office Doboj, No. KT-RZ-7/02 of 3 December 2007 on the examination of witness Čedo Prodić, Record of the Basic Court in Derventa, No. Kri 56/94 of 18 October 1992 on the examination of witness Momir Lazić, Record of the Basic Court in Derventa, No. Kri 44/94 of 14 October 1994 on the examination of witness Luka Patković, Record of the Basic Court in Derventa, No. Kri-67/94 of 24 October 1992 on the examination of witness Radojica Garić. Although the Defense Counsel for the Accused proposed that the Records concerned be admitted into evidence, after using them during the witnesses' cross-examination, the First Instance Court opined that these Records cannot be accepted as evidence because the witnesses concerned gave their testimonies before the Court at the main trial and were subjected to the direct examination and the cross-examination by both the Prosecution and the Defense, and also by the Panel members. In addition to this, as pointed out in the contested Verdict, the statements had been given to the judicial bodies long before an investigation was opened in this case. In support of this view, the Trial Panel refers to Article 281 of the CPC BiH, and Article 273 (2) of the CPC BiH.

After a review of the Records concerning the statements of the mentioned witnesses, the Appellate Panel found that they were taken in accordance with the statutory regulations that were applicable at the time when the witnesses gave their statements to the investigative judge (before the Basic Court in Derventa), that is in the District Prosecutor's Office Doboj. At the main trial, during the cross-examination, the witnesses were presented with the Records concerned, on which occasion they confirmed that these were the statements given before the investigative judge of the Basic Court in Derventa, that is, in the District Prosecutor's Office Doboj.

In order to question the credibility of these witnesses (that is, the witnesses for the Prosecution), the Defense Counsel used their earlier statements during the cross-examination. Article 273 (1) of the CPC BiH, prescribing exemptions from the direct presentation of evidence in the form that was applicable at the time of the First Instance Verdict rendering, allowed the use of the statements from the investigation as evidence at the main trial during cross-examination.[1] The applicable provision of this Article in the form that took its legal effect on 29 July 2008 allows in an even clearer manner the use of these Records as the evidence at the main trial. [2]

[1] Article 273(1) of the CPC BiH (Official Gazette of BiH, No. 36/03) reads as follows: Prior statements given during the investigative phase are admissible as evidence in the main trial and may be used in cross-examination or in rebuttal or in rejoinder. The person must be given the opportunity to explain or deny prior statement.

[2] By Article 83 of the Law on Amendments to the CPC BiH (Official Gazette of BiH, No 58/08) Article 273 (1) of the CPC BIH was amended to read as follows: Prior statements given during the investigative phase are admissible as evidence in the main trial and may be used in direct or cross-examination or in rebuttal or in rejoinder and subsequently presented as evidence. The person must be given the opportunity to explain or

The earlier statements of the four witnesses were given to the investigative bodies who had conducted the investigative procedure pursuant to the applicable statutory provisions specifically concerning the critical events that are the subject of the indictment against Ivica Vrdoljak. It is clear that the case at hand concerns the situation that is made possible by the stated statutory provision, and that the Defense Counsel acted correctly by using the earlier statements of the witnesses that are legally valid. Accordingly, there was no obstacle for these Records to be admitted into the case file, adduced as evidence and evaluated both individually and in relation to other pieces of evidence pursuant to Article 281 (2) of the CPC BiH.

Furthermore, within this appellate ground, the Appellate Panel reviewed whether the earlier mentioned incorrect application of Article 273 (1) of the CPC BiH by the First Instance Panel affected or could affect the lawful and correct rendering of the verdict, which could amount to an essential violation of the criminal proceedings provisions as stated in the Appeal.

After an analysis of the course of the main trial, it was found that that the First Instance Panel allowed the Defense Counsel for the Accused to present these statements to the witnesses during the cross-examination, and the witnesses could confirm their authenticity and directly explain possible differences in their statements. All this occurred before the First Instance Panel, so all the members of the First Instance Panel were *de facto* familiar with the earlier statements of these witnesses, their content and possible discrepancies in the testimonies of these witnesses during the main trial. Thus the statements from the investigative procedure were indirectly the subject of free evaluation of this evidence both individually and in relation to the other presented evidence. Furthermore, after the analysis of these Records in factual terms, it is easily concluded that these four witnesses had been examined before the official investigation against the Accused started (the witnesses were examined in the procedure against a NN person). Although the witnesses presented their statements specifically regarding the critical events that are the subject of the Indictment against the Accused, the examiners did not examine them at all with regard to the activities of the Accused in those events. Due to the deficiency of this manner of examination, it is quite understandable that the Court attaches more importance to the examination of these witnesses during the main trial . The Appellate Panel concludes from all this that the deficiency of the conduct of the First Instance Panel as reflected in the incorrect application of Article 273(1) of the CPC BiH regarding the Records of the statements of these witnesses from the investigation, did not affect the lawful and correct rendering of the first instance Verdict.

It follows from the foregoing that this appellate claim of the Defense Counsel for the Accused is unfounded.

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deny a prior statement.

c) Appellate ground: Incorrectly and incompletely established state of facts (Article 299 of the CPC BiH)

According to the appellate claims, the Court incorrectly and incompletely established the state of facts in the first instance Verdict. The Defense Counsel opines that in this criminal case the fact of injury of the Accused is important regarding the time when he was wounded, but also regarding the severity of his injury, the manner and the duration of his treatment, his ability to use the injured hand, etc. With regard to this, the Defense points out that a number of witnesses asserted that at this critical time they saw the Accused with a plaster on his hand, or a bandage over the wound from his fingers up to the elbow. The Defense particularly draws the attention to the forensic expert analysis by Dr. Franko Žanetić which the Court, as stated in the Appeal, entirely disregarded in the contested Verdict. The Defense Counsel states that this particular evidence of the Defense undoubtedly indicates that the Accused was wounded in the shoulder area, and not in the forearm. The Defense also states that it undoubtedly ensues from the Dr. Žanetić's finding that the present case concerns a severe bodily injury with permanent functional disturbances, that the injury treatment required 6-8 weeks and that the wound had to be rebandaged every second day. The Appeal asserts that by failing to evaluate this particular piece of evidence, as well as other evidence concerning the injury, the Court failed to establish completely and correctly the state of facts concerning the issue of essential importance for the proceedings.

The Defense Counsel notes that the witness, Dr. Ćazim Kraljušić stated that the injury of the Accused that he had temporarily treated had to be surgically sawn six days after the original treatment provided by him. The Defense Counsel asserts that such statement is entirely consistent with the statements of the Accused and witness Jurić that 7 days after he had been wounded, he left the hospital and went to the Republic of Croatia (R Croatia). In addition to this, the Defense Counsel also points to the assertions of witness Kraljušić that the surgical stitches were removed around 14 days later and that during this period the shoulder movements were not allowed "because the wound can lacerate".

The Appeal states that the assertion of the witness for the Prosecution that the Accused was injured in his forearm and that he had a plaster or bandage on his hand, was denied. The Defense Counsel notes that the Defense presented fairly large number of pieces of evidence that, in the opinion of the Defense, undoubtedly shows that the Accused was wounded on 10 June 1992, that he was treated in the Derventa hospital for seven days, and thereafter in the R Croatia, and that he returned to BiH only after the "Derventa fair" (in late August 1992). The Defense asserts that, bearing in mind the foregoing, the Accused could not at all be present at the places referred to in the Indictment, and particularly not in the so called "Silos". With regard to this facility, the Defense Counsel asserts that during the main trial the Defense proved that the term "Silos" implies several buildings and that none of them has any upper floor, which is contrary to the assertions of the witnesses for the Prosecution.

In the Appeal, the Defense Counsel further points to the international courts case law concerning the identification of the accused. The Defense Counsel asserts that it is scientifically proved that the visual identification amounts to a category of evidence which is particularly susceptible to errors. With regard to the identification of the Accused, the Defense Counsel states that the statements of the witnesses' for the Prosecution regarding

the physical appearance of the Accused are entirely inconsistent. The testimony of witness Luka Patković is revealing for the Defense Counsel who is said to have been indisputably a close friend of the Accused's family and who allegedly knew him very well before the war. The Defense Counsel reminds that witness Patković asserts in his statement that he did not recognize the Accused while he was in "Silos", while other witnesses who were in "Silos" assert that in the "Silos" facility they learned from Patković himself the full name and the nick name of the Accused. The Defense Counsel furthermore points to the testimonies of Čedo Prodić and Svetislav Topalović who, as stated in the Appeal, asserted that they had known the Accused before the war, while at the main trial they stated that they were not sure that the Accused was the person who was in the "Silos" and "Tulek" facilities. The Appeal further also contests the manner of identification and asserts that it was not carried out in accordance with the CPC BiH. The Defense Counsel states that a number of persons with the same first and last name lived in the territory of the Municipality of Derventa, and also that the earlier criminal proceedings concerning the same actions were conducted against the same person with the same full name, but whose personal details differ from the personal details of the Accused.

In the response to the Appeal, the Prosecutor points out that in accordance with the principle of free evaluation of evidence, the First Instance Court considered the probative value of every piece of evidence, including the finding of Dr. Franko Žanetić. It is further asserted that the First Instance Court was aparticularly cautios when evaluating the evidence related to the identification of the Accused in order to establish whether the testimonies of the witnesses are reliable concerning this issue. Based on such evaluation of evidence the Court correctly established that the Accused is the person who committed the criminal offense as charged. The view of the Prosecutor is that the Court also correctly established that certain differences in the witnesses' testimonies do not bring into question the credibility of their testimony and the correctness of the established state of facts.

In considering this appellate ground, the Appellate Panel starts from the reliably established fact that the Accused was wounded on 10 June 1992 during combat activities near the swing gate-old bridge in Derventa, and that the Accused sustained a blast injury of the right shoulder and the upper arm. This fact was established based on both the testimony of the witness, Dr. Ćazim Kraljušić and the finding of Dr. Franko Žanetić. The Defense did not contest this fact either.

The basic thesis of the Defense is that after being injured the Accused left the BiH territory and that during June and July 1992 he stayed in the territory of the Republic of Croatia so that he was not in a position to inhumanely treat the detainees in the Silos facility in Polje and in the Department Store warehouse of the Tulek residential area in Bosanski Brod. The First Instance Court also addressed this issue and found that the entire evidentiary proceedings confirm the participation of the Accused in the events referred to in the Indictment. In doing so, the First Instance Court provides a convincing legal argumentation, that is also upheld by the Appellate Panel, because it is the result of careful and comprehensive evaluation of all the presented evidence for both the Prosecution and the Defense (including the finding of Dr. Žanetić), which in a logical and undoubtful manner supports the conclusion of the First Instance Court concerning the criminal liability of the Accused.

The Appeal asserts that the Defense evidence is more acceptable as reliable and unambigous. It is clear that the presented Defense evidence entirely deny the participation of the Accused in the incidents with detainees. However, as also correctly concluded by the First Instance Court, none of the witnesses for the Defense confirmed the obvious fact of the existence of Serb detainees at the Silos location in the Municipality of Derventa and in the Department Store warehouse in Bosanski Brod. Furthermore, these were the witnesses who are wartime-friends of the Accused, while some of these witnesses are in a close family ralation with the Accused. Therefore it is understandable that their interest is to protect the Accused in order for him to evade criminal liability.

Contrary to this, as correctly explained by the First Instance Court, the Prosecutor examined a fairly large number of persons who were detained, and whose testimonies undoubtedly lead to the conclusion on the existence of the facilities where the Serb detainees from the Municipality of Derventa were imprisoned. The Prosecution witnesses consistently describe the person who inhumanely treated the detainees as a short, plump person, with short hair and without a beard. Also, these witnesses are consistent in the assertion that the right hand of this person was bandaged.

The appeal contests the identity of the Accused as the perpetrator of the criminal offence. The evidence adduced by the Prosecutor and the assessment of this evidence in relation to the adduced evidence in its entirety made by the Court of First Instance convincingly deny this allegation in the Appeal. More precisely, witness Predrag Nikolić, who was apprehended on 26 April 1992 and detained both in the Silos and Robna kuća (Department Store) states that he had known the Accused from the pre-war period when on several occasions they went out together in Derventa. On one occasion the Accused even saved him from another combatant and talked to the Accused who gave him the cigarette. The testimony of this witness is sincere and convincing for the Court because to some extent this witness attempts to indirectly protect the Accused admitting that he saw the Accused taking the captives, that he was not present when they were tortured, but he did not think that the Accused beat them. Personal description of the Accused given by this witness is identical to the one given by other witnesses who, as the detainees, were subjected to inhuman treatment by the Accused. Even witness Svetislav Topalović notes that on one occasion the commander of the Silos detention camp told to the soldiers, addressing thereby Geza as well, to take him away. He met this person in Bosanski Brod again who inquired about Dalibor Topalović. Though this witness had not known the Accused before, nor did he recognize him in the court room, the witness is sure that Geza's right hand was bandaged.

Also, witness Radojica Garić affirms that the Accused first time he beat them tintroduced himself as Ivica Vrdoljak aka Geza. The Accused's description by this witness is identical to the one given by other witnesses for the Prosecution. Finally, even witness Cvije Aničić, the former inspector in the Derventa Police Station, recalls that when he was dealing with a robbery case in 1991 Ivica Vrdoljak aka Geza was apprehended and detained. During his detention in the Silos camp one young man addressed him by saying, 'Inspector, do you remember me?' This young man's description given by this witness is identical to the descriptions by other witnesses for the Prosecution.
Accordingly, when all these statements are linked with other adduced evidence and the facts established by the Court of First Instance (wounding of the Accused, lack of convincing

evidence for his two-month absence from BiH), the Court of First Instance concludes quite reasonably that the Accused is the person who stayed at the Silos and Robna kuća locations late in June and during July 1992, and who treated the detainees in an inhuman manner.

In doing so the Court of First Instance relied on the testimonies given by witness Radojica Garić, who knew two other persons bearing the same name as the Accused, and by witness Svetislav Topalović, who knew three other persons having the same name as the Accused, and linked these testimonies with the statements given by other detainees, in which way the Court dispelled any doubt about that the Accused might be a different person who has the same first and last name as the Accused; this, because the Defence Counsel also advanced this argument in the Appeal justifying it by the fact that in addition to the Accused there were three other persons in the Derventa area who had the same full name.

There are no dificiencies in the identification of the Accused, as claimed in the Appeal, in terms of the manner as provided for in Article 85, paragraph (3) of the CPC BiH. It is essential to underline that during the investigation both the Prosecutor and the authorized official person failed to conduct the classical identification process defined under the said Article. All the witnesses were examined only about the personality and the physical appearance of the person who took away and tortured the detainees; in this matter the Appellate Panel, and the Court of First Instance as well, conclude that there exists a high degree of accord in the statements by the witnesses for the Prosecution regarding the description of the person who treated them in an inhuman manner.

Moreover, the Appeal challenges the credibility of the witnesses for the Prosecution, claiming that they altered their testimonies several times and that there exist conflicting evidence as to the wounding of the Accused.

The Appellate Panel concludes that there is no inconsistency in the statements by the witnesses for the Prosecution, as unreasonably claimed in the Appeal. The essential parts of the statements by the witnesses for the Prosecution do not show any discrepancy with regard to the Accused's participation in the incidents with the detainees. The exception to this is the statements given by the previously mentioned witnesses Momir Lazić, Luka Patković and Radojica Garić to the investigative judge in 1992; they were not examined at all as to the Accused's activities in the incidents at issue. For this reason, the statements given at the main trial are more acceptable to the Court because on that occasion these witnesses were examined in detail in respect of the Accused's activities during the period at issue. It is unreasonably alleged in the Appeal that witnesses Čedo Prodić and Svetislav Topalović had known the Accused in the per-war period since in the course of the direct and cross-examination these witnesses stated unequivocally that they had seen the Accused first in Silos where they were detained. The lack of certainty shown by these witnesses during the identification of the Accused in the court room is an additional argument for the Court in terms of the credibility of these witnesses because these are responsible witnesses whos do not want to charge the Accused by all means without being certain at the same time of thier testimony.

Furthermore, none of the witnesses for the Prosecution who were detained on the premises of Silos in Polje affirmed during their examination that there was an additional floor in Silos to which they were taken and beaten. All the witnesses who spoke about it emphasize that

they were taken up the stairs leading to a platform which was raised above them where they were abused and beaten and that it was exactly this place wherefrom the guards had an overview and control over the detainees requesting them to stand upright and with their hands crossed behind the neck. According to the foregoing, the Appellate Panel does not find as well-founded the objection in the Appeal as to the credibility of the witnesses which is based on the fact that the presented photos of Silos show that in terms of the construction there is no additional floor in Silos.

In the Appellate Panel's view, there is no doubt even about the credibility of the testimony by witness Luka Patković. Although this witness claims that it was in 1986 that he saw the Accused for the first time, because he is a close friend of the Acused's family, on his arrival to Silos he learned from his uncle, Čedo Prodić, that the Accused had beaten the latter. The uncle told him that Geza had done it, pointing thereby his finger to Geza who was in the Silos yard at that moment. Witness Patković did not know then that this was the Accused so that during his captivity this witness knew only the nickname Geza. Also, during his captivity Luka Patković mentioned only Geza talking to the other detainees because, as he claims, he learned the Accused's name only upon his leaving the camp in the Police Station. The Accused's description by this witness is identical to the one given by other witnesses for the Prosecution; therefore, the Court has no doubts that the Accused treated this witness too in an inhuman manner, and in particular that Luka Patković himself claims that he was taken away and beaten by the Accused.

Finally, even the evidence of the Defence related to the wounding of the Accused is not inconsistent with other evidence adduced and the assessment of this evidence does not question the Accused's participation in the incidents being the subject matter of the Indictment. Both doctors claim that the Accused was wounded in the area of his right shoulder blade and right upper arm. In doing so doctor Žanetić proided his opinion on the basis of the Accused's medical documents unlike doctor Kraljušić who received the Accused on the day of his wounding and who explained that the Accused had not had the bone fracture, that he was administred antitetanus (treated on an outpatient basis and discharged). It follows from the report on his wounding that the Accused was not hospitlised. Furthermore, doctor Kraljušić does not recall that he amdnistered stitches on the wound of the Accused and if it was done, then it was on an outpatient basis, he says. Further examination of doctor Kraljušić abounds in assumptions about the nature of the wound and possible medical treatment. Even if doctor Kraljušić's assumptions come true, dressing takes quite some time and the secondary stitching-up takes place at a later time, it all will take about 30 days, wherefrom it follows that the medical treatment of the Accused could be ended in early July. This fact corresponds with the testimonies by the witnesses for the Prosecution who said that upon their being transferred to the premises of Robna kuća in Bosanski Brod in the first half of July, they no longer saw the Accused with his right hand bandaged. In addition, none of the witnesses for the Prosecution made any statement regarding the exact place of the Accused's wounding. The witnesses only point out that they saw him in Silos with the forearm of his right hand bandaged or in a cast. Neither the Appellate Panel nor the Panel of First Instance has any doubt about these statements since they agree as to the presence of a white bandage on the Accused's right hand. The injury was inflicted on the Accused by a tank grenade and considering the nature of his wounding, it is quite reasonable that the Accused could suffer minor injuries, not only in the area of his upper arm but also over all other parts of his right hand, which not of equal significance as

the wound described in the report on his wounding. That is the reason for the bandage wrapped around the right forearm which the witnesses could see on the Accused's right hand. It was objectively difficult for the witnesses to notice the bandage above the right upper arm primarily because of the clothes the Accused was wearing. Also, all the witnesses point out that they were not allowed to look at their guards otherwise they would be punished. The Appellate Panel finds as irrelevant the objection by the Defence that doctor Žanetić underlined that the Accused's injury was severe. Anyhow, the degree of such injury is not relevant given that witness Radojica Garić claims that he was beaten by Geza during his captivity in Silos, that Geza was beating him with his right hand for which reason he was warned by another soldier to mind his hand because he may hurt it. The Accused's participation was affirmed also by other witnesses for the Prosecution (Momir Lazić, Radojica Garić, Svetislav Topalović, Borislav Miodanić, Luka Patković, Radoslav Stojaković and Čedo Prodić) who were the victims of the Accused's conduct and who saw him on the premises of Silos in Polje and Robna kuća in Tulek.

Therefore, when analyzing the first instance Verdict within the context of this ground of appeal, the Appellate Panel finds that the Court of First Instance has entirely and properly established the facts and that the participation of the Accused in the incidents being the subject matter of the criminal proceedings has been established in an unquestionable manner.

d) Ground of appeal: Violations of the Criminal Code (Article 298 of the CPC BiH)

When reasoning his averments as to the violations of the Criminal Code, the Defence Counsel states that the Criminal Code of the Socialist Federal Republic of Yugoslavia (the CC SFRY) was applicable at the time of the perpetration of the crime the Accused stands charged with; hence, the Court should have applied that Code in his case. The Defence Counsel avers that having acted contrarywise, the Court has committed the violation referred to in Article 298 (1) d) of the CPC BiH because it applied the non-applicable law.

In his response to the Appeal, the Prosecutor submits that the Court of First Instance has not violated the Criminal Code and that he explained in detail the reasons for applying the Criminal Code of BiH (CC BiH). In support to his position as to the proper application of the substantive law, the Prosecutor also refers to the Decision taken by the BiH Constitutional Court on the appeal by Abduladhim Maktouf.

Having analyzed in detail the application of the Criminal Code in the present case, this Panel also came to the conclusion that it was correct to apply the CC of BiH rather then the CC SFRY to which the Defence Counsel refers as the applicable Code at the time of the crime perpetration. In doing so and accepting the position of the Court of First Instance, the Appellate Panel simultaneously advances its arguments concerning this complex legal issue.

In the analysis this Panel also proceeded from Articles 3 and 4 of the CC BiH and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Article 3 of the CC BiH (Principle of Legality) provides that, '*the criminal offences and criminal sanctions shall be prescribed only by law*' and that, '*no punishment or other*

criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law'. Also, Article 4 of the CC BiH prescribes that, '*the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence*' and that, '*if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law which is more lenient to the perpetrator shall be applied*'.

The principle of legality is incorporated also in Article 7 (1) of ECHR. In this matter it should be noted that in terms of the application the ECHR has priority over all the other BiH Laws (in accordance with Article 2 (2) of the BiH Constitution). The said Article of ECHR prohibits that a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed, but it does not provide for the application of the most lenient law.

In particular the Court had in mind the Decision taken by the BiH Constitutional Court in the Abduladhim Maktouf case (No. AP-1785-06) wherefrom it follows that the application of the CC BiH in the cases of criminal offences against humanity and values protected by the international law (the offences which were committed before this Code entered into force) is in accordance with the ECHR as well as with the BiH Constitution[3]. However, the above mentioned Constitutional Court's Decision does not assert that the CC BiH is always more lenient and that as such it may always (and should) be applied. Also, the said Decision cannot serve as a basis for general references thereto. Quite the opposite; each individual case must be given special consideration in the light of the application of the respective law. The Constitutional Court's Decision concludes that in the present case the CC BiH is not more sever than the Criminal Code which was in effect at the time of the crime perpetration. The ECHR does not prescribe the term 'more lenient law' either; it only provides that, '*a heavier penalty cannot be imposed'* (Article 7 (1) of the ECHR).

Furthermore, Article 4a) the CC BiH provides that, "…*the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law"*. However, it follows from the above quoted Article that its provision is applied where specific criminal offences are not regulated by the domestic legislation and, therefore, it allows the application of the international law.

The Accused stands charged with the perpetration of the criminal offence under the CC BiH adopted in 2003, that is, after the period relevant to the Indictment. At the time of their perpetration, the acts alleged against the Accused amounted to the criminal offence, both under the general principles of the international law and under the CC SFRY which was in force at the material time.

Even the CC BiH incorporates the principles of legality and time effectiveness and as such it obligates to the application of the law which was in effect at the time of the perpetration

[3] In the said case the Constitutional Court instructs that the substance of Article 7 (2) of ECHR is calculated "*at making it clear that Article 7 does not affect the laws adopted under the exceptional circumstances after the end of the World War II and which were designed for punishing the war crimes, treason and collaboration with the enemy and its aim is neither moral nor legal condemnation of such laws*".

of criminal offence. Only where the CC BiH is found not to be more stringent than the law which was in force at the time of the perpetration, only then the CC BiH can be applied to the specific case. Subject to this provision, the Panel reviewed the relevant provisions of the previous Code (the SFRY CC) and the CC BiH and came to the following conclusions:

According to its provisions on punishment the SFRY CC also allowed the pronouncement of capital punishment[4]; hence, the CC BiH would be, for sure, less stringent because the most severe sentence which may be pronounced under this Code is the long-term imprisonment (45 years). This conclusion refers to the maximum sentence which may be pronounced to a person. However, if we consider the minimum sentence which may be pronounced for this particular offence, under the CC SFRY this minimum is five (5) years, while under the CC BiH the minimum sentence for the criminal offence at issue is ten (10) years. Accordingly, it follows from the foregoing that the CC SFRY application is more favourable when it concerns the minimum sentence which may be pronounced for the present criminal offence (special statutory minimum), while, on the other hand, the CC BiH is more favourable in respect of the maximum sentence for the criminal offence at issue.

In the present case the Accused is sentenced to five-year imprisonment pronounced by the Court applying thereby the provisions concerning the mitigation of punishment. Hence, we can conclude that the Court was moving towards the lower limit, to wit, to the minimum; this would mean that the CC SFRY is less stringent in the present case (because this Code provided the five-year imprisonment as a special minimum as against the CC BiH which provides the ten-year imprisonment as minimum). However, the Court must bear in mind the fact that the Accused was found guilty of the co-perpetration being a form of liability, for which "*a decisive contribution has been made to its perpetration"* as required by Article 29 of the CC BiH, which was not the case under the CC SFRY. This means that the provisions of the applicable Criminal Code require a higher degree of participation (it must be a decisive impact; a mere participation does not suffice). Accordingly, the existing CC BiH is less stringent than the code which was in effect at the time of the crime perpetration, and even than the Criminal Codes of the BiH Federation and of Republika Srpska, as the interim codes.

e) Extended Effect of the Appeal

Article 308 of the CPC BiH governing the extended effect of an appeal provides that, '*an appeal filed in favour of the accused due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment'*. Although the Appeal does not invoke this provision, the Appellate Panel reviewed also the sentence imposed on the Accused. This Panel found that the Court of First Instance had correctly applied the general rules of meting out the punishment under Article 48 of the CC BIH, and considering the gravity of the perpetrated criminal offence, degree of the criminal liability on the part of the Accused and in particular the mitigating circumstance manifested in the fact that the Accused is declared to be a 100% disabled person, as a result ofposttraumatic stress disorder (PTSD), the Panel applied the provisions on mitigation of punishment and sentenced the Accused to the five-year imprisonment; by doing so it mitigated to the maximum the prescribed

[4] Criminal Code of SFRY, 1976, Article 34

sentence for this criminal offence. The Appellate Panel also shares the position of the Court of First Instance that the statutory purpose of the punishment shall be entirely achieved by that sentence.

f) Conclusion

Having considered the first instance Verdict and the grounds of the Appeal, the Appellate Panel finds that the Court of First Instance has not committed the essential violations of the criminal procedure at the main trial, which might have affected the rendering of the Verdict in a legal and proper manner. The Court of First Instance has correctly and entirely established the facts and properly acted by applying the CC BiH and sentencing the Accused to the five-year imprisonment. Now therefore, the Appellate Panel refused as unfounded the Appeal filed by the Defence Counsel for the Accused and upheld the Verdict of the first instance, pursuant to Article 313 of the CPC BiH.

Record-taker **PRESIDING JUDGE**
Dženana Deljkić-Blagojević **Judge Azra Miletić**

INSTRUCTION ON LEGAL REMEDY: An appeal from this Decision shall not be allowed.