



Number: X-KRŽ-06/294
Sarajevo, 23 March 2009

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division comprised of Judges Hilmo Vučinić, as the Presiding Judge, and Marie Tuma and Dr. Miloš Babić, as members of the Panel, with the participation of the Legal Officer, Nevena Aličehajić, as the Minutes-taker, in the criminal case against the Accused Šefik Alić, for the criminal offense of War Crimes against Prisoners of War in violation of Article 175(a), in conjunction with Articles 21, 35 and 180(1) and (2) of the Criminal Code of Bosnia and Herzegovina (CC BiH), acting upon the Appeal of the Prosecutor of the BiH Prosecutor's Office, David Schwendiman, filed from the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-06/294 dated 11 April 2008, at the session held in the presence of the Accused and his Defense Counsels, Senad Kreho and Mirza Kovač, and the Prosecutor of the BiH Prosecutor's Office, Jude Romano, on 23 March 2009 issued the following:

DECISION

The Appeal of the BiH Prosecutor's Office is granted, the Verdict of the Court of Bosnia and Herzegovina number: X-KR-06/294 dated 11 April 2008 is revoked and a retrial scheduled before the panel of the Appellate Division of Section I for War Crimes of the Court of Bosnia and Herzegovina.

Reasons

Introductory considerations

1. By the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-06/294 dated 11 April 2008 the Accused Šefik Alić was acquitted of the charges for the criminal offense of War Crimes against Prisoners of War in violation of Article 175(a) of the CC BiH, in conjunction with Articles 21, 35 and 180(1) and (2) of the same Code, and Common Article 3(1)(a) of the 1949 Geneva Conventions.
2. Pursuant to Article 189(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) the Accused was relieved of the duty to compensate the costs of the criminal proceedings, while the injured parties, pursuant to Article 198(3) of the same Code, were instructed that they may pursue their claims under property law in a civil action.
3. The Prosecutor of the BiH Prosecutor's Office timely appealed the Verdict for essential violations of the criminal procedure provisions set forth in Article 297(1)(k) of the Criminal Procedure Code (CPC BiH), incorrectly or incompletely established state of facts set forth



in Article 299 of the CPC BiH and a violation of the criminal code set forth in Article 298 of the CPC BiH. The Prosecutor moved the Appellate Panel to revoke the Trial Verdict and schedule a retrial before the panel of the Appellate Division.

4. The Defense Counsels for the Accused, Senad Kreho and Mirza Kovač, delivered on 11 July 2008 their response to the Appeal proposing that the Appellate Panel refuse it as unfounded.

5. At the session of the Appellate Panel, pursuant to Article 304 of the CPC BiH, the Prosecutor's Office presented the appellate grounds, and the Defense Counsel his response to the Appeal. They entirely maintained their respective appellate grounds and the proposals presented.

Appellate grounds considerations

6. Having reviewed the Trial Verdict insofar as contested, as set forth in Article 306 of the CPC BiH, the Appellate Panel decided as stated in the Operative Part herein for the reasons to follow.

7. The Appellate Panel finds that the Appeal of the BiH Prosecutor's Office is well-founded, that the Trial Panel incorrectly and incompletely established the state of facts and that the contested Verdict contains erroneous conclusions on the decisive facts. This resulted in the misapplication of substantive law by the Trial Panel. According to this Panel, the Trial Panel failed to consciously evaluate all the evidence adduced and explain the reasons as to why certain pieces of evidence were given credence. This all brings under suspicion the correctness of the established state of facts and makes the Trial Verdict deficient.

8. The Trial Verdict acquitted the Accused Šefik Alić of the charges for the actions with which he was charged under the Indictment following the principle of both individual and command responsibility.

9. When it comes to the individual responsibility of the Accused Alić, as reasonably stated in the Prosecution Appeal, the Trial Panel concluded that the actions of the Accused did not reach the adequate level of gravity to be considered as inhuman treatment. The Trial Panel did not even try to establish the individual responsibility of the Accused because it opined that the essential elements of the criminal offense with which he was charged were not satisfied in his actions.

10. This Panel finds that the Prosecutor's Office rightfully indicated that the Trial Panel erred in concluding that treatment must raise to the level of "atrocious" or "barbarous" to constitute the crime of "inhuman treatment" under Article 175(a) of the CC BiH within the essential elements of the criminal offense of War Crimes against Prisoners of War. Having set too high the standard of "inhuman treatment" and established that the actions of the Accused did not reach the level of "atrocious" or "barbarous", the Trial Panel failed to establish whether his actions were of such nature that they could cause serious violations of physical or mental integrity of the war prisoners, that is, whether they constituted a serious



violation of human dignity. In the opinion of the Panel, and in accordance with the international jurisprudence, all this constitutes inhuman treatment. Having acted in the stated manner, in addition to the incomplete establishment of the state of facts, the Trial Panel misapplied the substantive law. Therefore, the Appellate Panel concludes that the appellate grounds of the Prosecutor's Office contesting such action of the Trial Panel are well-founded.

11. The Prosecution further reasonably indicated in the Appeal that the state of facts was established incompletely because the Trial Panel did not consider the actions of the Accused within the context of overall circumstances under which the related incidents with the war prisoners occurred, although it was obliged to do so. The Prosecutor argues that the Trial Panel had to take into account that the prisoners were captured on the front line, were vulnerable and helpless, at the total mercy of their captors, and they could not defend themselves, or escape. In such circumstances, Tewfik's threats to one prisoner that he would kill him if he lied during Alić's questioning, the fact that Alić intimidated the prisoners by saying that „Tewfik was a mujahedeen who slit throats”, and the fact that Alić himself once slapped the prisoner Branko Bašić, particularly Tewfik's fierce punching the prisoner Pero Borosina in his chin while Alić physically restrained him, represent the facts that the Trial Panel should not have disregarded.

12. The Trial Panel assessed Alić's activities in isolation, and not within the context of the circumstances and the time in which the relevant incidents occurred (during the armed conflict in the territory of BiH and the Republic of Croatia). The Trial Panel did not consider whether the circumstances in which they were and the manner in which they were treated and threatened constituted a risk for their safety, whether the threats were credible and what mental and moral effects the threat had on them. The Trial Panel easily concluded that Tewfik's threat that he would kill the captured soldiers was not *per se* a credible threat, namely that the Accused, who was present during all this, was not aware that his conduct or behavior enabled or increased the threat or intimidation of prisoners. The incompletely established state of facts also ensues from the fact that the Trial Panel considered the activities of the Accused in isolation, and did not bring them into relation to Tewfik's actions. It did not evaluate all the actions as a whole. The reasons for a separate analysis of these actions do not ensue from such established state of facts, as reasonably pointed to in the Prosecutor's Appeal.

13. The next appellate ground which the Appellate Panel finds well-founded and worthy of pointing to is the complaint concerning the command responsibility. The Prosecutor indicates that the Trial Verdict erroneously established that the Accused Alić, who was Assistant Battalion Commander for Security, was acquitted of the responsibility because of the presence of his superior officer, Battalion Commander Asim Bajraktarević. The Appeal further reasonably stated that because of the conclusion of the Trial Panel that the Accused's relation with Tewfik was not a superior-subordinate relation, namely that Bajraktarević had the role of a superior, while the Accused had an „advisory“ role, the Trial Verdict did not consider whether the Accused could have prevented the commission of the related crime or punish the perpetrator. In addition, the Trial Panel erred in analyzing whether the Accused could have known that his alleged subordinates committed the criminal offenses at issue. Specifically, the Trial Panel misapplied the standard „could have known“. Thus, according to the Trial Panel, as reasonably indicated by the Prosecutor, this



is an indirect proof of the actual knowledge. According to the Prosecutor, this cannot be considered correct.

14. The Appellate Panel finds that the Trial Panel exclusively addressed the analysis of the Accused's *de jure* status and position. According to the Appellate Panel, this constitutes a failure of the Trial Panel because it did not consider whether the Accused *de facto* had "material possibility to prevent or punish the criminal behavior" of Tewfik al-Harbi.

15. As to Tewfik al-Harabi himself, the facts established by the Trial Panel are particularly limited and insignificant. Although the Trial Panel stated that most of the witnesses testified that they knew Tewfik al-Harbi as a humanitarian worker and that he was not a member of the Hamza Battalion, the Trial Panel did not discuss or draw any conclusion regarding the *de facto* role and participation of Tewfik al-Harbi on that critical day. The Trial Panel did not establish any fact, for example, regarding the manner in which Tewfik al-Harbi participated in combat activities, whether he was officially or unofficially a member of any unit or hierarchy, whether he received instructions from the Accused or other persons, whether he generally accepted or ignored the authority of superiors including the Accused in the Hamza Battalion. The Appellate Panel further emphasizes that although the Trial Panel indicated the witness's testimony regarding the reputation of Tewfik al-Harbi as a humanitarian worker, the Trial Panel failed to establish concretely whether this testimony was credible and whether it actually reflected the opinion and knowledge of members of the Hamza Battalion, including the Accused.

16. As to the Accused himself, the Appellate Panel finds that in the Trial Verdict, even within the analysis of the Accused's *de jure* status, the Trial Panel failed to establish his competences and responsibilities regarding the disciplinary measures, as well as the responsibility and competences regarding the captured enemy soldiers. The Trial Panel also did not establish any facts regarding the Accused's *de jure* powers to conduct an investigation or initiate a disciplinary procedure, although it did state the testimony according to which the Accused was responsible for the security in the battalion, the captured soldiers and deserters.

17. In addition, considering that the Trial Panel did not analyze the *de facto* position of the Accused, it also did not establish the facts regarding his *de facto* authorities, such as the actions, role and behavior of the Accused at the time of interrogating the captured soldiers, the actual relationship between the Accused, members of the Hamza Battalion and Tewfik al-Harbi during the period before the killings. For example, the Trial Panel neither discussed nor established the scope in which the Accused *de facto* represented a leader and executed powers over other persons, the scope in which the Accused was and was not "in charge of" or "had control" over the situation, or *de facto* a real possibility of the Accused to stop or instigate certain behavior in the given circumstances.

18. Even if the Accused, as concluded in the Trial Verdict, was assigned to the post of Assistant Commander for Security in the Battalion on an *ad hoc* basis, this does not mean that he could not have a certain "actual control", which the Trial Panel failed to establish.

19. The Trial Verdict should have established all the foregoing and thereby clarify the disputable issues, and based on such established state of facts draw the conclusion on the



existence or non-existence of the command responsibility of the Accused Šefik Alić. The Appellate Panel must state that the fact that the witnesses Fuad Kulauzović and Dževad Jusić testified that „the presence of the Commander Bajraktarević excludes the responsibility of others“ is not sufficient for the Trial Panel’s conclusion on the non-existence of Alić’s responsibility, because the issue of command responsibility is a mere legal issue on which a conclusion can be drawn only by the Court after a detailed establishment of the circumstances of the particular case.

20. Based on the foregoing, the Appellate Panel notices that the state of facts was incompletely established in the Trial Verdict, because the conclusion on the responsibility of the Accused was drawn only based on a formal status/position of the Accused from which it cannot be seen whether he *de facto* performed actual control over the alleged perpetrators of the crime. Such incompletely established state of facts regarding the real powers and responsibilities of the Accused Alić resulted in the misapplication of the law in considering the elements of the superior-subordinate relation pursuant to Article 180(2) of the CC BiH. The Prosecutor reasonably pointed to this in his appeal, and the Appellate Panel accepted his arguments.

21. Finally, the Appellate Panel finds well-founded the Prosecution complaint indicating that the Trial Panel did not consciously evaluate all the evidence which resulted in the deficiencies of the established state of facts. The Prosecutor’s Office submits that the two witnesses referred to by the Trial Panel, Senad Šaković and Refik Duraković, who spoke about the role of the Accused during the specific incidents, changed their statements given earlier during the investigation, trying to dilute and diminish the responsibility of the Accused Alić. Also, the testimony of the witnesses W3, W4 and Hasan Ćatić who spoke about the presence of the Commander Barjaktarević, are according to the Prosecution “obviously contradictory, inconsistent with the earlier statements given in the investigation and obviously staged in order to protect Alić.”

22. It is not clear why the contested Verdict does not address this, but rather notes such fact generally stating that the statements were changed, and only referring to their testimony at the main trial. The Appellate Panel opines that the Trial Panel should have specified precisely which witnesses changed their statements and with regard to what, and whether such changes essentially affected the final conclusion. Also, the Trial Panel did not explain why it gave credence to certain witnesses whose changed statements were accepted, and with which evidence their credibility was supported. Clarification of the differences in the statements would possibly lead to a different and clearer establishment of the state of facts based on which the presently non-clarified dilemmas would not exist.

Conclusion

23. Pursuant to the foregoing, the Appellate Panel concluded that the Trial Panel made a number of omissions regarding the establishment of decisive facts because it established them erroneously or did not establish them at all, which resulted in the incorrectly and incompletely established state of facts in the Trial Verdict. This ultimately led to erroneous conclusions and misapplication of substantive law. In its Appeal, the Prosecutor’s Office reasonably pointed to all the foregoing. Therefore, Appellate Panel finds that the revocation



of the Trial Verdict and scheduling a retrial in this specific case constitute the only possibility to rectify the established deficiencies and flaws in the contested Verdict.

24. In the retrial, all the deficiencies will be rectified, and if necessary the evidence already adduced will be adduced again pursuant to Article 317 of the CPC BiH. Upon evaluation of other appellate grounds new evidence will possibly also be adduced. Such established state of facts will be subsumed under adequate provisions of the substantive law.

25. Bearing in mind that the Trial Verdict was revoked pursuant to Article 310(1) of the CPC BiH and Article 315 of the CPC BiH, the Appellate Panel did not analyze in detail other appellate grounds. Instead, pursuant to Article 316 of the CPC BiH, the Appellate Panel provided a brief reasoning for the Verdict revocation.

RECORD-TAKER:

Nevena Aličehajić

**PRESIDENT OF THE PANEL
JUDGE**

Hilmo Vučinić

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

*I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.
Sarajevo, 29 October 2009
Alisa Rajak-Čolaković
Certified Court Interpreter for English*