

BOSNA I HERCEGOVINA



БОСНА И ХЕРЦЕГОВИНА

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СУД БОСНЕ И ХЕРЦЕГОВИНЕ
THE COURT OF BOSNIA AND HERZEGOVINA

Case no: S1 1 K 002995 13 Krž 8

Date of delivery: 13 September 2013

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Appellate Panel: Judge Dragomir Vukoje, LL.M, presiding judge
Judge Tihomir Lukes, member
Judge Senadin Begtašević, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

DRAGAN NEŠKOVIĆ AND ZORAN ILIĆ

APPELLATE VERDICT

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

Predrag Tomić

Defense Counsel for the Accused Dragan Nešković:

Vesna Tupajić Škiljević and Goran Nešković

Defense Counsel for the Accused Zoran Ilić:

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, Judge Dragomir Vukoje, LL.M., as the Presiding Judge, and Judges Tihomir Lukes and Senadin Begtašević as members of the Panel, with the participation of Legal Advisor – Neira Tatlić as the record-taker, in the criminal case of the Accused Dragan Nešković and Zoran Ilić, charged with the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in relation with sub-paragraphs a), d), e) and k), as read with Articles 29 and 180(1) of the Criminal Code of Bosnia and Herzegovina, deciding upon the Appeal of the Prosecutor's Office of Bosnia and Herzegovina of 23 January 2013 against the Court of BiH Verdict number S1 1 K 002995 10 Kri of 3 October 2012, having held a panel session, on 13 September 2013, in the presence of Predrag Tomić, Prosecutor of the Prosecutor's Office of BiH, the Accused Dragan Nešković and his Defense Counsel Vesna Tupajić Škiljević, in absence of the duly informed attorney Goran Nešković, and in the presence of the Accused Zoran Ilić and his Defense Counsel Miloš Perić and Petko Pavlović, pursuant to Article 310(1), as read with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina, rendered the following

VERDICT

The Appeal filed by the Prosecutor's Office of Bosnia and Herzegovina **is hereby dismissed**, and the Verdict number S1 1 K 002995 10 Kri rendered by the Court of Bosnia and Herzegovina on 3 October 2012 **is upheld**.

REASONING

I. PROCEDURAL HISTORY

A. TRIAL VERDICT

1. Under the Verdict number S1 1 K 002995 10 Kri rendered by the Court of Bosnia and Herzegovina (hereinafter: the Court of BiH) on 3 October 2012, the Accused Dragan Nešković and Zoran Ilić were acquitted of the criminal offense of Crimes against Humanity – persecution in violation of Article 172(1)(h) of the Criminal Code of Bosnia and

Herzegovina (hereinafter: the CC of BiH), as read with paragraph 1)a) - depriving another person of his life, sub-paragraph d) - forcible transfer of population, sub-paragraph e) - imprisonment or other severe deprivation of physical liberty, sub-paragraph k) - other inhumane acts of similar character set forth under the same Article, all in conjunction with Articles 29 and 180(1) of the CC of BiH.

2. Pursuant to Article 189(1) of the Criminal Procedure Code of BiH (hereinafter: the CPC of BiH), the costs of the criminal proceeding stipulated under Article 185(2) a) through f) of the same code, and the necessary expenses and remuneration of the Defense Counsel shall be paid from the budget appropriations of the Court of BiH.

3. Pursuant to Article 198(3) of the CPC BiH, the aggrieved parties are hereby instructed to take civil action to pursue their potential claims under property law .

B. APPEAL AND RESPONSES TO THE APPEAL

4. The Verdict was appealed by the Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the Prosecution) on the following grounds: essential violations of the criminal procedure in violation of Article 296(a), as read with Article 297(1)k) and paragraph 2) of the CPC of BiH, since the Verdict did not contain the reasons as to decisive facts, and since the Court, during the main trial and when rendering the Verdict, misapplied the CPC of BiH provisions; erroneously and incompletely established account of facts in violation of Article 296 c), in conjunction with Article 299(1) and (2) of the CPC of BiH, because the Court erroneously established some decisive facts or failed to establish them even when they were supported by new facts or new evidence; and because of the erroneous application of substantive law. The Prosecution moved the Appellate Division Panel (hereinafter: the Appellate Panel) to entirely uphold the Appeal as well-founded, revoke the appealed Verdict, and schedule a new trial pursuant to Article 315(2) of the CPC of BiH to present new evidence or present anew the evidence that caused the erroneously and incompletely established account of facts in the first instance proceeding. The Prosecution proposed examining witness NI-119 and witness Milivoje Batinica, in order to completely establish the facts and remedy the violations of the CPC of BiH and eventually find the Accused Dragan Nešković and Zoran Ilić guilty of the criminal offense of Crimes against Humanity – Persecution, in violation of Article 172(1)h)

of the CC of BiH, as read with paragraph (1)a) - depriving another person of his life, sub-paragraph d) - forcible transfer of population, sub-paragraph e) - imprisonment or other severe deprivation of physical liberty, sub-paragraph k) - other inhumane acts of similar character set forth under the same Article, all in conjunction with Articles 29 and 180(1) of the CC of BiH, and impose on them the sanction foreseen under the law.

5. Attorney Vesna Tupajić Škiljević, Defense Counsel for the Accused Dragan Nešković, and attorney Miloš Perić, Defense Counsel for the Accused Zoran Ilić, both responded to the Prosecution Appeal and moved the Appellate Panel to dismiss the Prosecution's Appeal as unfounded and uphold the Trial Verdict.

6. Pursuant to Article 304 of the CPC of BiH, the Appellate Panel held a session on 13 September 2013. At the session, the Prosecutor presented his Appeal and Defense Counsel for the Accused Dragan Nešković and Zoran Ilić verbally responded to the Appeal. The Prosecutor maintained his written appeal arguments and the reasoning thereof.

7. Having examined the appealed Verdict within the grounds of the Appeal pursuant to Article 306 of the CPC of BiH, the Appellate Panel has decided as stated in the Operative Part for the following reasons:

II. GENERAL CONSIDERATIONS

8. Prior to addressing each ground of the Appeal, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC of BiH, an appeal must include the legal grounds for contesting the verdict and the reasoning behind the appeal.

9. Pursuant to Article 306 of the CPC of BiH, the Court shall review the verdict only insofar as it is contested under the appeal. An appellant is required to draft his appeal in such a way that it may serve as a basis for reviewing the verdict.

10. In that regard, an appellant shall provide precise grounds on which he contests the verdict, specifically state which part of the verdict, evidence or action of the court he appeals and give clear and substantiated arguments in support of his allegations.

11. Referring to the appellate grounds in general terms only and arguing the alleged irregularities in the first instance proceedings without specifying which

appeal grounds the appellant refers to, does not constitute a valid basis for reviewing the Trial Verdict. The Appellate Panel relied on these legal grounds in deciding to dismiss the uncorroborated and unclear appeal arguments as ill-founded.

III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF BiH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE

A. STANDARDS OF REVIEW

12. A verdict may, pursuant to Article 296 of the CPC of BiH, be contested on the grounds of an essential violation of the criminal procedure provisions. Article 297 of the CPC of BiH defines essential violations of the criminal procedure provisions.

13. As to the gravity and significance of the procedural violations, the CPC of BiH differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced verdict (absolutely essential violation), and such violations regarding which it is up to the Court to assess, in each specific case, whether they have or could have affected the validity of the verdict (relatively essential violation).

14. Absolutely essential violations of the CPC of BiH are listed in Article 297(1)(a) through (k) of the CPC of BiH.

15. If the Appellate Panel establishes an essential violation of criminal procedure provisions, the Panel shall revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC of BiH, except in the cases referred to in Article 314(1) of the CPC of BiH.

16. Unlike absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a verdict the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

17. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have

hypothetically affected the rendering of a lawful or proper verdict. The Appellate Panel will rather only find a violation of the criminal procedure principles when the appellant shows that it is of substantial character, and that it is impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. Furthermore, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

Sub-ground 1: Article 297(1)k) of the CPC of BiH – The Prosecution argues that the Trial Verdict does not cite the reasons concerning the decisive facts

(a) The Appellate Panel is satisfied that the Trial Verdict does cite the reasons concerning the decisive facts and dismisses the allegations of the Prosecution Appeal as unfounded.

(i) Prosecution Appeal arguments

18. The Prosecution argues that the Court correctly established the facts which support the essential element of the relevant criminal offense – widespread or systematic attack on civilians and provided valid reasons thereof, but the Court erroneously concluded that the Accused were not aware that their acts constituted part of that attack and failed to substantiate those decisive facts.

19. The Prosecution refers to paragraph 147 of the Verdict as obviously inconsistent with regard to the facts relevant to *mens rea* of the Accused. The Court finds that “*the entire body of presented evidence suggests that the Accused were unaware of the existence of a widespread attack ...*”. This implies that the Accused were absolutely unaware of the attack which lasted for several days, and they were entirely oblivious of what was going on, why they were in that area, why they were armed, wore uniforms, why they executed the orders of their superiors. On the other hand, the Court concluded that the acts described under Counts 1, 2 and 3 were part of a widespread or systematic attack.

20. In paragraphs 181, 183 and 186 of the Verdict, the Court failed to provide valid reasons as to why the testimony of witnesses NI-101, NI-102 and NI-104 were found to be unreliable, that is, why those witnesses did not convince the Court that the Accused Dragan Nešković was guilty as charged. The Court merely stated that they were not consistent about “*important facts*”, and did not at all evaluate either the testimony of these or other prosecution witnesses, including the statements given by witnesses during the investigation.

21. The Appeal also refers to paragraphs 189–213 relevant to Section 2 of the appealed Verdict, and argues that the Court only stated the evidence which implied that the Accused were innocent, but failed to provide the reasoning thereof.

22. In that regard, in paragraph 196, the Court did not dispute the events of 13 and 14 July 1995 and did not exclude the Accused Dragan Nešković from them. However, in paragraph 205, the Court concluded that the Accused Nešković was unaware that the men they captured, deprived of liberty and escorted to the Kravica Farming Cooperative would be killed.

23. The Appeal refers to paragraph 201 in which the Court stated that none of the witnesses (NI-117, NI-110, Zoran Erić, Jovan Nikolić and Ilija Nikolić) supported the allegation of the Indictment that the Accused were aware of the ultimate fate of the Bosniak men. This is entirely unsubstantiated, since none of the witnesses knew the Accused.

24. In addition, in paragraph 205, the Court reached an entirely unsupported conclusion that members of the Jahorina Training Center were unaware that the captured Bosniaks would be killed.

25. In paragraph 206 of the appealed Verdict, as alleged in the Appeal, the Court concluded that the Accused Dragan Nešković “*had a completely different understanding of his assignments and their purpose - that it was a legitimate capture of enemy soldiers*” - in relation to witness NI-110, who was a member of a different unit and had much more wartime experience, and as such, he could understand the information he received from his superiors. In the opinion of the Prosecution, these assertions are logical.

26. In paragraph 219 of the Verdict, the Court stated that the testimony of witnesses NI-104, S-115 and NI-102 should be evaluated as one whole, including the investigative

statements of these witnesses. Nevertheless, in paragraph 240 already, the Court changed this position by finding unreliable the testimony relating to the killing of the two captives.

27. The Prosecution further argues that the Court acquitted the Accused Zoran Ilić of the charges under Count 2 of the Indictment, but failed to explain why it did not evaluate the testimony of witnesses NI-101 and NI-104, who corroborated the charges under this Count of the Indictment.

28. Furthermore, the Court provided no reasoning whatsoever in support of the decisive fact that the Accused Zoran Ilić had not committed the criminal offense specified under Section 3 of the Verdict. The Court evaluated the testimony of witness NI-101 given at the main trial, but did not take into account the allegations contained in the witness examination record taken during the investigation, notwithstanding that the testimony of this witness should include both the records from the investigation and his evidence given at the main trial.

a. Findings of the Appellate Panel

29. Pursuant to Article 297(1)k) of the CPC of BiH, an absolutely essential violation of the criminal procedure occurs when a first instance verdict, as a formal document of the court, contains certain deficiencies in the Operative Part and in the Reasoning thereof, whose nature is such that it precludes examining its lawfulness and correctness. Essential violation within the meaning of this section occurs whenever the first instance verdict does not at all contain nor does it cite the reasons concerning the decisive facts.

30. First of all, the Appellate Panel concludes that the form and contents of the first instance Verdict comply with the provisions of the procedural code, therefore, the law has not been violated in that aspect.

31. The appealed Verdict contains the reasons in support of the decisive facts which were relevant in adjudicating this criminal matter, together with a detailed and comprehensive analysis of the entire body of evidence, both individually and in correlation. In the appealed Verdict, the Trial Panel provided a general evaluation of the evidence presented during the trial, and after that evaluated the evidence relevant to the individual charges. Finally, the Trial Panel specifically reflected upon and evaluated

the testimony of witnesses NI-104 and S-115, and witness NI-102.

32. In deciding about the credibility and reliability of witnesses' testimony, the Trial Panel in particular took into account the conduct and character of the witnesses, their individual circumstances, lapse of time, state of shock, their age, interrelated participation in the events, risk of self incrimination and their relationship with the Accused in this case. Apart from that, the Trial Panel examined the consistency of the testimony of every witness during direct and cross-examination, and compared them to the statements given during the investigation. In addition, the Panel bore in mind that the credibility of witnesses depended on their familiarity with the facts they testified about, on their personal integrity, reliability and obligation to tell the truth under oath.

33. Therefore, contrary to the allegations of the Prosecution Appeal, the Trial Panel provided sufficient and convincing arguments in support of every Section of the Verdict with regard to the Accused Dragan Nešković and Zoran Ilić, and gave reasons which guided the Court to reach such a decision. The fact that the conclusions of the Trial Panel does not correspond to the Prosecution assertions, does not render them unsubstantiated and unsupported by evidence.

34. In the Appeal, the Prosecution argues that the appealed Verdict failed to correctly establish the subjective nexus between the Accused and the criminal offenses committed in Srebrenica and its surroundings at the relevant time, that is, the awareness of the Accused of the widespread and systematic attack. In the opinion of the Appellate Panel, the Trial Panel was justified in concluding that the established facts of 26 March 2007 indisputably showed that, at the time relevant to the Indictment, there was a widespread and systematic attack in the territory of the UN Safe area Srebrenica carried out by the Army and Police forces of the so called Serb Republic of Bosnia and Herzegovina and Serb paramilitary formations, which was targeted against Bosniak civilians, where such an attack, in the context of Crimes against Humanity, according to customary international law, was not restricted only to the existence of an "armed conflict".

35. The Trial Panel also correctly concluded that the evidence presented at the main trial showed that the Accused Dragan Nešković and Zoran Ilić were unaware of the existence of the widespread and systematic attack targeted against Bosniak civilians in the UN Safe Area Srebrenica and its wider surroundings; however, objectively, the offenses charged under Counts 1, 2 and 3 of the Indictment constituted part of the

widespread and systematic attack. This conclusion is entirely upheld by the Appellate Panel.

36. Based on the foregoing, the Appellate Panel is satisfied that the Trial Panel applied the principle of free evaluation of evidence set forth under Article 15 of the CPC of BiH and correctly evaluated the entire body of evidence presented at the main trial, both testimony of witnesses and physical evidence. In the reasoning of the appealed Verdict, the Panel paid special attention to the evidence of distinctive quality and importance, and/or the evidence which was crucial for establishing the decisive facts and for rendering final decision about the culpability of the Accused.

37. Thus, the Appellate Panel hereby dismisses as unfounded the appellate allegations that the evidence and facts in favor of the Prosecution were not evaluated. This allegation of the Appeal will be examined in more detail further in the Verdict, in the section relevant to the incorrectly and incompletely established facts.

38. In the opinion of the Appellate Panel, the Prosecution's Appeal failed to show that the appealed Verdict is incorrect and unlawful, therefore the Trial Panel did not violate the provisions of Article 297(1)k) of the CPC of BiH.

2. Sub-ground 2: Article 297(2) of the CPC of BiH – The Prosecution argues that the Court did not apply or improperly applied the CPC of BiH provisions in rendering the Verdict, and in so doing affected a lawful and proper rendering of verdict

(a) The Appellate Panel is satisfied that the Trial Panel correctly applied the provisions of the CPC of BiH and did not make a substantial violation of the criminal procedure stipulated in Article 297(2) of the CPC of BiH.

a. Allegations of the Prosecution Appeal

39. In the Appeal, the Prosecution argues that the Trial Panel, acting contrary to the legal provisions, did not allow the presentation of relevant rebuttal evidence and additional evidence, including the testimony of the eye-witnesses to the killing of an

unarmed captured Bosniak by the Second Accused Zoran Ilić.

40. The Court rendered a procedural decision not allowing the testimony of Milivoje Batinica (“Simo from Alipašino Polje”) and protected witness NI-119, stating that witness NI-119 was not a witness in rejoinder, quite the opposite, he was the key element in the Prosecution’s theory. According to the Prosecution, in so doing, the Court provided the basis for acquittal. This testimony is relevant to all counts of the Indictment, *inter alia*, because of the fact that this witness was in Jelah on 17 July 1995, and his testimony would refute the allegations of the Defense and the cross-examination of witness NI-101.

41. The Prosecution notes that the Court first time dismissed the Prosecution Motion for the presentation of this evidence at the rebuttal stage, and second time to present the evidence as a supplement to the evidentiary proceeding.

42. The Prosecution refers to paragraph 88 of the Verdict, alleging that the Court contravened the law by refusing to allow the examination of witness Milivoje Batinica as a supplement to the evidentiary proceeding because this witness would rebut the testimony of witness NI-101.

43. According to the Prosecution, the Trial Panel was entirely wrong in dismissing the Prosecution’s motion for examining witness NI-119 as an additional piece of evidence by stating that the Prosecutor failed to explain why they were unaware of this witness before the issuance of the Indictment. In this respect, the Appeal refers to a number of facts the Prosecution repeatedly pointed out at the main trial, which clearly show that the Prosecution could not have been aware of this witness before and argues that this witness could have some information about the relevant incidents.

44. The Appeal further alleges that the Trial Panel contravened the law when it tolerated open threats to prosecution witnesses whose testimony was relevant to the Second Accused Ilić, primarily those to the protected witnesses. To that end, the Prosecution filed a Motion on 15 August 2008 for ordering the Accused Zoran Ilić into custody for the following reasons:

45. According to protected witnesses NI-104 and S-115, they were threatened prior to testifying, while witness NI-104 was offered money to change his testimony.

46. Witness Haso Hasanović, who survived the genocide in Srebrenica, said he

believed that a threatening message was sent to him from the Bratunac Municipality, from Kravice, where he showed the crime scenes. The Prosecution pointed out that the Accused Zoran Ilić lived in the area of Kravica.

47. In view of the mentioned threats, the Prosecution claims it can be reasonably concluded that the Accused Zoran Ilić threatened witness NI-101. In his three previous statements, given when Zoran Ilić was not a suspect in any investigation, witness NI-101 referred to the Accused Ilić as a member of his unit, implicating him in the crimes committed during the Srebrenica operation. However, this witness changed his testimony in the part relevant to the Accused Ilić at the main trial in the case of Duško Jević *et al*, same as he did in this proceeding. The conclusion that witness NI-101 is afraid of the Accused Ilić's family is substantiated by his statement that a cousin of the Accused Ilić killed a witness' acquaintance after the war.

48. In addition, witness NI-111, who previously testified before the ICTY, refused to testify in this case, and he is now unavailable as a witness.

i. Findings of the Appellate Panel

49. Pursuant to Article 297(2) of the CPC of BiH, essential violation of the criminal procedure provisions (relatively essential violation), arises if during the preparation of the main trial or in rendering a verdict the Court did not apply a provision of the law or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

50. With regard to a relatively essential violation of the criminal procedure provisions, the appeal should not simply indicate the acts and omissions which resulted in the non-application or misapplication of the relevant procedural code provision, quite the opposite, the appeal must clearly show in what way and why it could have affected the rendering of a lawful and proper verdict. Otherwise, examining whether a relatively essential violation of the criminal procedure did indeed occur would turn into an *ex officio* examination.

51. Based on the foregoing, the Appellate Panel concludes that the Prosecution's Appeal failed to prove that the stated omissions resulted in rendering an unlawful and incorrect Verdict by the Trial Panel, and dismisses the Appeal as unfounded on that

ground.

52. Having examined the allegations of the Prosecution Appeal, the Appellate Panel first notes that the court is entitled to decide which evidence is relevant to the specific proceeding and/or which evidence would contribute to establishing the truth in the case at hand, and to accept it. Also, the court may decide not to adduce the entire body of the proposed evidence if it is unnecessary or irrelevant to the case.

53. In that regard, the appealed Verdict states that during the proceeding, the Trial Panel complied with the provisions of Article 239(2) and Article 263(2) of the CPC of BiH, which means that the Trial Panel observed the obligation to adduce the evidence relevant to the specific case and to eliminate everything that prolongs the proceeding.

54. As opposed to the allegations of the Appeal, the appealed Verdict provides clear and concrete reasons as to why the motion for the examination of witnesses Milivoje Batinica a.k.a. "Simo from Alipašino" and NI-119 was dismissed, since this was the evidence in rejoinder to the Prosecutor's rebutting evidence given by the witness in direct examination, which, in the opinion of the Trial Panel, contravened the procedural law provisions. Also, the Trial Panel found that the testimony of this witness went along the same lines as that of witness NI-101, whose account of the murder in Jelah given at the main trial was incorrect. Therefore, the Trial Panel correctly concluded that testimony of this witness did not satisfy the criteria set under Article 276 of the CPC of BiH to be considered as a supplement to the evidentiary procedure, notwithstanding when the witness became available.

55. With regard to the testimony of witness NI-119, the Trial Panel found in the appealed Verdict that the Prosecution failed to specify which defense allegation would be refuted by the examination of that witness, and/or to state specifically which defense evidence asserted that Bosniak men had been killed by members of the unit to which the Accused Zoran Ilić belonged, and/or that this Accused participated in the search of the terrain. In addition, as it follows from the appealed Verdict, the fact that the witness was examined after the issuance of the Indictment, does not mean that he was unavailable, more precisely, the Prosecutor did not explain why he was unaware of this witness before the Indictment was issued.

56. The Trial Panel supports its position by noting that evidence was discussed at a status conference and the Prosecution said they would not propose any evidence

that could be considered supplemental to the evidentiary procedure. The fact that the Prosecution was dissatisfied with the decision of the Court regarding the proposed rejoinder evidence did not provide the grounds for the Prosecution to propose supplements to the evidentiary procedure, nor did it additionally strengthen their position in that respect, since those are two completely different grounds with clear and different criteria relevant to admissibility.

57. Therefore, this Panel is satisfied that the Trial Panel did not make an essential violation of the criminal procedure provisions by not accepting the Prosecution's evidence at the rebuttal stage and at the stage of presenting supplemental evidence, because in his appeal the Prosecutor gave only his subjective position that this evidence would affect the decision of the court, but failed to substantiate his opinion by facts.

58. With regard to the allegation of the appeal that the prosecution witnesses in this proceeding were influenced in order to alter or prevent their testimony, the Appellate Panel is satisfied that the Trial Panel provided a valid and acceptable arguments in the appealed Verdict, which makes the allegations of the Appeal unfounded.

59. When asked by the President of the Panel to explain why he altered his testimony, Witness NI-101 said that he knew the Accused Zoran Ilić, but he had not committed the murder, and added that he was concerned because he had been forced to give such a false statement with regard to the Accused Zoran Ilić.

60. Besides, the witness said at the main trial that he had experienced major inconveniences when giving his statement during the investigation and that members of his household and/or close family members also suffered consequences of investigators' actions.

61. Since this witness was inconsistent in his testimony, the Trial Panel clarified the problematic parts thereof during his examination. In that regard, the appealed Verdict cited what the witness stated about the statements obtained during the investigation – they had been taken under pressure, taking advantage of his personal situation.

62. Based on the foregoing, the Appellate Panel accepts the conclusion reached by the Trial Panel that this witness could not be found credible and/or consistent since his statements were largely dependent on the manner of examination and on who questioned him, which affected both establishing the account of facts and proving the

charges against the Accused Zoran Ilić.

63. In view of all the inconsistencies and contradictions in the testimony of Witnesses NI-104 and S-115, the Court found that the Prosecution failed to prove that those witnesses were influenced in order to alter their testimony. The Trial Panel was satisfied that it was in the interest of those witnesses to provide a distorted and fabricated interpretation of the relevant incidents in order to diminish their own responsibility, as members of the Jahorina Training Center, for the killing of the two Bosniak civilians, so that the Trial Panel could not accept their testimony as credible.

64. Considering that those witnesses altered their investigative statements and testified differently at the main trial, guided by different reasons, the Appellate Panel concludes that the only decision the Trial Panel could make was that the Accused Dragan Nešković and Zoran Ilić could not be found guilty on the grounds of unreliable and not credible testimony of those two witnesses.

65. The Appellate Panel concludes by finding that, during the main trial, the Trial Panel did not make any essential violations of the criminal procedure in terms of Article 297(2) of the CPC of BiH, nor does the appealed Verdict contain any deficiencies of such nature. All this leads to the conclusion that the allegations of the Prosecution Appeal are unsubstantiated.

GROUND OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

B. STANDARDS OF REVIEW

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

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

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

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

70. Article 299 of the CPC of BiH stipulates when a verdict may be contested because of the incorrectly or incompletely established factual status. Decisive facts are established directly by evidence or indirectly from other facts (indications or control facts). Only the facts being established by a verdict may be regarded as existent, and irrespective of the existence of decisive facts conclusions about their existence must always be made, or else there is no the established factual status (incompletely established factual status). In case a certain decisive fact has not been established in the manner it existed in the reality of a certain event, then there exists an incorrectly established factual status

71. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.¹ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

¹ M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

(i) Allegations of Prosecution Appeal

a. Account of facts relevant to Section 1 of the appealed Verdict

72. In the Appeal, the Prosecution alleges that the Court erred in acquitting the Accused Dragan Nešković of the charges under Counts 1 and 2 of the Indictment. According to the Prosecution, the Accused was undeniably present in Potočari, close to the Kravica Farming Cooperative, he had a position of a superior, and there is no doubt that he is guilty as charged.

i. Nešković's position of a superior

73. According to the Prosecution, seeking to support its conclusion about the innocence of the Accused Dragan Nešković, the Court erred in not giving credence to the testimony of witnesses NI-104, S-115 and other witnesses who pointed out that the Accused Nešković had a position of a superior.

74. The Appeal refers to Article 37 of the Law on Internal Affairs of Republika Srpska which shows that it was not unusual practice to deploy training units (like Jahorina Training Center Unit) to the field, given that this Article related to the creation and engagement of such training units to execute "*special assignments*". Based on this Article, it can be clearly concluded that the Accused Dragan Nešković and Zoran Ilić held official positions of "*authorized official persons*" during the Srebrenica operation, and as such, they had the duty to prevent criminal offenses.

75. The Appeal also refers to the regular procedures and to the MUP Rule Book, which prescribe that every platoon should have a commander and three members – commander deputies. However, since only one instructor from regular staff was assigned to each platoon, this means that other three positions of commander deputies were filled by the deserters. In this specific case, five witnesses (Milan Stojčinović, NI-104, S-115, NI-102, NI-101) confirmed that the Accused Dragan Nešković held a superior position.

ii. Participation of the Jahorina Training Center Unit and the two Accused in Crimes Against Humanity

76. In the Appeal, the Prosecution argues that five witnesses and three key documents prove that Bosniak houses were first searched with the aim of rounding up Bosniak citizens and taking them to the base in Potočari, on which occasion a member of the 1st Company killed an elderly Bosniak man by a hand grenade which he threw into his house. The 1st Company to which the Accused Dragan Nešković belonged actively assisted in these actions.

iii. Potočari

77. Also, while the Accused Dragan Nešković was at his post on 12 and 13 July 1995, many crimes were being committed in Potočari, and the Accused must have seen the killed bodies and he must have heard about the killings. Therefore, in the opinion of the Prosecution, the averment that the Accused was unaware of those events is entirely without merit.

78. In that regard, the Prosecution points out that the deserters, including the Accused Nešković and Ilić, were informed even before leaving Jahorina that they were going on a field mission and they had clear indications of the future events. This follows from the testimony of witnesses NI-100, S-105, and Borovčanin's report. According to witness NI-104, the Accused Nešković was the first one who went to Potočari with other superiors and, together with Goran Marković, he met the deserters when they arrived there.

79. In addition, the scene of terror in Potočari was described by witness Vincentius Egbers in his testimony before the ICTY and when he was cross-examined by this Court; witnesses Joseph Kingori, Elco Koster and Čamila Omanović before the ICTY, and witnesses Mile Janjić, Jovan Nikolić, Jevto Doder, NI-100, and NI-101 before the Court of BiH. According to the Prosecution, it follows from the testimony of these witnesses that not only did the 1st Company and the Accused Nešković aid in the ongoing crime against humanity, but they actively participated in it.

iv. Attack on the UN Base

80. The Prosecution argues that the 1st Company, together with the VRS and other forces, attacked the UNPROFOR personnel and their base after the Serb forces had requested the UNPROFOR to surrender. Witness NI-102, member of the 1st Company, confirmed that the VRS realized their threats and shelled the UN Compound. Soon afterwards, the Accused Dragan Nešković entered the Compound. Witnesses NI-100, NI-117 and Joseph Kingori also testified about this incident.

v. Separation of women and children from men by the 1st Company and the *White House*

81. The Appeal alleges that 25 witnesses and 50 exhibits undeniably show that members of the Jahorina Training Center 1st Company, including the Accused Dragan Nešković, also directly participated in the commission of the crime in Potočari and its surroundings, which included the separation of women and children from men, torture and killing of some men, and expulsion of women and children from the enclave. Dragomir Vasić confirmed that all of those people were civilians, men, women and children.

82. In that regard, the Appeal argues that even if not all of those people were civilians, that fact would still be irrelevant to the conviction of the two Accused for the criminal offense of Crimes against Humanity. In the opinion of the Prosecution, the term “civilian” by its definition includes not only the captives in Potočari and Kravica, but even the individuals who could have earlier been reservists in the 28th Division. In support of such position, the Prosecution refers to a number of case law examples where “civilians” are *inter alia* defined as “members of armed forces who have laid down their arms ..., and those placed *hors de combat*”.

83. The Prosecution further alleges that 7 witnesses, including Jevto Doder, Platoon Commander of the 1st Company and members of the 1st Company, witnesses: NI-104, NI-105, NI-102, NI-100, S-115 and NI-101, confirmed that on 12th and 13th July 1995, the 1st Company, including the Accused Nešković, took part in the separation of men from women and children. This was also confirmed by Elco Koster and Joseph Kingori.

84. The Appeal also refers to other abundant evidence which shows that

“identification documents” and other personal belongings were seized from the male captives and then destroyed, after which the captives were imprisoned in the White House and elsewhere. In the opinion of the Prosecution, the fact that the 1st Company destroyed identity cards clearly shows that the Accused Dragan Nešković and others were aware of the fate of Bosniak men beforehand, since it would be impossible to exchange prisoners without their personal documents.

85. In this part, the Appeal reflects upon the statements of witness NI-101, who changed his original statements given to the SIPA and the BiH Prosecution. According to the Prosecution, the witness obviously told the truth in his original statements, but after receiving threats from the Accused Zoran Ilić, the witness changed his statements because he feared for his family.

vi. Killings of captives from Srebrenica by Nešković’s Company

86. The Prosecution claims that the Accused Dragan Nešković and the 1st Company directly executed a huge number of captives from Srebrenica and these allegations are corroborated by the testimony of witnesses NI-100 and S-105. According to the Prosecution, it follows from the testimony of witness Milan Stojčinović that the Accused Nešković was kept in the Special Police as a reward for his good conduct and for the action in Srebrenica, which was a common practice at that time.

vii. Kravica

87. The Appeal argues that the Accused Dragan Nešković undeniably held such duty which *de facto* implied substitution in all situations in which he took over the duty and actions of the platoon commander and issued orders. In addition, he was in the firing squad which was ordered to execute the Bosniaks in the Kravica warehouse, and he personally ordered two members of the Jahorina Training Centre to kill two captured Bosniak men, which they carried out.

88. The Prosecution refers to witnesses NI-104, S-115 and NI-101, who testified that the Accused Dragan Nešković held a higher position in the 1st Company in relation to other deserters and that he issued orders. Witness NI-121 explained the procedure applied in his platoon – platoon commanders appointed three deserters as

squad commanders, and squad commanders were authorized to give orders and instructions to other deserters. The Appeal further alleges that it follows from witnesses' statements and from the documentary evidence that deserters held higher positions and that the Accused Dragan Nešković was one of such deserters.

89. In the opinion of the Prosecution, the Trial Panel erred by not giving credence to the testimony of protected witnesses NI-104 and S-115. Notwithstanding that the appealed Verdict found parts of the testimony of these witnesses imprecise and inconsistent, the Appeal nevertheless argues that the credibility of these witnesses follows from the verdicts issued precisely by the Court of BiH in which they were found guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1)(a) of the CC of BiH after the Court accepted their Plea Agreements concluded with the Prosecution. The Court accepted the fact that on 14 July 1995, both witnesses enforced the order issued by a superior officer from the Jahorina Training Centre known to them (Dragan Nešković), and deprived of life two captured Bosniak civilians close to the Kravica Farming Cooperative by firing from automatic rifle in their back, with the intention to kill them. Therefore, having in mind that these witnesses were sentenced to prison term of 5 years each, it is inexplicable that the Trial Panel in this case acquitted the Accused Dragan Nešković, who actually ordered those killings, and the Accused Zoran Ilić, who "verified" that none of them survived.

b. Facts relating to Count 2 relevant to the Second Accused Zoran Ilić

90. The Appeal argues that the Court Panel incorrectly established the facts relevant to the Second Accused Zoran Ilić. The Accused Zoran Ilić fired at the bodies of most probably still alive Bosniak captives to "verify" that none of them survived. The Prosecution proved this act of "verifying" by means of statements given by witness Luka Marković during the investigation before his death and by witnesses NI-102 and NI-104. It follows from their statements that several members of the Jahorina Training Center were assigned to "verify" that none of the executed captives from Srebrenica survived, and they did so by firing at their heads, including the Accused Zoran Ilić as one of the perpetrators.

c. Facts relating to Count 3 relevant to the Second Accused Zoran Ilić

91. The Appeal points out that the Trial Panel did not accept two transcripts of the testimony of protected witness NI-119, who was an eye-witness to Zoran Ilić's "verifying" that no one survived and to the incident that took place on 17 July 1995 during the search of the forest, when the Accused Zoran Ilić summarily executed one captured Bosniak man in Jelah.

92. According to the Prosecution, members of the Bratunac Brigade 3rd Battalion: Zoran Jovanović, Neđo Nikolić, Borivoje Jovanović, Dragomir Jovanović, Radivoje Ilić and Petko Tešić gave false testimony attempting to provide an alibi for the Accused Zoran Ilić. It follows from their testimony that on 17 July 1995 they were together with only one part of the Jahorina Training Center unit, that is, with some 30 members of that unit. Also, they were at a different location, not in Jelah, and one witness even testified to have heard gunfire from the direction of Jelah. As stated in the Appeal, it is entirely illogical that these witnesses were assigned to search the terrain only on 17 July, that is, on the day when the criminal offenses charged against the Accused Ilić actually took place, same as their assertions that they did not see either Zoran Ilić or the killing of the captives. In claiming so, the Prosecution relies on 5 documents and 2 established facts which were admitted into evidence, which clearly show that members of the Bratunac Brigade and its 3rd Battalion were assigned to carry out the relevant search of the terrain at least from 13th to 18th July.

93. The Prosecution points out that the Accused Zoran Ilić showed no remorse during the trial. Quite the opposite, he openly expressed disrespect to victims and to the court when he ridiculed survivor witness Haso Hasanović and threatened other witnesses, including protected witness NI-104.

94. The Appeal refers to Dragomir Vasić and others who confirmed that both companies searched the terrain on 17 July 1995 looking for Bosniak survivors, pointing out at the same time that not even the Defense denied the fact that the Accused Zoran Ilić returned to his unit before 17 July, nor did they deny that a member of the Jahorina Training Center killed one captured Bosniak in Jelah on 17 July 1995. Therefore, in the opinion of the Prosecution, the only point at issue is whether that individual was the Accused Zoran Ilić.

95. To that end, the Prosecution reflects upon the statements given under the investigation by protected witness NI-101, who claimed it was precisely the Accused Zoran Ilić, a.k.a. “Cindin”, who fired at the young man during the search of the terrain on 17 July. At the main trial, this witness changed his original statements by claiming that the civilian was killed by “Simo from Alipašino Polje”, who died, and not the Accused Ilić. The Appeal concludes that the Accused Ilić obviously threatened this witness, as he obviously did to other witnesses, which resulted in a changed testimony of this witness.

96. The Prosecution proposed summoning the witness “Simo from Alipašino Polje”, whose real name was Milivoje Batinica, and witness NI-119, who also saw the Accused Zoran Ilić killing the young man in Jelah, however, the Court dismissed those Prosecution motions in the first instance proceeding.

97. The Appeal alleges that the testimony of Milivoje Batinica and NI-119 is not crucial for the Court to find the Accused Zoran Ilić guilty of this murder, however, it is important to allow the court to compare two original statements given by witness NI-101 with his testimony before the court and to decide about their credibility.

98. It follows from the Appeal that the Accused Zoran Ilić was not a suspect in any case at the time when witness NI-101 gave his first statement in March 2009, which makes displaced all allegations about SIPA exerting pressure on this witness in order to persuade him to give false information about the Accused Ilić. It clearly follows from the Examination Record for witness NI-101 that the SIPA paid attention to the name of the Accused Zoran Ilić only on the second day of examination.

i. Findings of the Appellate Panel

99. Having examined the allegations of the Prosecution Appeal that the facts in the appealed Verdict are incorrectly and incompletely established, and having thoroughly analyzed the contents of the appealed Verdict and inspected the case file, the Appellate Panel has dismissed those allegations as unfounded. In the opinion of the Panel, the facts are correctly and completely established and the appealed Verdict provides valid and acceptable reasoning in support of all decisive facts on whose basis the Accused Dragan Nešković and Zoran Ilić were acquitted.

100. As stated earlier, the Appellate Panel is satisfied that the Trial Panel correctly

evaluated the evidence in this case, in accordance with the CPC of BiH provisions, and was primarily guided by the principle of the presumption of innocence stipulated under Article 3 of the CPC of BiH, which embodies a general principle of law that the burden of proof rests upon the prosecutor.

101. Having applied the principle of free evaluation of evidence, the Trial Panel correctly and completely established all decisive facts, and the appealed Verdict correctly focused on the examination and evaluation of those pieces of evidence on which the decision of the court is based. Therefore, the allegations about the incompletely and erroneously established facts on this ground are also without merit.

102. The Appellate Panel finds that the Prosecution Appeal refers only to portions of some witnesses' testimony when alleging that such evaluation of evidence by the Trial Panel is inexplicable, more precisely, that the Trial Panel did not arrive at the conclusion suggested by the Prosecution.

103. The Trial Panel indisputably established the existence of a widespread and systematic attack in the area of Srebrenica and its surroundings, the presence of the Accused Dragan Nešković in the area of Potočari at the relevant period, and that he was a member of the Jahorina Training Centre Unit of the Serb Republic Bosnia and Herzegovina MUP Special Police Brigade.

104. However, the mere fact that the Accused was a member of this unit, whose members participated in the commission of the crime, same as the fact that the Accused were in the wider vicinity of the crime scene, cannot *a priori* be taken as grounds for the culpability of the Accused Dragan Nešković and Zoran Ilić, as it is correctly found in the appealed Verdict.

105. In the Appeal, the Prosecution disputes the conclusion of the Trial Panel that it followed from the entire body of presented evidence that the Accused Dragan Nešković and Zoran Ilić were unaware of the existence of the widespread and systematic attack targeted against Bosniak civilians in the UN Safe Area of Srebrenica and its wider surroundings, notwithstanding that, objectively looking, the offenses charged under Counts 1, 2 and 3 of the Indictment constituted part of the widespread and systematic attack.

106. As opposed to these Prosecution allegations, the Appellate Panel upholds the

position taken by the Trial Panel that the Prosecution did not prove beyond any reasonable doubt that the Accused Dragan Nešković and Zoran Ilić were aware and actively participated in the commission of the charged offenses described in detail under Counts 1, 2 and 3 of the Indictment.

107. With regard to **Count 1 of the Indictment**, the Trial Panel was correct in establishing that the Prosecution failed to prove beyond any reasonable doubt that the Accused Dragan Nešković had the required intent when he undertook any of the acts described under Count 1 of the Indictment charging the Accused Nešković that he, armed with an automatic rifle, participated in the searches of Bosniak houses with the aim of rounding up and escorting the Bosniak population to the UN Compound in Potočari; participated in the forcible transfer of the civilians from the UN Compound in Potočari by buses and trucks to the area under the control of the Army of BiH in the manner that he put women and children on the buses and trucks; separated male Bosniak civilians from their families, and held the men detained in the White House from where they were eventually transferred to the execution sites in the wider area of the Zvornik Municipality.

108. A number of witnesses² testified about these circumstances, but only witnesses NI-101, NI-102 and NI-104 spoke specifically about the activities of the Accused Dragan Nešković.

109. The Appellate Panel holds that the appealed Verdict provides valid and substantiated reasons regarding the evaluation of the testimony of these witnesses, on which the appealed Verdict is based in this part.

110. To that end, the appealed Verdict correctly refers to the testimony of witness NI-101, who could not firmly identify the Accused Dragan Nešković as the person who was actively involved in separating the men from women and children in Potočari. In addition, the witness did not know if that person participated in the search of the terrain.

² Witnesses: Jevto Doder, Mile Janjić, Dragomir Vasić, Jovan Nikolić, S-117, Mićo Gavrić, NI-100, S-115, NI-104, NI-102, Elco Koster, NI-101, Joseph Kingori, Dean Manning, Vincentius Egbers, Ljubisav Simić, Milan Stojčinović.

111. The appealed Verdict also correctly points at witness NI-102, who stated he thought that the Accused Dragan Nešković too had entered the compound on the relevant occasion.

112. In that regard, the Trial Panel examined the testimony of witness NI-104 and correctly referred in the appealed Verdict to the portion of the testimony of this witness in which he confirmed to have seen the Accused Dragan Nešković in Potočari, but he did not say precisely what were the duties and assignments of the Accused.

113. Based on the foregoing, the Trial Panel did not give credence to the testimony of these witnesses because their testimony was inconsistent about the important facts, so that it could not be undeniably concluded that the Accused participated in the search of the terrain and in the separation of the men from women and children, nor could it be concluded that the Accused undertook those actions with the required *mens rea* of knowing that the people found in the search would be transferred against their will, imprisoned and/or deprived of their physical liberty.

114. Therefore, the Appellate Panel upholds the Trial Panel in finding that the offered evidence did not produce a firm conclusion that it was precisely the Accused Dragan Nešković who committed the relevant offenses, which makes the prosecution allegations unsubstantiated, and this Panel dismisses them as such.

115. According to **Count 2 of the Indictment**, while the Accused Dragan Nešković and Zoran Ilić were deployed along the Kravica – Konjević Polje road on 14 and 15 July 1995, they captured male Bosniaks whom they brought to the *Kravica Farming Cooperative*, and executed them. The Appellate Panel entirely upholds the factual findings of the Trial Panel.

116. The appealed Verdict correctly established that the relevant incidents had indisputably happened, but the Trial Panel focused on examining in detail the acts of the Accused and their state of mind in respect of the relevant incidents, doing so on the basis on the evidence presented at the main trial.

117. To that end, the Trial Panel was justified in giving credence to the testimony of witnesses S-117, NI-110, Zoran Erić, Jovan Nikolić and Ilija Nikolić, because they made one integrated and logically consistent whole. The Trial Panel correctly concluded that the presented evidence did not prove beyond any reasonable doubt that, while the

Accused Dragan Nešković was deployed on the road, he was aware that the Bosniak men they had captured and/or deprived of liberty and taken to the Kravice Farming Cooperative would be killed, nor was it proved that the Accused Dragan Nešković participated in their execution. The same applies to the Accused Zoran Ilić.

118. Witness NI-102 said that he was in a state of shock and he did not know who was shooting at the lined up men, and/or if the Accused Dragan Nešković was among the soldiers/policemen who fired.

119. As for the Accused Zoran Ilić, the Trial Panel correctly concluded in the appealed Verdict that the Prosecution failed to prove beyond doubt that the Accused Zoran Ilić participated in the Jahorina Training Center operations, and/or that he was deployed on the Kravica-Konjević Polje road and took part in capturing the Bosniak men who were subsequently killed.

120. Witnesses NI-104 and S-115 testified about the circumstances relevant to the Accused Zoran Ilić, but the Trial Panel found their testimony inconsistent about the important facts. Witness NI-104 stated he had seen the Accused Zoran Ilić firing at dead bodies, while witness S-115, although not negating that he was with witness NI-104 on the relevant occasion, denied to have seen the Accused Zoran Ilić, moreover, he denied to have noticed any shooting, even though he had an unobstructed view to the area.

121. Also, speaking about the “finishing off” of the victims, witness NI-102 said he had seen two or three men going through the rows and executing the Bosniak men who survived the execution, but the Accused Zoran Ilić was not among them.

122. Therefore, as opposed to the allegations of the Prosecution Appeal regarding the testimony of witnesses NI-102, S-115 and NI-104, the Trial Panel was justified in not finding them credible with respect to the account of facts under Count 2 of the Indictment. Notwithstanding that these witnesses gave rather similar accounts of the murder of two male Bosniak civilians, the other parts of their testimony were largely inconsistent, both individually and in correlation with the other presented evidence.

123. The Trial Panel correctly evaluated the testimony of these witnesses, in their entirety, not fragmentary as the Prosecution does in the Appeal, which produced a correct and logical conclusion that it was not undeniably proved that the Accused Dragan Nešković, as a member of the firing squad executed the captured Bosniaks in the Kravica

warehouse, and/or that he also ordered two members of the Jahorina Training Centre known to him to deprive two captured male Bosniaks of their lives, which order they carried out, while Zoran Ilić, by firing single shots from automatic weapons into a pile of bodies of the captives who had been executed, “verified” that none of them survived.

124. In addition, the Appellate Panel dismisses as unfounded the allegations of the Prosecution Appeal regarding the command role that the Accused Dragan Nešković played in the commission of the criminal offense charged against him under the Indictment.

125. As opposed to the Prosecution allegations, the Trial Panel correctly concluded in the appealed Verdict that the presented evidence did not indisputably prove that the Accused Dragan Nešković, as a member of the Jahorina Training Center Unit (deserter), held a superior position that *de facto* implied substitution in all situations in which he took over the duty and actions of the platoon commander and issued orders.

126. The Trial Panel correctly evaluated the entire body of relevant evidence and was correct in concluding that witnesses NI-104 and S-115 were unable to define the duty of the Accused Dragan Nešković, and that, apart from the unclear and unconvincing testimony of those witnesses, the Prosecution did not present any other evidence which would enable the court to determine the scope of decisions which the Accused Dragan Nešković could make as the alleged “*platoon commander on behalf of the deserters*” or as “*a lower officer*”. Also, the appealed Verdict found the testimony of witness NI-102 insufficiently clear and convincing, so that it could not be taken as the basis to reach a conclusion about the culpability of the Accused.

127. In view of the above, the Appellate Panel upholds as correct the position taken in the appealed Verdict that the Prosecution failed to prove that the request/instruction/suggestion, if any, made by the Accused Dragan Nešković to Witness NI-104 and Witness S-115 to deprive two Bosniak men of their lives, could be considered as an order, and that its enforcement could be considered as acting pursuant to the order. The Court was not convinced that witnesses NI-104 and S-115 were in such a severe state of shock that they allegedly executed the order without giving it too much thought. It never even crossed their mind to simply release the people they subsequently executed, nor did they think about the consequences of their failure to enforce the order.

128. Therefore, this Panel upholds as correct the conclusion reached in the

appealed Verdict that the evidence presented at the main trial did not prove that the Accused Dragan Nešković held a position of a superior. In this regard, it should be noted that the witnesses who testified about this circumstance were not clear, detailed and convincing enough to satisfy the Trial Panel that the Accused had a *de facto* or *de iure* authority to issue and convey orders in the field.

129. The Appellate Panel dismisses this allegation of the Prosecution's Appeal as ill-founded and unsubstantiated, and as such, insufficient to dispute the correctly and completely established account of facts by the Trial Panel.

130. Based on the foregoing, the Appellate Panel concludes that the Prosecution neither indicated relevant evidence, nor did they provide sufficient arguments to convince this Panel that the Trial Panel reached erroneous conclusions about the participation of the Accused Dragan Nešković and Zoran Ilić in the commission of the offenses described under Count 2 of the Indictment. As a result, this Panel dismisses those appellate allegations of the Prosecution as unfounded.

131. With regard to the charges under **Count 3 of the Indictment**, the Appellate Panel upholds as correct the conclusion reached by the Trial Panel in the appealed Verdict that the presented evidence did not prove that the Accused Zoran Ilić summarily executed one captured Bosniak man in the village of Jelah on 17 July 1995, during the first day of the search of the forest area above the Konjević Polje – Bratunac road, which was carried out with the aim of capturing several hundred male Bosniaks, including some children.

132. Although it was not disputed that the terrain was searched close to the Kravica – Konjević Polje road on 17 July 1995, and that random killings of captured people took place during the search, the Appellate Panel is satisfied that not a single piece of the presented evidence casts doubt on the conclusion reached by the Trial Panel to apply the *in dubio pro reo* principle and acquit the Accused Zoran Ilić of the charges under Count 3 of the Indictment.

133. The appealed Verdict was correct in not giving credence to Witness NI-101, on whose testimony the Prosecution based its case, since the Prosecution did not present to the court any other evidence which would prove that the Accused Zoran Ilić committed the criminal offense charged against him. The Trial Panel took into account what Witness NI-101 said about the circumstances in which his statements were taken and how

the minutes were composed during the investigation, which is explained in more detail in the part of Verdict relevant to the appellate allegation about essential violations of the criminal procedure provisions.

134. It also has to be noted that the Prosecution did not prove that it was precisely the Accused Zoran Ilić who committed the relevant offenses, nor did they discredit his alibi. For those reasons, the Appellate Panel upholds the conclusions reached in the appealed Verdict as correct and based on the evidence presented at the main trial.

135. The Defense presented abundant evidence³, primarily witnesses, who were consistent in stating that the Accused Zoran Ilić was at his family house in Bratunac at the relevant time, where he assisted in organizing a military farewell party for his brother Miroslav Ilić.

136. All these witnesses confirmed that the party lasted from 12 to 13 July 1995 and the recruits were seen off in the early afternoon hours of 14 July 1995, when they had the opportunity to see the Accused Zoran Ilić and his escort who was assigned to him while he was on leave in Bratunac.

137. As it is correctly stated in the appealed Verdict, all this was confirmed by witness Zdravko Dačić, who escorted the Accused while he was on leave. According to him, after the Accused Zoran Ilić had seen off his brother on 14 July 1995 at the bus station in Bratunac, he was escorted and handed over to the Bratunac PS. Witness Miodrag Josipović too confirmed this fact and added that the Accused spent the night in the Bratunac PS, where he stayed until the morning hours of 15 July 1995.

³ This follows from the testimony of witnesses: Žarko Matić, Zdravko Dačić, Željko Vasić, Mirko Dragičević, Duško Nikolić, Miodrag Josipović, Jakov Kosanović, Nikola Petrović, Zoran Jovanović, Neđo Nikolić, Borivoje Jovanović, Dragomir Jovanović, Mirko Mičić, Petar Zorić, Radivoje Ilić, Petko Tešić, and Ranko Krstić; and from Exhibits: O2-6-photograph with Željko Vasić's signature, O2-6-2 - photograph with Žarko Matić's signature, O2-8a and c – photographs with Žarko Matić's signature, O2-9a, b and c - VoB-2, VoB-3 and VoB-1 Forms for Žarko Matić, O2-32 - VoB-2 Form for Miroslav Ilić certified by the Ministry of Defense – Bratunac Department, O2-32a VoB-2 for Miroslav Ilić certified by the Ministry of Defense – Bratunac Department and Sarajevo Military Post, O2-32b VoB-1 Form for Miroslav Ilić, O2-33 VoB-2 Form for Zarija Milovanović, O2-33a VoB-3 for Zarija Milovanović, O2-33b VoB-1 Form for Zarija Milovanović.

138. Based on the foregoing, the Appellate Panel upholds as correct and logical the conclusion reached in the appealed Verdict about the alibi of the Accused Zoran Ilić, since the Trial Panel, when examining the truthfulness of the alibi, took into account the cumulative effect of the entire body of relevant evidence.

139. Therefore, since the Prosecution failed to present adequate evidence in support of their allegations relevant to Count 3 of the Indictment, it was not possible to issue a verdict of conviction.

140. In the opinion of the Appellate Panel, the only conclusion that the Trial Panel could reach on the basis of the presented evidence was that the Prosecution did not irrefutably prove that the Accused Dragan Nešković and Zoran Ilić were aware of the attack on civilians and that they, accepting the risk that their acts could constitute part of the attack, perpetrated the criminal offenses charged against them.

141. The evidence presented by the Prosecution in order to prove the participation of the Accused in the relevant incident was not of such quality to conclude beyond any reasonable doubt that the Accused Dragan Nešković and Zoran Ilić had committed the criminal offense charged under the Indictment, so that the Trial Panel applied the *in dubio pro reo* principle and rendered a correct and lawful decision to acquit the Accused.

142. The Appellate Panel concludes that the Prosecution's Appeal failed to refute the facts established under the appealed Verdict, but the Prosecution merely viewed the facts from a different perspective, which makes their appellate allegations unsubstantiated.

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

A. STANDARDS OF REVIEW

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

144. Where an error of law arises from the application in the Verdict of a wrong legal

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

145. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314(1) and 308 of the CPC of BiH.

a. Allegations of the Prosecution Appeal

146. According to the Prosecution, the Trial Panel relied on the erroneously and incompletely established facts and incorrectly applied the criminal law in terms of both the criminal offense and the culpability of the Accused.

i. Findings of the Appellate Panel

147. The Prosecution appealed the Verdict on the ground of erroneous application of the criminal law, but they did not provide a single argument in support of their allegation, so as to enable the Appellate Panel to examine the appealed Verdict in the relevant part. Since the Appeal does not contain any reasoning substantiating the appellate allegation, this Panel could not at all examine this allegation raised in the Appeal.

148. Based on the foregoing, the Appellate Panel applied the provisions of Article 313 of the CPC of BiH and decided as stated in the Operative Part of the Verdict.

Record-taker

Legal Advisor

Neira Tatlić

PRESIDENT OF THE PANEL

JUDGE

Dragomir Vukoje, LLM

LEGAL REMEDY: No appeal lies from this Verdict.