

Bosna i Hercegovina

Босна и Херцеговина



Court of Bosnia and Herzegovina

Case No. S1 1 K 003472 11 Krž 2 (X-KR-08/549)

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Before the Panel comprised of:

Judge Tihomir Lukes, as the Presiding Judge
Judge Mirko Božović, as the Reporting Judge
Judge Carol Peralta, as the Panel member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ZORAN BABIĆ, MILORAD RADAKOVIĆ, MILORAD ŠKRBIĆ, DUŠAN JANKOVIĆ AND
ŽELJKO STOJNIĆ

THE SECOND INSTANCE DECISION

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

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Ranko Dakić, Defense Counsel for Dušan Janković
Senad Kreho, Defense Counsel for Željko Stojnić

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Panel of the Appellate Division comprised of Judge Tihomir Lukes, as the President of Panel, and Judge Mirko Božović and Judge Carol Peralta, as the Panel members, with the participation of legal officer Anida Saračević as the record-taker, in the criminal case against the Accused Zoran Babić, Milorad Radaković, Milorad Škrbić, Dušan Janković and Željko Stojnić for the criminal offence of Crimes against Humanity, in violation of Article 172(1)h), as read with subparagraphs a), d), e), h) and k), all in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding on appeals filed from the Verdict of this Court, No. S1 1 K 003472 09 Krl (X-KR-08/549), dated 21 December 2010, by the Prosecutor's Office of Bosnia and Herzegovina and respective Defense Counsel for the Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić, attorneys Slavica Bajić, Slobodan Perić, Ranko Dakić and Zlatko Knežević, following the session of the Panel, in the presence of the Prosecutor of the Prosecutor's Office of BiH, Slavica Terzić, the Accused personally and their respective Defense Counsel, on 4 October 2011 rendered the following:

VERDICT

I The appeal of the Prosecutor's Office of BiH, in the part pertaining to erroneously established state of facts in the acquitting part **is hereby refused as ill-founded**, and the Verdict of this Court, No. S1 1 K 003472 09 Krl (X-KR-08/549), dated 21 December 2010, in the part pertaining to the Accused Milorad Radaković is hereby upheld.

II The appeals filed by the Defense Counsel for the Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić are hereby upheld, and the Verdict of this Court No. S1 1 K 003472 09 Krl (X-KR-08/549), dated 21 December 2010, in the convicting part pertaining to the Accused, **is hereby revoked**, and the case is referred to re-trial before the Appellate Division.

REASONING

A. COURSE OF THE PROCEEDINGS

1. In virtue of a Verdict of the Court of BiH, No. S1 1 K 003472 09 KrI (X-KR-08/549), dated 21 December 2010, the Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić were found guilty of the criminal offence of Crimes against Humanity, in violation of Article 172(1)h), as read with items a) - murder, d) – forcible transfer of population, h) - looting, of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH, committed by the actions described in the operative part of the Verdict.
2. Pursuant to Articles 39, 42b and 48, and in respect of the Accused Željko Stojnić, Article 42 of the CC of BiH, the First Instance Court has sentenced all the Accused to imprisonment as follows: the Accused Zoran Babić to a long-term imprisonment of 22 (twenty two) years, the Accused Milorad Škrbić to a long-term imprisonment of 22 (twenty two) years, the Accused Dušan Janković to imprisonment of 27 (twenty seven) years and the Accused Željko Stojnić to 15 (fifteen) years of imprisonment.
3. Pursuant to Article 284(1) c) of the CPC of BiH, the Accused Milorad Radaković was acquitted of charges that he, by the actions described in the operative part of the Verdict, committed the criminal offence of Crimes against Humanity, in violation of Article 172(1) h), as read with items: a) – murder, d) – forcible transfer of population, h) – looting and k) – other inhumane acts of CC of BiH, in conjunction with Article 180(1) of the CC of BiH.
4. Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody was credited towards the imprisonment sentence, specifically:
 - a. For the Accused Milorad Škrbić, the period between 14 October 2008 and 24 October 2009;
 - b. For the Accused Dušan Janković, the period between 29 May 2008 and 11 November 2009;
 - c. For the Accused Željko Stojnić, the period between 29 May 2008 and 11 November 2009.
5. Pursuant to Article 186(1) and (2) of the CPC of BiH the Accused Zoran Babić, Milorad Radaković, Milorad Škrbić, Dušan Janković and Željko Stojnić were relieved of the duty to cover the costs of the criminal proceedings which shall be paid from budget appropriations of the Court.

6. Pursuant to Article 198(2) of the CPC the aggrieved parties were advised to file a civil suit with their potential property claims.

B. APPEALS

7. The Prosecution filed an appeal from the First Instance Verdict on the grounds of erroneously established state of facts in the Acquittal pertaining to Milorad Radaković and also because of the scarcity of the criminal sanction in the conviction of the other Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić. It encourages the Appellate Division Panel of the Court of BiH to uphold the appeal and modify the challenged Verdict so as to find the Accused Milorad Radaković guilty of the criminal offence charged against him in accordance with the law, and to impose a long-term imprisonment sentence of a longer duration on the Accused Zoran Babić, Milorad Škrbić, Dušan Janković, and the maximum imprisonment sentence under the CC of BiH on the Accused Željko Stojnić.
8. The Defence for Zoran Babić, filed a timely appeal from the First Instance Verdict on the grounds of essential violations of the criminal procedure provisions, violation of the Criminal Code, erroneously and incompletely established state of facts and the decision on the criminal sanction, moving that the Appellate Division uphold the appeal, revoke the First Instance Verdict and refer the case for a re-trial before the Appellate Division. On 18 April 2011, the Defence submitted to the Court a supplement or additional reasoning to the appeal.
9. Defence Counsel for Milorad Škrbić also filed an appeal from the First Instance Verdict, on the grounds of essential violations of the criminal procedure provisions, erroneously and incompletely established state of facts and violation of the criminal code moving that the Appellate Panel revise the Verdict so as to acquit this Accused, or revoke the Verdict and order a re-trial.
10. Defense Counsel for the Accused Dušan Janković, filed an appeal on the grounds of essential violations of the criminal proceedings, violation of the criminal code, erroneously and incompletely established state of facts and the decision on the criminal sanctions, moving that the Appellate Panel revoke the Verdict and refer the case for re-trial and a new decision or modify the Verdict and acquit the Accused Dušan Janković of the charges proffered against him. On 27 July 2011 the Defence also submitted to the Court an additional reasoning of the appeal.
11. Defense Counsel for the Accused Željko Stojnić filed an appeal on the grounds of essential violations of the criminal code, violation of the criminal code, erroneously established state of facts and the decision on the criminal sanction, moving the

Appellate Panel of the Section for War Crimes of the Court of BiH to uphold this appeal as well-founded in its entirety, fully revoke the challenged Verdict and refer the case for re-trial before the Appellate Panel of the Court of BiH.

12. All defence advocates have submitted their responses to the Prosecution's appeal moving that the appeal be refused as ill-founded. The Prosecution has submitted an individual response to each of these appeals moving that they be refused as ill-founded.
13. At a session of the Panel held on 3 and 4 October 2011 and in pursuance of Article 304 of the CPC of BiH, the appellants maintained their written appeals and the reasons provided therein.

1. Appellate grievances of the Prosecution: erroneously established state of facts, in violation of Article 299 of the CPC of BiH.

14. Primarily, it is important to note that the Prosecution has filed an appeal against the acquittal of Milorad Radaković, based on erroneously established state of facts and against the decision on the criminal sanction in the conviction of Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić.
15. After taking into consideration that the First Instance Verdict pertaining to the conviction of the Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić has been revoked and that a retrial before the Appellate Division has been ordered, this Panel will not be taking cognizance of the Prosecution's Appeal grievances pertaining to the decision on the criminal sanction but will only be addressing the appellate grievances concerning the acquittal.
16. It is not any error of fact that obliges an Appellate Panel to overturn a verdict. Only an error which has caused a miscarriage of justice and which can be identified as an error which has produced a grossly unfair outcome in judicial proceedings can overturn a first instance verdict as, for example, when an accused is convicted of the criminal charges brought against him despite the lack of evidence on an essential element of the crime with which he is so charged. In order to prove that the miscarriage of justice has occurred, the appellant must clearly prove that the alleged errors of fact made by the Trial Panel do raise a reasonable doubt as to his culpability. In order for the Prosecutor to prove that the verdict is incorrect, he must, manifestly prove that after taking into account the errors of fact that the Trial Panel has made, any doubt as to the guilt of the accused has been eliminated.

17. Therefore, it is only where the Appellate Panel concludes that no reasonable trier of fact could have found for the disputed state of facts and that this error of fact has invalidated the verdict, will the Appellate Panel uphold an appeal which is based on an erroneous establishment of facts and which is filed in accordance with Article 299(1) of the CPC of BiH.
18. In the appeal under review, the Prosecution argues that the Trial Panel has erroneously established the state of facts in relation to Milorad Radaković and to his function and participation in the commission of the criminal offence charged against him. The Prosecution alleges that, based on this erroneously established state of facts, Radaković has been wrongly acquitted of the criminal offences charged against him. The appeal focuses and, therefore, directs its grievances in proving this Accused's membership in the Intervention Platoon, his role in it, his intent to perpetrate the goals of a Joint Criminal Enterprise, and his contribution in accomplishing these goals.
19. As far as the membership of this Accused in the Intervention Platoon is concerned, the Prosecutor argues that the Trial Panel has not, sufficiently, evaluated the evidence of witness "K-3" about that circumstance who testified that the Accused was a member of the Platoon and that his tasks were "just like ours", and that the military occupational specialty of medic, as listed in his military master card file and which was issued during his military term service, did not, in reality, relate to the tasks and assignments which this Accused was assigned and performed in the Intervention Platoon. Also, the statements of witnesses KA-1, Zuban Miljanović and Velimir Vrapčić have not been taken into consideration by the First Instance Panel. In other words, the Accused was not a medic as he presented himself to be.
20. In relation to his intent of implementing the JCE goals and his contribution to this, implementation, the appeal argues that the Court has made an erroneous evaluation of the relevant facts, primarily of the testimony of the Accused himself who gratuitously confirms the fact that he was aware of the widespread and systematic attack in the area of Prijedor and that he had participated in the escort of previous convoys. Furthermore, the appeal points out that all members of the Intervention Platoon, including Radaković, had knowledge about the seizure of belongings (looting) in those convoys, that he had been seen in the notorious so called "yellow van" wearing a uniform and carrying a rifle in his hands, and that he had handed over, to another member of the escort, a bag containing ammunition used for the killing of civilians during the incident.
21. However, this Panel finds that the Trial Panel has fully and correctly established all the facts relevant to this Accused. The Trial Panel has strictly adhered to Article

281(2) of the CPC of BiH and has properly evaluated every single piece of evidence, individually and collectively, and has reached a conclusion which is based on all the relevant facts which are necessary for a proper clarification of all existing disputable issues and which are issues that have been raised in the appeal: his membership in the Intervention Platoon, his intent and contribution in the implementation of the goals of the JCE.

22. In the first place, the argument of the appeal that the Trial Panel reached its conclusion that Radaković Milorad was not a member of the Intervention Platoon solely on the basis of the Accuseds' own statement is not exact in that that Court also based itself on the evaluation of other evidence presented throughout the trial, including the testimony of other witnesses and documentary evidence.

23. It has been satisfactorily established that Radaković had declared that he was not a member of any Intervention Platoon but had been assigned to the Medical Corps of the Battalion of the Reserve Police within the Prijedor Public Security Station. The Accused also declares that his tasks and assignments were limited to the provision of medical services to all the members of this Station, and that this accounts for his presence in the Intervention Platoons during some of its operations. In other words, he was there to help in case somebody was injured. Witnesses Damir Ivanković, Zuban Miljanović, Velimir Vrabičić, witnesses K-3 and K-1 who were referred to in the appeal have never challenged the fact that Radaković had provided assistance to Intervention Platoon members when wounded, that is, that he had performed the tasks of a medic. These witnesses only remark as to the possibility that Radaković may have belonged to the Intervention Platoon, but are very vague about this.

Witness K-3 thinks:

“that the Accused Radaković was a member of the Intervention Platoon who was in the infirmary in Han Pijesak, but not with them at the front line“,

Witness K-1 thinks

“that he was in the Intervention Platoon list but he was more of a medic than ...“,

while witness Ivanković notes that

“ Radaković joined the First Intervention Platoon later and that nobody saw him at Korićanke stijene“.

The Court has not taken into consideration the testimony tendered by Zuban Miljanović and Velimir Vrapčić, which testimony was referred to in the appeal of the Prosecution, because these witnesses state that they never accompanied a convoy

and, therefore, were not in a position to ascertain this Accuseds' exact role in the Intervention Platoon.

24. Because of this evaluation, the Trial Panel has reached the proper conclusion that the evidence the Prosecution presented and invoked in its appeal, is not sufficient or reliable enough to lead to the conclusion that Radaković was a member of the Intervention Platoon. This is even more evident when a particular uncontested document is examined (no. T-103 -Intervention Platoon List), which document has been verified and certified by the ICTY and which does not include the name of Radaković.

25. Furthermore, the Appellate Panel finds that the Trial Panel has provided valid and clear reasons in its Verdict to conclude that it has not been proved that Milorad Radaković had participated in combat operations, that he otherwise undertook any illegal actions based on discriminatory grounds or that he had any intent to implement the JCE goals, or gave his contribution in the implementation of those goals.

26. Paragraphs 524, 525, 526 and 527 of the contested Verdict, detail the correct considerations made by the First Instance Panel when stating that:

“there is no evidence that Radaković participated in the looting of passengers, or that he took active participation in the escort (forcible transfer) of civilians, as well as the fact that his participation in the convoy (which is not disputable) *per se* does not imply his state of mind, which would entail his criminal responsibility, including the conclusion that it has not been proven that the Accused shared the JCE intent, or that the Accused had the intent to implement the JCE goals.”

For these same reasons, this Panel also finds unacceptable the arguments of the Prosecution in the appeal that the JCE intent of the Accused has been proved beyond all reasonable doubt because he was seen, on several occasions, wearing a uniform and carrying a rifle, riding in the notorious “yellow van”, which belonged to the Intervention Platoon. This van is linked to the stories of these unfortunate incidents (vide testimony of Hasan Elkaz whose wife describes the Accused in this manner).

27. The Prosecution's appeal disputes the conclusion of the First Instance Panel that it has not succeeded to prove that Radaković participated in the murder of the male civilians in the convoy which it sees in the fact that he handed over a bag with ammunition to another member of the escort, which was used for the execution of the said civilians. According to the Prosecution, this fact is supported by the testimony of witness K-1 and of Damir Ivanković. However, a proper interpretation and evaluation of this evidence will, inevitably, lead to the same conclusion reached by the Trial Panel in paragraphs 534, 535 and 536 of the contested Verdict when it

remarked that the testimony of these witnesses is contradictory. Witness K-1 says that he took a bag with ammunition from Radaković to hand it over to Paraš. Damir Ivanković says that Radaković handed over the bag to Željko Stojnić. To confuse matters further, Željko Stojnić denies receiving anything from Radaković.

28. Therefore, after taking into consideration the fact that the appeal of the Prosecution does not raise reasonable doubts as to the findings of the Trial Panel concerning the acquittal of Milorad Radaković, it follows that the Trial Panel acted properly when acquitting Milorad Radaković of the charges pursuant to Article 284(1) c) of the CPC of BiH.

2. Appellate claims of the Defence Counsel for the Accused Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić

29. When considering the Appeals of the Defence Counsel for Zoran Babić, Milorad Škrbić, Dušan Janković and Željko Stojnić, the Appellate Panel has, first, reviewed the appellate claims pertaining to purported essential violations of the criminal procedure provisions under Article 297 of the CPC of BiH. This because the commission of essential violations of criminal procedure, in the course of the first instance proceedings, or more specifically, in a verdict, gives rise to the presumption that the substantive decision is also incorrect because of formal deficiencies and therefore unfit for review on other grounds, regardless of their applicability because, of itself, such a verdict would be defective.

30. The existence of even one of the violations listed under paragraph 1 of Article 297 of the CPC of BiH is a sufficient basis for the revocation of a verdict, because such violations constitute absolute essential violations, which, by their character, prevent any review of lawfulness and correctness of the contested verdict and, if established, form an irrefutable presumption that such violations have, adversely, affected the validity of the pronounced verdict.

31. The Appellate Panel deems as founded the appeal claims that several essential violations of the criminal procedure provisions under sub-paragraphs d) and k) of paragraph 1) of Art.297 have been committed, namely:

- that the right to defence has been violated (d),
- that the operative part of the Verdict is contrary to its reasoning and that the Verdict lacks reasons for decisive facts (k).

a) Violated right to a defence: Article 297, paragraph 1, sub-paragraph d) of the CPC of BiH

32. The violation of an accused's right to a proper defence, as an essential violation of the criminal procedure provisions, implies that the rules of criminal procedure were not applied or were incorrectly applied during the course of the proceedings to the detriment of the same accused. Therefore, each violation of the procedural norm to the detriment of the accused implies that his right to a defence, guaranteed by international instruments, has been violated. Should a party to the proceedings argue a violation of the right to a defence and if this is proved, this shall result in the revocation of the verdict..
33. In her appeal, Defence Council for Zoran Babić argues that the Court had, unjustly, refused her motion for the presentation of evidence in rejoinder. Primarily, the Court had accepted and allowed the presentation of the Prosecution rebuttal evidence in its entirety, and, subsequently, refused the motion of the Defence for this Accused to present rejoinder evidence even though the proposed witnesses were to testify about the same circumstance as the Prosecution witnesses had testified about. This suggests that the parties did not enjoy equal treatment during the proceedings before the Court, which, as argued in the Appeal, amounted to a violation of the right to a proper defence.
34. Furthermore, Milorad Škrbić notes in his Appeal that, in a hearing of the 29th of November 2010, the Court decided to refuse all the motions of the Defence for all the Accused to hear additional witnesses, finding that there was no such need for the declared additional evidence. This refusal of the Court for the requested additional evidence followed as a result of the amendments to the Indictment effected by the Prosecution. Because of these amendments the Defence of Milorad Škrbić was forced to abandon a number of witnesses whose testimony was relevant to the rendering of a lawful and proper decision in favour of the accused. The Appeal further argues that the Court acted in this manner because there was no time left for the evidentiary proceedings to continue because the mandate of the International Judge and Panel member, Marijan Pogačnik, was about to expire. This was emphasized by the President of the Trial Panel when explaining the reasons for the refusal of the Defence's motion as follows:

"We have to complete these proceedings because of the International Judge...this is a problem for me now. Fifteen days ago, I advised the Defence Counsel to start preparing their closing arguments and your Counsel is requesting this now and creating a problem, and our International Judge is leaving on 24 December 2010 and we have to finish everything by then."

35. Defence Counsel for Dušan Janković also argues that the Accused's right to a defence has been violated, after taking into consideration that in the course of the first instance proceedings, the same Defence Counsel attempted to have 60 witnesses heard, but was allowed to produce 29, and that out of 9 additional witnesses he proposed to call, he was allowed to call 5. The Defence Counsel further argues that these witnesses possessed direct knowledge as to the precise functions discharged by Jankovic during the relevant period and whether he had participated in the convoy under examination. The correct establishment of these two important facts, essentially condition the correctness or otherwise of the Courts' ruling relating to his criminal liability.
36. Even though the then Defence Counsel for the Accused Željko Stojnić, Attorney Zlatko Knežević, filed an appeal from the First Instance Verdict arguing essential violations of the criminal procedure provisions, he never referred to any specific violations of the criminal procedure provisions in the reasoning of his appeal. Because of these reasons this Panel has applied the principle of *beneficium cohaesionis* to the benefit of his client. This principle will be further explained below.
37. Because of these reasons, the Appellate Panel finds the appeals filed by all four accused to be grounded at law and, considered that the Trial Panel, by acting in the described manner, has violated the right of these four accused to a proper defence.
38. It is an indisputable fact that the Prosecution was allowed to present all its evidence, including at the rebuttal stage during, the course of the proceedings. This has been established by this Panel after having reviewed the transcripts of the First Instance hearings. It does not seem that the Defence was allowed to do the same. The motions of the Defence were only partially acceded to by the Court as far as Janković and others are concerned whilst, in other stages of the proceedings, mainly concerning rejoinder evidence relating to Babic and Jankovic the Court refused, in their entirety, all motions for the presentation of additional evidence.. Special mention must be made of the hearing held on the 29th of November 2010 when the Trial Panel refused the request of all the Accused for the presentation of additional evidence following amendments to the Indictment carried out by the Prosecution.
39. The Court is not obliged to allow the presentation of all the proposed evidence during the proceedings, be it proposed by the Prosecution or Defence, because it is not bound by any legal provision to do so. Because of these reasons, it can be, reasonably argued that the Court has acted correctly when refusing the motions of the Defence for the presentation of additional evidence. However, this matter cannot and may not be interpreted and decided without taking into consideration

other legal provisions which prescribe strict adherence to the equality of arms principle. It is obvious that the Trial Panel has not adhered to this accepted principle because it has refused the motions of the Accused for the presentation of additional mentioned evidence without explaining the reasons for such a refusal in its Verdict. This has been detrimental to the Accused and has, inevitably, resulted in a violation of their right to a proper defence. Defence motions for the presentation of additional evidence, following approved amendments to the Indictment by the Prosecution, may not be refused by the Trial Panel without providing a clear, proper and logical explanation for that decision. Moreover, at the hearing of the 29th of November 2011, as substantiated by the relevant transcript the Trial Panel, on several occasions, reminded the Defence that the First Instance proceedings would have to be completed as soon as possible because one of the Panel members was appointed to another public office which he was to assume on 24 December of that same year and that the proceedings would have to be completed by that time at the most. This fact could be considered to be the reason for the Court's refusal of the Defence's motions, which, in this Panel's opinion, cannot form the foundation for a decision refusing motions for the presentation of additional evidence. On the contrary, this Court is of the opinion that it can only be interpreted as exertion of pressure and influence by the First Instance Court on the Defence to conclude the proceedings forthwith.

40. Therefore, the Appellate Panel is of the opinion that the First Instance Panel, acting as herein described, has violated the right to a proper defence of the Accused thereby committing an essential violation of the criminal procedure provisions under Article 297, paragraph 1, sub-paragraph d) of the CPC of BiH, as argued by the Accused in their appeals. For these reasons, the Verdict of the First Instance Panel is being revoked.

b) The operative part of the Verdict contradicts its reasoning; the Verdict lacks reasons for decisive facts, Article 297, paragraph 1, sub-paragraph k) of the CPC of BiH.

41. The Appellate Panel finds, as founded, all the Accuseds' arguments pertaining to the essential violations of the criminal procedure provisions under Article 297, paragraph 1, sub-paragraph k) of the CPC of BiH and, also on these grounds, revokes the convicting part of the First Instance Verdict.

42. In their appeals, the Accused refer to a number of important facts and circumstances in support of their argument that the First Instance Verdict lacked proper reasons for its determination of the decisive facts and also failed to give a

proper explanation of the facts and the evidence detailing the Accused's criminal liability. The Defence makes reference to specific exhibits, such as witness testimonies, in full or in part, which, in their opinion, were not correctly evaluated by the First Instance Court and which also include the contradictions between the operative part and the reasoning of the Verdict.

43. The essential violation of criminal procedure provisions is not only reflected in the deficiencies detected in the operative part and the reasoning of the First Instance verdict as a formal judicial document, which, by their nature, prevent the review of the verdict's lawfulness and correctness. Essential violations may also be committed when the Court, in the reasoning of its verdict, does not refer at all or insufficiently refers to convincing and proper reasons as to why it has reached a particular decision vis-à-vis decisive facts. Therefore, the Appellate Panel concludes that the Trial Panel, in the contested Verdict, did not provide a sufficient or clear explanation as to the reasons leading to its conclusions of liability of each of the Accused in terms of the criminal charges proffered against them. As argued in the appeals, the Trial Panel has not provided a comprehensive evaluation of all the presented evidence but, invariably, only favoured the evidence tendered by the Prosecution, which it did not compare with the evidence tendered by the Defence, failing to explain obvious contradictions in evidence, which it is duty-bound to do in terms of Article 290, paragraph 7 of the CPC of BiH. In other words, the First Instance Panel has a duty to provide a concrete and full explanation as to why certain facts have been accepted while others were not, evaluating, in particular, the credibility of the contradictory evidence.

44. The Accused, in their appeals, have made reference to the evidence which has been presented during the proceedings. They have quoted the testimony of witnesses which could have seriously undermined the findings of the Trial Panel. The contested Verdict, in the most part, refers only to the names of the witnesses who have, allegedly, confirmed a particular fact, without producing, in writing, the relevant part of the testimony. This failure of the First Instance Panel to sufficiently explain its findings is found in many paragraphs of the contested Verdict, eg: paragraph 306:

„Furthermore, witnesses Damir Ivanković, Ljubiša Četić, Gordan Đurić, K-3, K-1 and KA-1 especially confirmed that money and valuables were seized. They had direct knowledge about the duties of the Intervention Platoon (escorting convoys practically on a regular basis) and were familiar with the procedures applied when escorting convoys.”

45. A simple reference to the names of the witnesses who have testified about an important fact, followed by a declaration that the testimony of these witnesses has

confirmed the existence of a certain fact, without quoting the relevant extracts of their testimony and without evaluating and comparing all the testimony cannot produce a correct finding as to whether a fact has been proven.

46. The Trial Panel has applied this manner of evaluating evidence and establishing facts vis-à-vis all of the Accused.
47. Defence Counsel for Zoran Babić refers to witnesses Munib Sivac, K-1, K-3, Luka Gnjatović, Jusuf Žerić, Vlad Boban, Vitomir Lakić, KO-7, B and Sadik Suhonjić, whose testimony has not been interpreted, analyzed or brought in line with the evidence on which the findings in the First Instance Verdict are based. No reasons or proper explanation for this have been provided in the First Instance Verdict.
48. Defence Counsel for Milorad Škrbić refers to witnesses Munib Sivac, Husein Jakupović, KA-1, witness K-3 and witness K-18, whose testimony undermines the findings of the Trial Panel because it did not provide reasons or a proper explanation for not accepting this testimony. Consequentially, the Trial Panel did not comment on the fact that Škrbić and the Prosecution witness KA-1, who both were members of the escort on one of the buses in the convoy, had, in fact, exchanged places. The correctness of the finding as to which one continued with the convoy until its final destination at Smetovi, and which one stayed behind at the separation point where the civilians from the convoy were killed, depends on the establishment of this very important fact. In other words, the establishment of this particular fact is intrinsic to the correctness of the finding of Škrbić's criminal liability. Even though many witnesses have testified about these particular circumstances, the First Instance Verdict lacks analysis and evaluation and does not deal with the issue. All this indicates a lack of reasoning when establishing decisive facts and amounts to an essential violation of the provisions of criminal procedure.
49. The operative part of the Verdict is in contradiction in its reasoning when compared to paragraph 342 of the contested Verdict. Dušan Janković was charged, in the original Indictment dated 8 January 2009 and confirmed on 12 January 2009, with the commission of the criminal offence of Crimes against Humanity in violation of Article 172, paragraph 1, sub-paragraph h), as read with sub-paragraphs a), d), e) and k), in conjunction with Article 180, paragraph 2 of the CC of BiH. The amended Indictment, dated the 23rd of November 2010, charges the same Accused with the commission of the criminal offence of Crimes against Humanity in violation of Article 172, paragraph 1, sub-paragraph h), as read with sub-paragraph a)- murder, b)- forcible transfer of population, e)- imprisonment, h)-persecution by looting and k)- other inhumane acts, again in conjunction with Article 180, paragraph 1 of the CC of BiH, for which acts he was convicted by the First Instance Verdict and sentenced to a period of long-term imprisonment. It is, therefore, evident from the contested Verdict that Jankovic was convicted on the basis of individual responsibility in terms

of Article 180, paragraph 1 of the CC of BiH. However, in paragraph 342 of the First Instance Verdict, the First Instance Court ruled as follows:

„Considering that, as previously mentioned, looting was a common practice (confirmed by almost all witnesses who were members of the Intervention Platoon) and that Defendant Dušan Janković did not do anything to prevent such a practice (as was his duty of a superior), it is clear that by his passive conduct he at least significantly contributed to the lootings of civilians in the convoy.”

50. The description of the acts undertaken by the Accused Dušan Janković by the First Instance Court in this paragraph of the contested Verdict suggests command responsibility as a form of participation in the commission of the alleged criminal offence, even though the Accused was never charged with command responsibility nor could he have been convicted of such a charge bearing in mind that the Prosecution had amended the Indictment in that part, only charging the Accused with individual responsibility. This results in an obvious contradiction between the operative part of the contested Verdict and its reasoning which amounts to an essential violation of the criminal procedure provisions under Article 297, paragraph 1, sub-paragraph k) of the CPC of BiH.

51. With regard to Željko Stojnić, the Appellate Court is applying the principle of *beneficium cohaesionis*, in terms of Article 309 of the CPC of BiH, because the Defence Counsel for the Accused Stojnić, Attorney Zlatko M. Knežević, who no longer represents this Accused, had merely listed his appellate claims in the introduction to his Appeal from the First Instance Verdict, without explaining them, in further detail in the relevant appeal. He, therefore, did not submit specifically that he had filed his appeal on the grounds of a violation of the right to a proper defence. Neither did he state that the operative part of the Verdict was contradictory to its reasoning and that the Verdict lacked reasons to explain the First Courts' conclusion vis-à-vis the decisive facts, as the other Defence Counsel did, in fact, detail, and on which grounds the First Instance Verdict was revoked.

52. Article 309 of the CPC of BiH provides for the procedural instrument of *beneficium cohaesionis*, which is a benefit enjoyed by the Defence. The purpose of this legal benefit is to prevent, in appellate proceedings, the unequal treatment of the co-accused who are the subject of the same verdict in a joint criminal indictment. Therefore, the benefit of cohesion is an essential element of the process of fair trial and aims to eliminate the possibility of different treatment of the individual co-accused in appellate proceedings because of only formal reasons. In a situation where an appeal of one of the co-accused persons has been granted, while the other co-accused did not file an appeal or filed an appeal on different grounds, the latter should not be disadvantaged. In line with the benefit of cohesion provided for

by this Article, should the Appellate Panel find that the reasons which have led it to decide in favour of the accused who has filed the appeal are also favourable to the co-accused who did not file an appeal or who has filed an appeal on different appellate grounds, it shall extend, *ex-officio, this benefit to this co-accused* as though such appeal did exist. Having applied this principle, for the reasons explained above, this Panel has decided to revoke the First Instance Verdict as far as Željko Stojnić is concerned and order a re-trial before the panel of the Appellate Division.

53. Having established the existence of essential violations to the provisions of criminal procedure under Article 297, paragraph 1, sub-paragraphs d) and k), the Appellate Panel is obliged, in terms of Article 315, paragraph 1, sub-paragraph a) of the CPC of BiH, to revoke the First Instance Verdict and to order a re-trial before the panel of the Appellate Division to rectify the essential violations of the provisions of criminal procedure, to hear the evidence which has already been presented and which it deems to be relevant, to hear any additional evidence which it deems necessary, and, considering the other appellate claims, to issue a new verdict founded on the law.

54. In line with the statutory duties under Article 316 of the CPC of BiH, the Appellate Panel has provided a summary of the reasons for the revocation of the convicting part of the First Instance Verdict.

55. Accordingly, and in line with Article 313 and Article 315, paragraph 1), sub-paragraph a) of the CPC of BiH, it was decided as stated in the operative part herein.

RECORD TAKER

Anida Saračević

**PRESIDENT OF THE PANEL
JUDGE**

Tihomir Lukes

Legal Remedy: No appeal lies from this Verdict.