



Number: X-KRZ-07/400
Sarajevo, 12 April 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel of the Appellate Division composed of Judge Azra Miletić as the Presiding Judge and Judges Dragomir Vukoje and Phillip Weiner as the Panel members, with the participation of Legal Adviser – Assistant Medina Džerahović as the Minutes-Taker, in the criminal case against the Accused Krsto Savić and Milko Mučibabić for the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraphs a), b), d), e), f), g), h), i) and k) of the Criminal Code of Bosnia and Herzegovina (the CC of B-H) and in conjunction with the criminal offence of War Crimes against Civilians referred to in Article 173, Paragraph 1, Subparagraphs c), e) and f) of the CC of B-H, as read with Article 180, Paragraphs 1 and 2 and Article 29 of the CC of B-H with respect to the Accused Krsto Savić, and with respect to the Accused Milko Mučibabić for the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraphs a), b), d), e), f), h), i) and k) of the CC of B-H and in conjunction with the criminal offence of War Crimes against Civilians referred to in Article 173, Paragraph 1, Subparagraphs c), e) and f) of the CC of B-H, as read with Article 180, Paragraph 1 and Article 29 of the CC of B-H and for the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the Criminal Code of the Republic of Srpska (the CC of RS), deciding on the Appeal by the Prosecutor's Office of B-H number KT-RZ-97/06 of 14 August 2009 and Appeals by defence counsel for the Accused Krsto Savić, attorney Slaviša Prodanović of 20 August 2009, and defence counsel for the Accused Milko Mučibabić, Attorney Krešimir Zubak of 18 August 2009, from the Verdict of the Court of Bosnia and Herzegovina number X-KR-07/400 of 24 March 2009, at the session of the Panel held in the presence of the prosecutor of the Prosecutor's Office of B-H Munib Halilović, the Accused personally and their defence counsels, attorneys Slaviša Prodanović, Momir Kolesar and Krešimir Zubak, on 12 April 2010 rendered the following:

VERDICT

I The Appeal filed by the Defence Counsel for the Accused Milko Mučibabić is hereby granted, so that the Verdict of the Court of B-H number X-KR-07/400 of 24 March 2009 finding the Accused Milko Mučibabić guilty of the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the Criminal Code of Republika Srpska (the CC of RS) is **revised** and pursuant to Article 283, Subparagraph a) of the CPC of B-H the charges against Milko Mučibabić that he:

On 7 September 2007, at the family house at Kilavci Street bb /no number/, Nevesinje Municipality, in contravention of Articles 6 and 7, Paragraph 2 of the RS Law on Weapons and Ammunition, unlawfully kept firearms and ammunition the possession of which is not at all allowed to citizens, specifically: a semi-automatic rifle, serial number 594416; an empty clip for automatic rifle; 206 pieces of ammunition for 7.62-mm rifle; 12 pieces of 7.9-mm ammunition; two defensive grenades, serial numbers 8608 and 8142; two empty clips for automatic rifle; rifle kit with 4 empty clips; 2 empty *Scorpion* clips and 84 pieces of ammunition for 7.62-mm pistol,

ARE DISMISSED

Whereby he would have committed the criminal offense of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the Criminal Code of Republic of Srpska;

II The Appeals filed by Defence Counsels for the Accused Krsto Savić and Milko Mučibabić are granted and the Verdict of the Court of B-H number X-KR-07/400 of 24 March 2009 is hereby **revoked** in the sentencing part and a trial is ordered before the Panel of the Appellate Division of Section I for War Crimes of the Court of B-H.

Reasoning

Procedural History

Under the Verdict of the Court of B-H number X-KR-07/400 of 24 March 2009 and by perpetrating the acts described in detail under the enactment clause of the Verdict the Accused Krsto Savić and Milko Mučibabić were found guilty of having committed the following: the Accused Savić – the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraphs a), d), e), f), g), h), i) and k) of the CC of B-H, as read with Article 180, Paragraph 1 of the same Code and the Accused Mučibabić – the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraphs d), e) and k) of the CC of B-H, as read with Article 31 of the same Code and the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the RS CC, thus the Trial Panel sentenced them for the mentioned criminal offences, more specifically: the Accused Savić to 20 (twenty) years long-term imprisonment and the Accused Mučibabić to compound sentence of 5 (five) years and 3 (three) months imprisonment. Pursuant to Article 56 of the B-H CC the time the Accused spent in custody was credited towards the imposed prison sentence, which for the Accused Krsto Savić included the period from 6 September 2007 until 23 January 2009 and from 24 March 2009 until 31 March 2009 and for the Accused Milko Mučibabić the period from 6 September 2007 until 17 October 2008.

Pursuant to Article 284, Paragraph 1, Subparagraph c) of the B-H CPC, the same Verdict acquitted the Accused Milko Mučibabić of the charges that he, as described under Section II of the acquitting part of the enactment clause, committed the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraph k) of the B-H CC.

Pursuant to Article 74 of the B-H CC it was decided to seize the following objects from the Accused Milko Mučibabić: a semi-automatic rifle, serial number 594416; an empty clip for automatic rifle; 206 pieces of ammunition for 7.62-mm rifle; 12 pieces of 7.9-mm ammunition; two defensive grenades, serial numbers 8608 and 8142; two empty clips for automatic rifle; rifle kit with 4 empty clips; two empty *Scorpion* clips and 84 pieces of ammunition for 7-62-mm pistol; six pieces of 7.65 ammunition; two pieces of 9-mm ammunition; three pieces of 9-mm pistol ammunition; 11 pieces of 7.65-mm pistol ammunition; two pieces of 6.35-mm pistol ammunition; whereas pursuant to Article 186, Paragraphs 1 and 2 the Accused Krsto Savić and Milko Mučibabić had to reimburse the costs of criminal proceedings. Once the necessary data were collected, the Panel would issue a separate decision stating the amount of these costs.

The Prosecutor's Office of B-H filed the Appeal against the sentencing part of the Verdict on time, contesting the Verdict with respect to both Accused persons because of the decision on sanctions and with respect to the Accused Mučibabić also because of erroneously and incompletely established facts, moving the Appellate Panel to revise the contested Verdict with respect to the Accused Savić and the decision on his sanction and sentence him to a considerably longer long-term imprisonment and with respect to the Accused Mučibabić moved the Appellate Panel to make correct conclusion about culpability of the Accused on the basis of properly established facts and find him guilty as perpetrator of persecution in joint criminal enterprise, as stated in the Indictment and, in accordance with such a finding, to sentence the Accused to a considerably longer term of imprisonment within the prescribed range.

The defence counsel for the Accused Krsto Savić, attorney Slaviša Prodanović, appealed the Trial Verdict on all grounds for appeal, moving the Appellate Panel to revoke the contested Verdict and order a trial.

The defence counsel for the Accused Milko Mučibabić, attorney Krešimir Zubak, also filed a timely Appeal due to essential violation of the criminal procedure provisions, violation of the Criminal Code and erroneously established facts, moving the Appellate Panel to grant the Appeal in part pertaining to the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) of the CC of B-H and pursuant to Articles 314 and 284, Subparagraph c) of the CPC of B-H acquit the Accused of the charges, and as for the criminal offence referred to in Article 399, Paragraph 1 of the CC of RS to revoke the Verdict and refer that portion of the case to the Court which has subject-matter and territorial jurisdiction over that or grant the Appeal and pursuant to Article 315, Paragraph 1, Subparagraphs a) and b) of the B-H CPC revoke the Verdict and order a trial, and as for the criminal offence referred to in Article 399 of the CC of RS to revoke the Verdict and refer that portion of the case to the Court which has subject-matter and territorial jurisdiction over that.

The defence counsels for both Accused submitted responses to the Appeal by the Prosecutor's Office of B-H, emphasizing that the Appeal was ungrounded and should be refused as such.

At the session of the Appellate Panel held pursuant to Article 304 of the B-H CPC, both parties to the proceedings reasoned their Appeals, provided responses and fully maintained the presented arguments and motions.

Having reviewed the Verdict insofar as contested by the Appeal pursuant to Article 306 of the CPC of B-H, the Appellate Panel rendered Decision as stated in the enacting clause for the following reasons:

The Appellate Panel first reviewed the grounds for appeal pertaining to essential violations of the criminal procedure provisions referred to in Article 297 of the CPC of B-H given that essential violations committed during the trial proceedings and/or in the Verdict indicate that due to formal defects the decision on the merits is incorrect and thus render it inappropriate for review regardless of the existence of other grounds for appeal that the Appellate Panel can neither evaluate nor can it give positive or negative opinion about them.

The Appeals that the defence counsels for both Accused persons filed on this ground can be boiled down to the complaint that the Trial Verdict suffers from various forms of essential violations of criminal procedure provisions referred to in Article 297, Paragraph 1, Subparagraph k) of the CPC of B-H, given that the wording of the Verdict is incomprehensible, internally contradictory or contradicted the grounds of the Verdict or if the Verdict has no grounds or if it does not cite reasons concerning the decisive facts, whereas the Appeal by defence counsel for the Accused Mučibabić also indicates the violation of Paragraph 2 of the same Article of the B-H CPC given that the Court of B-H has no jurisdiction over the criminal offence referred to in Article 399 of the RS CC that this Accused was found guilty of.

The Appellate Panel finds that the Appeals by defence counsels legitimately point to the existence of all aforementioned essential violations and in order to systematize and harmonize the reasoning with the sequence of Sections of the enactment clause of the Verdict, it will first start reasoning the part dismissing the charges against the Accused Mučibabić.

I

The Trial Panel, among other things, found the Accused Mučibabić guilty of having committed the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the RS CC by perpetrating the acts described under Section II.2 of the enactment clause of the contested Verdict, despite the fact that this criminal offence falls under the jurisdiction of a lower entity court and that there is no basis to constitute the jurisdiction of the Court of B-H. In other words, the Court, throughout the trial proceedings, ever since the Indictment in this case was confirmed and until the Trial Verdict was rendered, was not mindful of its jurisdiction over the referenced charges, as imperatively bound by Article 28, Paragraph 1 of the B-H CPC, which the Appeal justifiably emphasized. Pursuant to the mentioned provision, the Court was bound to be mindful of its jurisdiction set forth in Article 23, Paragraph 1 of the B-H CPC and as soon as it realized it had no jurisdiction it should have refused jurisdiction, which was not done in this case. Consequently, the Trial Panel, when deciding on the merits of the criminal action falling under the jurisdiction of another, lower court committed an essential violation of the criminal procedure provisions referred to in Article 297, Paragraph 1, Subparagraph g) of the B-H CPC in terms that it rendered the Verdict without having subject-matter jurisdiction.

To put it briefly, the contested Verdict fully accepted the allegations from the Indictment, which in no way indicate the jurisdiction of this Court pursuant to Article 7 of the Amended Law on the Court of Bosnia and Herzegovina (B-H LoC), that is,

Article 13 of the B-H LoC, and unjustifiably decided on the merits of the criminal responsibility of the Accused for the referenced criminal offence. In the specific case, in order to constitute the jurisdiction of the Court of B-H over the criminal offence falling under the jurisdiction of another lower court, the Prosecution was supposed to proffer evidence and strong arguments based on which the Panel would conclude that the action, described in detail in the enactment clause of the contested Verdict and defined as the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the RS CC, might have serious repercussions or detrimental consequences for the economy of Bosnia and Herzegovina or cause other detrimental consequences for Bosnia and Herzegovina or inflict serious economic damage or other detrimental consequences outside the territory of the Federation of Bosnia and Herzegovina. Only in that case could the Court have constituted its jurisdiction and decide on the criminal responsibility of the Accused Mučibabić for that criminal offence.

Since the state of facts was the opposite, based on the Appeal arguments the Appellate Panel has undoubtedly determined that the Court of B-H has no jurisdiction to adjudicate on the criminal offence of Illegal Manufacturing and Trade of Weapons or Explosive Materials referred to in Article 399, Paragraph 1 of the RS CC, so pursuant to Article 314, Paragraph 1 of the CPC of B-H, prescribing that the Appellate Panel, according to the state of facts and in the case of violations under Article 297, Paragraph 1, Subparagraph g) of that Code, shall revise the Trial Verdict, the Panel has **revised** it in the referenced part in a way that the charges for that criminal offence are dismissed on the grounds set forth in Article 283, Subparagraph a) of the B-H CPC.

Pursuant to Article 290, Paragraph 10 of the B-H CPC, in the reasoning of its Decision the Appellate Panel did not delve into the merits, but merely presented the grounds for the dismissal of the charges.

II

The Appeal by the Defence Counsel for the first Accused Krsto Savić submits that the contested Verdict is incomprehensible because he was found guilty of the criminal offence of Crimes against Humanity referred to in Article 172, Paragraph 1, Subparagraph h) in conjunction with Subparagraphs a), d), e), f), g), i) and k) of the B-H CC and that the enacting clause of the Verdict did not specify what those subparagraphs mean nor did the reasoning provide detailed comments thereon. The same violation was also indicated by the Appeal filed by the second Accused Milko Mučibabić because the enacting clause of the contested Verdict, a part pertaining to this Accused, states that he acted with the intention to „*help (someone)*“. However, it is not clear from enacting clause or the reasoning who he helped to.

Article 285, Paragraph 1, Subparagraph a) of the CPC of B-H prescribes that the guilty verdict must cite facts and circumstances that constitute the elements of the criminal offence and those on which the application of a particular provision of the Criminal Code depends and Subparagraph b) of the same Article reads that it must state the legal name of the criminal offence and the provisions of the Criminal Code that were applied.

Accordingly, the consistent interpretation of the quoted provision shows that this part of the Verdict must be clear, specific and concrete and that it must contain all

facts and circumstances that constitute the elements of the criminal offence and that confirm that a person committed the referenced criminal offence.

On the other hand, the Appellate Panel found that the factual description of enacting clause of the contested Verdict, both the part pertaining to the Accused Savić and the part pertaining to the Accused Mučibabić, failed to specify/describe factual details constituting subjective (*mens rea*) as well as objective (*actus reus*) elements of the criminal offence that the Accused were found guilty of as well as the factual circumstances from which conclusion on their culpability has been inferred.

The Trial Panel used the method of interpreting what the Prosecution wanted to say with respect to *mens rea* when it stated, in the reasoning, that although the Indictment had failed to indicate explicitly that Krsto Savić was aware of a widespread and systematic attack, such conclusion could be drawn from the overall wording of the Indictment's operative part (paragraph 164). This *per se* indicates that the contested Verdict contains formal defects, which make it incomprehensible. In other words, a review upon the Appeal does not inherently include a review of reasons, but a review of the reasoning of the enacting clause that is the actual subject-matter of the Appeal. The enacting clause of the Verdict contains no facts of subjective nature based on which the Trial Court, in its reasoning and when it comes to guilt of the Accused, drew the conclusion on the existence of his intent.

In other words, with respect to the Accused Savić it is stated that he acted as a *knowing participant in a joint criminal enterprise* (hereinafter: JCE) (...) *in pursuance of a common purpose to implement the state policy and thus conduct persecution of the Bosniak and Croat population (...) on all grounds by perpetrating several different underlying criminal actions of Crimes against Humanity, (...) planned, ordered and committed persecution (...) of Bosniak and Croat population as described in individual sections of the enacting clause of the Verdict.*

Hence, it is evident that the Accused was found guilty based on the participation in JCE, one of the forms of individual criminal responsibility implicitly contained in Article 180, Paragraph 1 of the CC of B-H, the application of which concept requires quotation of the purpose of the enterprise, its category, identity of participants and nature of the Accused's participation in the enterprise, along with factual corroboration of all mentioned elements. In other words, it was insufficient to state that the Accused was a knowing participant in the enterprise without specifying facts as to how he participated in the implementation of the common purpose/plan and desired or agreed with occurrence of the prohibited circumstances projected by the plan.

To tell the truth, the enacting clause reads that the Accused planned, ordered and committed persecution of the Bosniak and Croat population. However, there is no specific factual basis explaining each and every individual form of the Accused's participation, that is, **in which manner and by which specific actions that he undertook** the Accused, as the participant in JCE, *planned, ordered or committed* the persecution. Bearing in mind that the participation of the Accused in the JCE concept is inferred from Article 180, Paragraph 1 of the CC of B-H, it is clear that this is a mere paraphrasing of legal description. In other words, the factual corroboration of this form of criminal responsibility that the Accused Savić is found guilty of cannot be substituted by use of legal terms as the Trial Verdict does in a definitely wrong manner.

Each and every of the stated actions has its typical/characteristic forms of responsibility for all criminal offences, which have to be contained in the factual description of the enacting clause of the Verdict in terms that they are specified and precisely described, so that they clearly show the Accused's contribution to implementation of the common purpose, which in this case is the persecution. Accordingly, if the Trial Panel established that the Accused, as a person who participated in JCE and persecution, acted in the manner that he *planned* it, then it had to state specific facts and circumstances that such intellectual activity of his is reflected in, that is, the participation in and contribution to creation of the common plan, which resulted in persecution. The same arguments also apply to a form of participation in terms that the Accused *ordered* the persecution, whereas the Trial Panel had to precisely state legally relevant facts indicating his active role in terms of issuing certain orders to other participants of the enterprise, which resulted in perpetration of the specific criminal actions by those persons. Not only did the enacting clause of the Verdict fail to describe the actions that show such conduct of the Accused Savić, but what's more it fails to identify the persons to whom these orders were issued to or their position of direct or indirect subordination in relation to the Accused. All the more because the Appeal by the defence counsel for the Accused Savić indicated that each and every PSS (Public Security Station) in the mentioned municipalities had its own commanders.¹

On the other hand, the enacting clause of the Verdict generally denote the members of Gacko PSS, Bileća PSS, Kalinovik PSS and Nevesinje PSS as perpetrators of certain criminal actions that the Accused Savić is charged with although some of these members were even identified by witnesses – eye witnesses and some of them were not police officers². However, the Verdict does not name them. All the more, the Verdict states no factual details whatsoever, from which one could draw conclusion about nexus between the Accused and their incriminated activities.

Hence, if one excludes Section 4a) (and partially Sections 4 b), f) and j) of the enacting clause, which factual substance only specifies the relevant act of the Accused Krsto Savić as direct perpetrator of murder of the aggrieved party Redžo Trebović, the factual description of all other individual criminal actions that the Accused is charged with lacks *nexus* between his activities and ultimate consequence, that is, lacks the factual corroboration that would indicate that a consequence occurred as a result of his actions, either planning, ordering or perpetrating as the participant in JCE.

Not only did the Trial Verdict fail to present evidence that would directly indicate the nexus between the Accused and incriminated activities of those, even to the Trial Court, unknown persons that physically committed described crimes, but it also fails to state relevant details that would, in the context of factual circumstances, provide basis to affirm such a conclusion.

¹ „The Accused Savić was not the immediate superior with the PSS Nevesinje, Kalinovik, Gacko and Bileća, but other persons.” Appeal by defence counsel for the Accused Savić, page 23.

² The Appeal by the defence of the accused Savić indicated, although in the context of the complaint pertaining to erroneously and incompletely established facts regarding persecution of Bosniak civilians by the members of Gacko PSS (section I.1. of the enacting clause of the Verdict), specifically, the event pertaining to murder of Osman Osmanović since witnesses Asaf Pošković and Šučrija Tanović confirmed he was killed by Zoran Sušić whom Asaf knew as a professional student, which means that Osman was not killed by a police officer. As for the killing of Aziz Hasanbegović, witness Šučrija Tanović claims that Milan Govedarica killed Aziz while loading people onto trucks (page 16 of the quoted Appeal).

On one hand it was not sufficient only to refer to the role of the Accused as a high-ranking official within SAO Herzegovina and municipalities where the crimes were committed, and on the other hand determine that the referenced crimes were indeed committed, this Panel too has no dilemma that they actually occurred, for culpability of the Accused Savić to transpire from such deficient factual substance. What is more, in addition to the lack of factual details about the identity of participants and nature of the Accused's participation in JCE, the enacting clause of the Verdict also fails to specify in which of the three potential forms of the enterprise the Accused participated, while it transpires from the reasoning of the Verdict that he was the member of the first form of JCE. Moreover, the Verdict had to state not only the purpose of the enterprise, but also its category, identity of participants and the nature of the Accused's participation in the enterprise.³

It is precisely this failure of the Trial Panel that the defence counsel for the Accused Savić legitimately pointed to in the Appeal when invoking the fact that the conclusion of the Trial Verdict (paragraph 191) about the events in Gacko does not show which role the Accused Savić had in all that at the relevant time, taking into account the fact that the examined witnesses neither knew him⁴ nor was there any document that would link him with those events. Therefore, at this level of reviewing the Defence Appeal arguments with respect to this Accused person, the explanation that deficit of evidentiary material, if viewed from the aspect of Savić's individual responsibility for the events pertaining to persecution of non-Serb civilians at the relevant time not only in Gacko, but in Bileća and Kalinovik too, appears to be logical and results in the fact that the enacting clause of the contested Verdict could not have had any description of his actions.

Hence, although the introduction of the enacting clause of the Verdict links the committed actions with respect to the Accused Savić with Article 180, Paragraph 1 of the CC of B-H, even claiming that Savić committed them personally, one cannot make such a conclusion from the given example as definitely reliable. Actually, the mentioned example indicates that the contested Verdict does not present the contents of the presented evidence nor does it subject it to evaluation as to why it accepts or does not accept it and in which parts. Therefore, the contested Verdict contains no reasons about decisive facts referred to in Article 297, Paragraph 1, Subparagraph k) of the B-H CPC, which is why the Verdict cannot be reviewed.

The Appellate Panel finds fully grounded the complaint by the Defence of the Accused Savić indicating that the contested Verdict has an essential violation since it contains no reasoning as to why the credence is given to one and not to other evidence and that despite numerous presented defence evidence the Verdict makes no comments on them at all. In other words, pursuant to Article 290, Paragraph 7 of the CPC of B-H in the reasoning of the contested Verdict, the Trial Panel had the obligation to specify and completely present which facts it finds proven or not, and for which reasons, particularly evaluating credibility of contradictory evidence, and it had to state what were the reasons that guided it when addressing certain legal issues and particularly when determining whether there exist the criminal offence and culpability on the part of the Accused.

³ For more information see ICTY Manual on Developed Case Laws, ICTY-UNICRI 2009, Sarajevo, page 38.

⁴ Paragraph 183 of the Trial Verdict in relation to charges for the events in Gacko (Count I-1 of the Indictment) reads that the Panel had in mind the fact that all witnesses said they were not in dispute with the Accused, and some even stated that they did not know the Accused at all.

According to the Appellate Panel, in this case the Trial Panel failed to evaluate every item of evidence individually and collectively with other evidence pursuant to Article 281, Paragraph 2 of the B-H CPC and it focused on Prosecution evidence without providing any explanation as to why it did not accept Defence evidence as credible, that is, without providing explanation about contradictory evidence which had bearing on determination of the criminal offence and criminal responsibility of the Accused. In case that the Trial Panel, when evaluating evidence, found the Defence evidence to be irrelevant, then it was still obliged to make reference to them in the reasoning, presenting at least brief reasoning for such a stance. In such a manner the Trial Panel completely failed to reason the evaluation of Defence evidence, if it evaluated it at all, which is in contravention of the quoted legal provisions and which entails mandatory revocation of the Trial Verdict.

All these are failures pointing to defects of factual substance of the criminal offence, which make the enacting clause of the Verdict incomprehensible, and which is why it cannot be reviewed. Along these lines, the Appellate Panel reiterates that the factual description cannot be substituted with mere paraphrasing of legal description.⁵

According to findings by the Appellate Panel, the reasoning of the Verdict suggests the existence of command responsibility on the part of the Accused Savić, although incompletely too, stating only his *actus reus* (paragraph 468), that is, that he did nothing to prevent the criminal activities that he was aware of. At the same time, the Verdict, in its enacting clause, does not find him guilty of that form of criminal responsibility. Disregarding the fact that this part of the reasoning of the Verdict clashes with findings from paragraph 460 of the reasoning stating that the Accused tried to prevent or impede criminal activities, which makes the Verdict completely incomprehensible.

If viewed in that context, there is a risk that if too much emphasis is placed on the rank of the Accused, which is exactly what the Trial Verdict is doing, then the key factor in deciding whether to convict the Accused or not becomes his *position*, and not the basis and level of his *responsibility* for the referenced crime. It is understandable that the position in which the individual was within the hierarchy of a state apparatus or within other relevant structure is a factor that might be relevant when deciding about prosecution and establishment of his responsibility at a later stage, but definitely that factor, disregarding other evidence, cannot be given disproportionately great weight.⁶

The same violation also exists in the part of the enacting clause pertaining to the Accused Milko Mučibabić when stating that the Accused acted *with the intention to commit persecution of Bosniak and Croat population*, without specifying the main perpetrator of the criminal offence, as this was legitimately indicated by the Appeal. The only conclusion that can be made from such wording is that it is an impersonal

⁵ "Incomprehensibility of the enacting clause of the Trial Verdict is one of the forms of essential violation of criminal procedure provisions from this Section (Section k), remark of this Court). Thus, if the factual description of the enacting clause of the Trial Verdict, instead of facts and circumstances that would constitute important elements of the criminal offence that the Accused was found guilty of, contains allegations that are, in fact, the legal description of that criminal offence, then such enacting clause is incomprehensible and there is essential violation of the criminal procedure provisions (*Livno Cantonal Court, KŽ-31/00, Bulletin 2/03*). "Quoted from: Group of Authors, Commentaries of Criminal Procedure Code in Bosnia and Herzegovina, Joint Project of the Council of Europe and European Commission, Sarajevo, 2005, page 774.

⁶ „If the position of the Accused becomes a key issue for his „incrimination“, the Prosecutor's Office should basically look for evidence linking the Accused with a, even worse, *any* crime, instead to proceed from the crime towards those who are the most responsible for it.“ V. Mettraux, Guénaël: *Law of Command Responsibility*, Humanitarian Law Centre, B-H Open Society Centre, Sarajevo, 2010, page 16, 17.

perpetrator and therefore aiding and abetting, as a form of the Accused's participation, is linked to the actions, the perpetrator of which is not identified. In terms of the relevant legal provisions defining the elements of aiding and abetting and having in mind the accessory nature of aiding and abetting as one of the forms of complicity it is clear that this concerns an intentional supporting of another person's criminal offence, whereby the intent consist of the knowledge that a certain perpetrator (an individual, several persons, group, etc.) was aided and abetted to commit the criminal offence, that is, that there is the nexus between the accessory and main perpetrator.

Neither the factual description of the Verdict nor the reasoning state *whom* the Accused aided and abetted to persecute, and therefore it also lacks *nexus* between the accessory and main perpetrator of the referenced criminal offence. The enacting clause of the Verdict, when providing factual description of individual charges, also does not contain the facts and circumstances constituting the acts of accessory pursuant to Article 31 of the CC of B-H, and all of that makes the enacting clause of the Verdict deficient in this part too.

Finally, the enacting clause of the Verdict is incomprehensible since the legal definition of the committed criminal actions of each of the two Accused does not state the legal name of the underlying offence of Crimes against Humanity, which was pointed out in the Appeal by the Accused Savić. Instead, the legal definition of the enacting clause of the Verdict arbitrarily states that each Accused person committed the criminal offence of Crimes against Humanity – persecution referred to in Article 172, Paragraph 1, Subparagraph h) of the CC of B-H in conjunction with, for example as for the Accused Savić, Subparagraphs a), e) and k) of the CC of B-H for Sections I-1 and I-4 c of the enacting clause of the Verdict, without stating the legal name of the criminal offences supporting these Sections, which is in contravention of Article 285, Subparagraph b) of the CPC of B-H. Each and every of the criminal actions listed in Subparagraphs a) through k) constitutes separate underlying criminal offence of Crimes against Humanity and, along with presence of the elements of some of them and finding the Accused guilty for the perpetration of any of these offences, it is necessary to state its legal name.

The Verdict, in its reasoning, neither deals with consideration of each and every criminal action that the Accused are found guilty of, disregarding the rule that each offence contains its own basic elements which make it a criminal offence, the existence of which the Court must determine based on the proffered evidence. Hence, proceeding from the principle that every criminal action, due to the specific quality and complexity of Crimes against Humanity, constitutes a separate criminal offence within genus act, when reviewing its existence it was necessary to state the elements of each and every of those criminal offences, both objective and subjective, and then through the established facts review whether they were present, which the contested Verdict is not doing, but gets satisfied by stating certain parts of witness testimonies from which it draws the arbitrary conclusion that a certain criminal offence was committed. The Verdict also does not present arguments as to why such actions are considered to be in contravention of international humanitarian law, nor why each and every charge amounts to the criminal offence of persecution.

To that end, through the specific facts and circumstances of each established incriminated action, it was necessary to point to the conclusion that the Accused, when committing it, acted with discriminatory intent in terms that the intention

behind all described offences was exactly the discrimination, that is, different treatment of victims on the grounds of ethnic, national, religious, and political affiliation, which definitely is contrary to rules of international law. Acting contrary to this, the contested Verdict made essential violation referred to in Article 297, Paragraph 1, Subparagraph k) of the CPC of B-H.

The specific example for the mentioned violation, which is only one out of many, is stated in the Appeal by the Accused Mučibabić, and it concerns charges described under Section II 1 c) of the enacting clause of the Verdict that are qualified as imprisonment and other severe deprivation of physical liberty and as other inhumane acts. In the reasoning of the Verdict the Court drew the arbitrary conclusion that the Accused committed the referenced criminal actions, failing to mention the substantial elements and results of presented evidence, including their logical evaluation too, from which the presence of important elements of each and every of the referenced criminal offence would transpire. On the contrary, the contested Verdict, in a non-selective and superficial manner, presents certain facts and circumstances from which it is not clear what they are specifically proving.

The explanation regarding the second charge – that the Accused, as an accessory, committed the criminal offence referred to in Article 172, Subparagraph k) of the CC of B-H (there is no legal name of the offence) is particularly deficient. In other words, it is first noted that the Panel could not conclude beyond reasonable doubt that the Accused in any manner participated in torture of detained civilians, especially not in the torture of Mujo Ćupina, Meho Ćatić and Adem Mrndžić, and then that he significantly contributed to mistreatment and abuse of non-Serbs, which was defined as aiding and abetting other inhuman acts. In doing so, it does not state at all who committed the referenced criminal actions, how, what the contribution of the Accused as accessory in their participation is reflected in. The Court was satisfied with stating that the „*Accused was taking the detainees for interrogation, at which point they were beaten up*“, in order to establish his criminal responsibility.

Hence, the Court completely failed to provide reasoning regarding this charge, which makes the Verdict incomprehensible given that it contains no reasons of decisive facts, so this part too contains an essential violation of the criminal procedure provisions referred to in Article 297, Paragraph 1, Subparagraph k) of the B-H CPC.

Given that the established essential violations of the criminal procedure provisions are absolutely essential violations that adversely affected rendering a lawful and proper Verdict and which mandatorily imply the revocation of the Trial Verdict, the Appellate Panel granted the Appeals and pursuant to Article 315, Paragraph 1, Subparagraphs a) and b) of the CPC of B-H **revoked** the Trial Verdict in the sentencing part and ordered a trial to be held before the Appellate Panel of the Court of B-H.

Due to the committed violations that, according to the mentioned provisions of the Criminal Code, imply the revocation of the Trial Verdict, the Appellate Panel was not able to engage itself in the evaluation of other grounds for the appeal referred to in Article 296, Subparagraphs b), c) and d) of the B-H CPC and the decision on merits, nor did it engage in the evaluation of the merits of the Appeal that the Prosecutor of the Prosecutor's Office of B-H filed because of the erroneous and incompletely established facts and the decision on sanctions, since that would constitute

prejudging the outcome of retrial, but pursuant to Article 316 of the CPC of B-H it limited itself only to the citation of brief reasons for revoking the Verdict.

During the retrial the essential violations of the criminal procedure provisions shall be remedied, relevant evidence that was already adduced shall be presented anew and, if necessary, having examined other Appeal arguments, other evidence shall be presented as well, at which point the Panel shall be able to render a new Verdict based on law.

The Appellate Panel particularly points to the fact that the Trial Verdict, in the part acquitting Milko Mučibabić of having committed the criminal action described in detail in the enacting clause of the Verdict, became ***final and legally binding*** on the day when the deadline for the Appeal expired since none of the Appeals, filed either by the Prosecution or Defence teams, contested the referenced part, so here it should only be noted that that part of the contested Verdict is final and legally binding.

MINUTES-TAKER

Medina Džerahović

**PRESIDING JUDGE
J U D G E**

Azra Miletić

[signature and stamp affixed]

LEGAL REMEDY: No appeal lies from this Verdict.