

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine Суд Босне и Херцеговине

Case No. S1 1 K 017133 15 Krž 4

Delivered on: 25 January 2016

Written Judgment sent out on: 16 March 2016

Before the Appellate Panel composed of Judges:

Meddžida Kreso, Presiding

Mirko Božović, member

Dragomir Vukoje, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v. the accused

SREĆKO BOŠKOVIĆ

SECOND-INSTANCE JUDGMENT

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

Mr. Predrag Tomić

Counsel for the Accused:

Mr. Petko M. Pavlović, Attorney

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No. S1 1 K 017133 15 Krž 4

Sarajevo, 25 January 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel composed of Judge Meddžida Kreso, as the Panel Presiding, and Judges Mirko Božović and Dragomir Vukoje, as members of the Panel, with the participation of legal advisor-assistant Nedim Muminović, as the record-taker, in the criminal matter against the accused Srećko Bošković, charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the Criminal Code of BiH (CC BiH), in connection with Article 180(1) of the same Code, in relation to the appeals filed by the Prosecutor's Office of BiH of 24 September 2015, and the accused's defense attorney, Mr. Petko Pavlović, of 9 October 2015, from the Judgment of the Court of BiH No. S1 1 K 017133 14 Kri, of 3 July 2015, at the Panel session held on 21 January 2016 in the presence of the accused Srećko Bošković, the accused's defense attorney, Mr. Petko Pavlović, and the Prosecutor of the Prosecutor's Office of BiH, Mr. Predrag Tomić, on 25 January 2016 handed down the following:

J U D G M E N T

Dismissing as ill-founded the appeal filed by the Prosecutor's Office of BiH from the Judgment of this Court No. S1 1 K 017133 14 Kri of 3 July 2015, and **granting, in part, the appeal filed by the defense attorney** for the accused Srećko Bošković, and **revising** the Judgment of this Court No. S1 1 K 017133 14 Kri of 3 July 2015, as follows:

With regard to sentencing decision, by sentencing the accused Srećko Bošković **to imprisonment for a term of 8 (eight) years** for the criminal offense of War Crimes against the Civilian Population in violation of Article 142(1) of the CC SFRY of which the Trial Judgment found him guilty, by applying Articles 33, 38 and 41 of the CC SFRY.

Pursuant to Article 50(1) of the CC SFRY, the time the accused spent in custody in relation to the referenced criminal offense, running from 15 September 2014 to 17 September 2014, shall be credited towards the imposed prison sentence.

The Trial Judgment shall remain unrevised in its remaining part.

R e a s o n i n g

I – PROCEDURAL HISTORY

1. The Judgment of the Court of BiH No. S1 1 K 017133 14 Kri of 3 July 2015 found the accused Srećko Bošković guilty of committing, by the acts described in the referenced Judgment enactment clause, the criminal offense of War Crimes against the Civilian Population in violation of Article 142(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia-SFRY¹ (CC SFRY), and sentenced him to 10 (ten) years in prison.
2. Pursuant to Article 56 of the CC BiH, the time the accused spent in custody for the commission of the referenced offense, running from 15 September 2014 to 17 September 2014, was credited towards the imposed prison sentence.
3. Under the same Judgment, pursuant to Article 188(4) of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of criminal proceedings, which will be, pursuant to the Court's decision, paid from within the budget appropriations.

II – PROSECUTION'S APPEAL

4. The referenced Judgment was timely appealed by the Prosecutor's Office of BiH on the grounds of sentencing under Article 300(1) of the CPC BiH, with a motion that the Appellate Panel of the Court of BiH grant the appeal as well-founded, in whole, revise the Trial Judgment, impose on the accused a prison sentence lengthier than 10 (ten) years, and uphold the Judgment in its remaining part.

IV – RESPONSE TO THE APPEAL

5. The accused's defense attorney, Mr. Petko Pavlović, submitted a response to the appeal, moving the Appellate Panel to dismiss the Prosecution's appeal as ill-founded, in whole.

¹ Decree with the Force of Law of 11 April 1991 concerning the taking over of the Criminal Code of the Socialist Federative Republic Yugoslavia adopting the Criminal Code of the CC SFRY as the Republic law ("Official Gazette of the SFRY, Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90).

V – DEFENSE’S APPEAL

6. The referenced Judgment was timely appealed by Mr. Petko Pavlović, defense attorney for the accused Srećko Bošković, on the grounds of essential violations of the criminal procedure provisions (Article 297(1)(d), (i), (k) and Paragraph 2 of the CPC BiH), incorrectly and incompletely established facts (Article 299 of the CPC BiH), violation of the Criminal Code, the decision on sentence and a claim under property law (Article 300(1) of the CPC BiH), violation of Article II/3.e of the BiH Constitution and violation of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms.

VI – RESPONSE TO THE APPEAL

7. The Prosecutor’s Office of BiH submitted a response to the appeal moving the Appellate Panel to dismiss the appeal filed by counsel for the accused Srećko Bošković as ill-founded in whole.

VII – PANEL’S SESSION

8. Pursuant to Article 304 of the CPC BiH, the Appellate Division Panel held a session, on 21 January 2016, where the prosecutor and the defense attorney presented their respective appeals and responses to the appeals, and fully stood by their appellate grievances. The accused stood by his attorney’s arguments.

VIII – GENERAL CONSIDERATIONS

9. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal.

10. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment,

specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

11. Mere arbitrary indication of the appellate grounds, and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers is not a valid ground for reviewing the Trial Judgment, Therefore, the Appellate Panel dismissed as ill-founded the unreasoned and unclear appellate complaints.

IX. THE APPEAL FILED BY THE ACCUSED'S COUNSEL

1. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(1) OF THE CPC BIH

(i) General considerations

12. A Judgment may be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297(1).

13. A substantial violation of provisions of criminal procedure is also established when the Trial Panel during the trial or in reaching the judgment failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of lawful and correct judgment.

14. 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. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, 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.

15. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the judgment. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts. The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the judgment formally contains all necessary elements for a well-reasoned and comprehensible judgment.

16. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Judgment. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Judgment.

17. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Judgment where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Judgment and should raise alleged errors of fact under Article 299.

1.2. Essential violations of the criminal procedure provisions in the light of a violation of the right to a defense

(ii) The Defense's grounds of appeal

18. According to the appeal, a substantial violation of the criminal procedure provisions or the right to a defense was made because the Trial Panel deprived the defense of the right to cross-examine the witnesses and the expert witnesses for the Prosecution of BiH indicated in para. 83 of the contested Judgment, and thus directly and grossly violated both Article 262 of the CPC BiH and Article 6(1) and 3(d) of the ECHR. Specifically, the Prosecutor seized of the case moved the Panel to accept and admit (in the case record) the transcripts of the testimony of the witnesses and expert witnesses from the trials before the ICTY (Dean Manning, Jean Rene Ruez, Dr C.H. Lawrence, Richard Butler). In

this regard, the defense requested, by its submission dated 5 January 2015, to be enabled to cross-examine the referenced witnesses and the expert witnesses, which, together with the Prosecution's request, was not addressed by the Trial Panel until the completion of the evidentiary proceedings, and which was dismissed at the hearing held on 22 May 2015.

19. The accused's counsel further submitted that the Trial Panel also violated the right to a defense at the hearing held on 29 May 2015 by depriving the defense of the right to pose any question whatsoever during the confrontation between the Prosecution witness SB-1 and the Defense's witnesses Dušan Nikolić and Radovan Đokić. In relation to the facts corroborating the violation of the right to a defense, Mr. Petko Pavlović, defense attorney for the accused Srećko Bošković, submitted that, by a series of procedural decisions, or the lack of decisions, or by its passive position, the Trial Panel *a priori* dismissed almost all defense's complaints, particularly during the direct and cross-examination of the protected witness SB-1 and M.K., Dušan Nikolić and Radovan Đokić, as well as other Prosecution witnesses.

20. The defense further submitted that the Trial Panel erroneously found, in para. 115 of the contested Judgment, that the defense attorney did not concretize the complaints advanced at the hearing in relation to the relevance of the prosecution Exhibits T-3 and T-4, while the Trial Panel did not request a more comprehensive explanation to be given, if it considered it necessary.

21. The defense attorney also pointed to the lack of equality of arms in the treatment accorded to the defense's and the prosecution's witnesses and the lack of equal evaluation of evidence, wherein the Trial Panel accorded a privileged treatment to the witnesses SB-1, M.K., and, generally, to the Prosecution's witnesses over the Defense's witnesses.

22. The Defense submitted that, during the whole trial, the Court made audio and video recordings, that classic records were not produced, that the referenced recordings were occasionally forwarded to the accused but that the accused had no technical capacities to play these CDs, and that thereby his right to a defense was violated.

23. In addition, the defense submitted that, on 9 January 2015, the accused was removed from the courtroom without any guilt on his part, as a result of which the ban on trial in absence was violated.

(iii) Conclusions of the Appellate Panel

24. The Appellate Panel concludes that the foregoing appellate grievances are ill-founded.

25. Article 5 of the Law on the Transfer of Cases provides for the manner in which the evidence used before the ICTY can be used before the Court, as well as the Defense's right to propose cross-examination of those witnesses, about which the Court shall render its final decision. Therefore, the referenced legal provision shows that it is at the Court's discretion to decide whether it will grant or not the motion for cross-examination. In the concrete case, the Panel considered the defense's motion for the witnesses' and the expert witnesses' cross-examination, and found that the referenced examination was proposed in an arbitrary manner, which is also upheld by this Panel. The very contents of the referenced motion does not indicate any circumstances about which the witnesses would be cross-examined by the defense, but rather the defense's motion is in whole based on the interpretation of Article 5 of the Law on Transfer of Cases in the context of relevant provisions of the CPC BiH, ECHR and the BiH Constitution, namely there is no indication of what the defense considers disputable in these witnesses' testimony, which would then be contested or explained in the cross-examination. In this regard, the Appellate Panel concludes that there is no violation of Article 6(3) of the ECHR or Article 262 of the CPC BiH, considering that it is at the Court's discretion to decide whether the presentation of certain evidence is justified, namely, in the concrete case, if the cross-examination of the witnesses and expert witnesses is justified. The Trial Panel was mindful of the defense's rights because, prior to rendering its decision, it asked the defense to provide its comments, and subsequently evaluated those comments. Therefore, there is no arbitrariness in the court's decision which would result in a violation of the right to a defense, or the right to a fair trial, because the significance of direct cross-examination of these witnesses was not indicated in the defense attorney's submission. In addition, the Trial Panel took into account Article 3 of the Law on Transfer of Cases which provides that a judgment of conviction cannot be based, exclusively or to a significant extent, on the statements of witnesses who did not testify at the main trial, which is not a situation in the

present case, that is, the judgment is not exclusively or to a decisive extent based on the evidence adduced before the ICTY. It should be noted that this issue was highlighted by the defense several times in the appeal. The Appellate Panel indicates that this issue was addressed in the light of violation of the right to a defense, and that it would not be addressed further below.

26. With regard to the appellate allegation that the defense was deprived of the right to pose questions during witness confrontation, this Panel indicates that the act of confrontation is being carried out after previous direct and cross-examination of the witnesses whose confrontation is being requested. Therefore, there is no violation of the right to a defense, because the defense both had an opportunity and used this opportunity to question these witnesses during their examination prior to the confrontation. The act of confrontation is a procedural option used in cases where there are inconsistencies in the witnesses' evidence regarding the decisive facts by confronting the testimony of the witnesses (the facts which could be explained or contested by the parties), whereupon the Panel evaluates each witness's testimony, individually and in combination with the other presented evidence. Accordingly, it cannot be stated that the defense was, in any way whatsoever, deprived of its rights because it previously had the opportunity to pose questions to the same witnesses. Thus, having evaluated these witnesses' testimony given both during the direct/cross examination during the proceedings and their confrontation, the Panel rendered its final decision on their quality. In addition, it is important to note that, during the main trial, the defense also did not insist on posing questions during the confrontation, that is, it neither initiated nor indicated that the Court made any omission during the witnesses' confrontation.

27. The Appellate Panel considers as arbitrary the appellate complaint that the Panel dismissed almost all the defense's objections during the witnesses' direct and cross-examination. In the Appellate Panel's view, this complaint is arbitrary because counsel did not concretely specify which of the defense's complaints were in question. Mere indication that the complaints were dismissed, without indicating precisely to what the complaints were related, or without contesting the Panel's concrete decision, is insufficient for a conclusion that the right to a defense was violated.

28. As to the defense's complaint that the Panel made an erroneous finding with regard to the complaint of the tendered evidence relevance, this Panel indicates that all parties to the proceedings must explain all their allegations during the proceedings, including those

relating to the tendered evidence. The Court's duty is to enable each party to the proceedings to advance their complaints, which certainly implies the explanation of their complaints. Therefore, the parties do have the right but not an obligation to object to certain evidence and, accordingly, to corroborate it with an adequate explanation. The defense was not deprived of this right to object to the referenced evidence relevance. In any case, the defense was entitled to advance its objection and explain it, and the fact that the objection was not reasoned cannot be the Court's omission, because the parties are entitled to advance objections and explain them. Even a possible omission of the Court to invite defense counsel to explain his/her assertion cannot be considered as unfair if defense counsel personally neither indicated nor highlighted so.

29. The Appellate Panel further indicates that defense counsel submitted with no arguments that the prosecution witnesses had a privileged treatment in relation to the defense witnesses. Specifically, during the proceedings, the parties enjoyed the same rights in terms of the evidence proposal and presentation, and both parties presented their respective evidence which was evaluated by the Court. However, since counsel argues that the prosecution witnesses were treated with privileges in relation to the defense's witnesses, this Panel notes that, pursuant to Article 15 and Article 281 of the CPC BiH, the Court shall render its decision after an evaluation of each piece of evidence, individually and in combination with the other evidence. The Trial Judgment evaluated all the presented evidence, and provided an adequate and logical explanation of the reasons for which certain pieces of evidence were admitted, or why certain evidence was credited or not. Thus, the Trial Judgment indicated that the prosecution witnesses, on whose testimony the Trial Judgment is mostly based, were consistent with regard to the decisive facts, unlike the defense witnesses, who made efforts to protect themselves against self-incrimination, and who had personal motives against the prosecution witness and thereby to contest the personality of the defense's witness. Since the defense attorney did not comprehensively explain what constitutes the lack of equality of arms between the treatment accorded to the defense's witnesses and the prosecution's witnesses, the Panel did not explain this complaint in more detail. It is important to note that the equality of arms in the use of procedural tools means that the Court shall provide each party with an opportunity to use their procedural means in the manner which is not to the prejudice of the opposite party, which does not include the manner in which the Court evaluates the evidence. In any case, it is important that the Court evaluates all the evidence, and accordingly renders its decision, not being bound by formal legal rules.

30. Contrary to the appellate complaints, that the Court did not produce classical records and that CDs with the trial video footage were occasionally delivered to the defense, the Appellate Panel indicates, pursuant to Article 253(1) and Article 155 of the CPC BiH, that a trial record need not be kept in the form of a written record, but rather that it can be audio/video recorded, and that such a recording is an original record kept during the hearing. In the concrete case, the entire course of the trial proceedings was audio and video recorded, while transcripts were also made for certain hearings and forwarded to the parties to the proceedings, including the defense attorney. Even if the referenced recordings were not forwarded to the defense, they are easily accessible and obtainable at any moment. Accordingly, the Appellate Panel holds that the accused's rights were not violated because the course of the main trial was audio/video recorded instead of taking a record in writing.

31. With regard to the appellate allegation, that the accused was removed from the courtroom on 9 January 2015 without any guilt on his part, as a result of which the ban on trial *in absentia* was violated, the Appellate Panel holds that, in the concrete case, the proposed additional measures to be granted to the witnesses were discussed, wherefore the accused was removed from the courtroom for a short period of time until this matter was decided, whereupon the accused was returned to the trial, and was present in the courtroom all the time during the witness's examination. Therefore, in the concrete case, there is no trial *in absentia*, but rather the accused was removed from the courtroom for a short period of time until the facts concerning the granting of protective measures to the referenced witness were discussed, in the presence of the defense attorney, while the ban on trial *in absentia* could be considered only in a situation where, e.g. the accused was absent either during the witnesses' examination, or during the whole hearing. Accordingly, the Appellate Panel holds that, in the concrete case, the removal of the accused for a short period of time was necessary because there was no other, less restrictive manner, to discuss additional protective measures for the witness, wherefore the removal was applied. Thus, it did not constitute a trial *in absentia*, and the accused's right to a defense was not violated.

1.3. The appellate allegations that the Judgment enactment clause is incomprehensible, contradictory internally or to the Judgment reasons, that the Judgment does not at all contain the reasons, or did not state the reasons for decisive facts (Article 297(1) of the CPC BiH)

(i) Defense's appellate grievances

32. According to the appeal, the Judgment enactment clause is incomprehensible because the factual description of the offense does not contain all the requirements for determination of the accused's offense, namely, in addition to the objective acts charged against him, it does not contain the subjective element, or the accused's relation toward the act of commission and its resulting effects.

33. According to the defense, the Judgment indicated that witness SB-1 stated that a day after St. Peter's Day (on 12 July 1995), specifically on 13 July 1995, at around 11:00-12:00 hrs, he went to M.K.'s place, and they together went to the Red Mud Dam to see what was going on there. It follows from the foregoing that the witness SB-1 was at the Dam on 13 July 1995, rather than on 15 July 1995, as indicated in the Judgment enactment clause, and that the referenced contradictions between the contested Judgment enactment clause and its reasoning render the Judgment incomprehensible.

34. According to the appeal, the Trial Panel made an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH, which is apparent from the fact that the Trial Judgment does not contain the reasons, or did not state the reasons for the decisive facts. Thus, the defense objects to the evaluation of evidence of witnesses Dušan Nikolić and Radovan Đokić, who testified on 22 May 2015, while on 29 May 2015 they were confronted with witness SB-1 with regard to the fact that witness SB-1 did not see them at the Red Mud Dam.

35. The appeal further stated that the Judgment disregarded the credibility of witness SB-1 and witness M.K. was contested by the defense during the proceedings and the contest of the closing argument.

36. The Defense further submits that the Trial Judgment omitted to evaluate the credibility of the contradicting statements of the witnesses given during the investigation and at the main trial, and the contradictions among the witnesses themselves at the main

trial. Thus, it was stated that the statements given by witness M.K. on the SIPA premises and at the main trial contradict his statement given to the prosecutor, but that the Trial Panel did not evaluate the referenced statements' reliability.

(ii) Conclusions of the Appellate Panel

37. Contrary to the appellate grievances, the Judgment enactment clause contains all requisite elements for a full determination of the offense. The Judgment described the manner in which the accused took part in the crime commission, that is, the concrete act which led to the occurrence of a prohibited consequence. In other words, the accused's presence during the crucial incident was proved beyond a doubt, including the resulting consequences and the *nexus* between the accused's acts and the prohibited consequence occurrence. In the concrete case, the accused's concrete acts of commission were described, that is, the Judgment enactment clause described the accused's active participation which resulted in the prohibited consequence, his subjective relation to the consequence in terms that he was shooting in the direction of a minor boy and thus wanted the occurrence of the prohibited consequence.

38. With regard to the defense's objection pointing to a vagueness in terms of the time of the crime commission despite the existence of certain inconsistencies between the Judgment enactment clause (that the critical incident took place on 15 July 1995) and the testimony of witness SB-1, who stated that it was a day after St. Peter's Day (13 July 1995), the Appellate Panel indicates that the Trial Panel's finding about the time of the crime commission was made on the basis of the other evidence tendered during the proceedings, namely both the Birač Factory work time schedule for July 1995 and the testimony of witnesses S-B5 and SB-6. The Trial Panel did not indeed evaluate the referenced witness's testimony in this context, considering that the other evidence proved beyond a doubt that it occurred on 15 July 1992. Despite being contrary to the other evidence, the statement of witness SB-1 does not bring into question the correctness of the finding regarding the Judgment comprehensibility, considering the period of time elapsed between the crime commission and the time of testimony. Therefore, it is logical that certain details are being forgotten, or that the witnesses cannot be resolute about them. Thus, given the existence of the other evidence specifying more precisely the time of the crime commission, this witness's imprecision does not, in any way, bring into

question the Trial Judgment's proper findings regarding the time of the crime commission and the Judgment's comprehensibility.

39. Contrary to the appellate grievances, the Appellate Panel considers as proper the evaluation of witness SB-1's statement that, on the critical day, witnesses Dušan Nikolić and Radovan Đokić were present at the Red Mud Dam, and accordingly that the Trial Panel's decision not to credit witnesses Dušan Nikolić and Radovan Đokić was also proper. Specifically, witness SB-1 provided a comprehensive and convincing testimony regarding the critical incident itself, with regard to both the acts and the behavior of the referenced defense witnesses. In this context, the Trial Panel properly found that the testimony of the two witnesses are not reliable considering not only that they were present at the crime scene at the critical time, but also undertook certain actions (Dušan Nikolić was tasked with removing the bodies of killed Bosniaks, while witness Đokić provided security duties), due to which the referenced witnesses made efforts to protect themselves against self-incrimination. Similarly, during the witnesses' confrontation, witness SB-1 consistently maintained his testimony, while witness Nikolić tried to contest his credibility by speaking about the conflict between witness Nikolić and witness SB-1's son, which is irrelevant to the decisive facts determination in the present case. In addition, witness Radovan stated that witness SB-1 lied, thereby trying to discredit witness SB-1's personality. It should be noted in this context that, by his statement, witness SB-1 did not try, in any manner, to incriminate witnesses Nikolić and Đokić, because had he not been telling the truth regarding the whole event he would have probably used a construction to also incriminate other persons, rather than solely the accused Bošković. Had the referenced witness had any intention to unjustifiably incriminate the accused or any other person, he could have also concocted a theory about the killing of other persons whose bodies he had seen at the referenced site, and, in addition to the accused, he could have incriminated other persons present at the site at the time. However, exactly the manner in which this witness gave evidence shows a lot about this witness, his objectivity and credibility, as he testified exactly about how he had seen the critical incident. The witness obviously did not want to fabricate things, but rather described in his testimony exactly how the incident indeed took place.

40. Contrary to the appellate grievances, the Trial Judgment provided comprehensive explanations of the reasons for which the Prosecution witnesses were credited, and for which the defense witnesses were not credited. The Trial Judgment referred not only to

the contesting of witness SB-1's testimony, but also to the other Prosecution's evidence tendered during the main trial. Exactly the Trial Judgment indicated the reasons for which it credited these Prosecution's witnesses rather than the defense's witnesses, who were unconvincing, who tried to protect themselves against self-incrimination, and had personal motives to contest the personality of the Prosecution's witnesses. Thus, in the present case, the Trial Panel comprehensively explained why certain evidence was accepted as convincing and reliable, and, on the other hand, why other evidence was unconvincing and why the judgment cannot be based on it. Therefore, the referenced complaint of the defense is also dismissed as ill-founded. The Trial Judgment also explained the reasons for which it credited the statement given by witness M.K. during the investigation (given on the premises of the Prosecutor's Office of BiH), and not his trial testimony (because the witness did not logically explain why he does not remember his earlier statement and did not prove the existence of health problems). This complaint was also repeated several times in the appeal filed by the accused's counsel, and since it was addressed in this part of the Judgment, this Panel holds that it is not necessary to address it in other parts of the Judgment either.

41. Counsel unjustifiably submitted that the Court did not evaluate the reliability of witness M.K.'s testimony considering that, on the contrary, it ensues from the contents of the Trial Judgment that the Court evaluated not just the statement he gave to the prosecutor, but also the statements that he gave both at SIPA and the main trial. It is important to note, first that the statements given at SIPA and the Prosecutor's Office were given at the investigation stage, when the witness was first examined at SIPA, and thereupon at the Prosecutor's Office of BiH. The statement given at the Prosecutor's Office of BiH is exactly a supplement to the statement given at SIPA, because the aim of the prosecutor's questions was to clarify the responses given at SIPA, and witness stood by the responses he gave in his earlier statement. In this context, the Appellate Panel holds that, by evaluating the witness's statement given at the Prosecutor's Office of BiH, the Panel in fact also evaluated the witness's statement given at SIPA. With regard to certain inconsistencies concerning the killing of a boy at the Red Mud Dam, the witness explained, during the examination at the Prosecutor's Office, that he wanted to avoid both being summoned before the Court and being found and killed by anyone. In addition, in the statement given at the Prosecutor's Office, the witness repeated all that he had stated during the investigation. Contrary to the defense's appellate grievances, the Trial Panel also evaluated this witness's trial testimony, and found that the witness did not provide a

logical and reasonable explanation. The Panel pointed to certain deficiencies in this witness's trial testimony (e.g., that he does not remember what he stated in the statement given at the Prosecutor's Office of BiH despite a short period of time having elapsed between the giving of the statement during the investigation and at the main trial, and that he had certain health issues, which is still unproved). It follows from the foregoing that this witness's trial testimony was evaluated both individually and in relation to his earlier statements and the other adduced evidence. In this context, it is important to note that the Trial Panel was able not only to examine this witness's statements given during the investigation but also to reproduce the audio recording of his examination at the Prosecutor's Office of BiH, and also to directly examine him at the main trial. Therefore, the Trial Panel properly found that, indicatively, the witness stated at the hearing that he remembered the statement he had given on the SIPA premises, but did not remember the statement he gave at the Prosecutor's Office of BiH even though only nine days elapsed between the two statements. Therefore, it is very important that the Trial Panel was able to directly see this witness's behavior at the main trial while contesting his previous statement, and, after comparing all his earlier statements, credit this witness's statement given at the Prosecutor's Office of BiH, and accordingly provide a reasonable and logical explanation. Therefore, the Judgment's referral to this witness's testimony cannot be considered as ill-founded.

1.4. Appellate grievances that the Judgment is based on the evidence on which it cannot be based pursuant to the CPC BiH's provisions (Article 297(1)(i) of the CPC BiH)

(i) The Defense's appellate grievances

42. The accused's counsel submitted that the Trial Judgment is based on the evidence on which it cannot be based pursuant to the provisions of the CPC BiH. Thus, the defense submits that the Witness Examination Record for M.K. was obtained unlawfully, corroborating this assertion with the notes and cautions of the Panel President and a Panel member addressed to the Prosecutor with regard to the manner in which the examination was carried out. In addition, the defense also contests the Trial Panel's finding regarding the lawfulness of this evidence, since it contradicts the judges' position presented at the main trial. Counsel also submits that the Trial Panel paid excessive attention to this witness's testimony, while it almost made no mention of the witness's

statement given at SIPA. The defense also submits that it was not mentioned whether the statements given at both the SIPA and the main trial were taken in a lawful manner.

43. In addition, the Defense also considers as unlawful Exhibits T-24 and T-48 with attachments because they are unverified copies, and contain many blots and cross-outs.

(ii) Conclusions of the Appellate Panel

44. With regard to the contested lawfulness of evidence, this Panel indicates that the Trial Judgment is based on the lawfully obtained evidence, and dismisses this complaint as ill-founded. When it comes to the statement of witness M.K. given before the Prosecutor's Office of BiH (Exhibit T-4), this Panel notes that the Trial Panel properly decided to allow that the referenced evidence be tendered in the evidentiary material, and to dismiss the defense's grievances as ill-founded. Pursuant to Article 10 of the CPC BiH, it is *forbidden to extort a confession or any other statement from the suspect, the accused or any other participant in the proceedings, and the Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, nor on evidence obtained through essential violation of this Code*. Having addressed the referenced defense's grievance in the context of the quoted legal provision, this Panel concluded that the defense attorney did not prove that the evidence at issue is unlawful, because the appellate contents did not show that the statement was taken by either extortion or through violations of human rights and freedoms, nor was it based on essential violations of the CPC BiH's provisions. Quite contrary, the statement was taken with full respect for both the witness's personal integrity and all the necessary requirements prescribed in the CPC BiH as a basis for the judgment. Despite the fact that the Prosecutor was cautioned by both the Panel Presiding and the Panel member, this certainly does not diminish the lawfulness of this evidence because the referenced cautions were not aimed at pointing to any unlawfulness, or otherwise the presentation of such an evidence would not have been accepted and the Judgment would not have been based on it. Therefore, the Panel's cautions were not pointing to any deficiencies in terms of failure to act in compliance with the CPC, but rather to the examination methodology, which ultimately did not result in the statement's unlawfulness. Contrary to the defense's submissions, the Panel evaluated witness M.K.'s statement given at SIPA in the context of his statement given to the Prosecutor, as addressed in the paragraphs above.

45. With regard to the defense's complaint concerning the unlawful evidence-unverified copies which contained cross-outs, this Panel considers that the Trial Panel's finding regarding this evidence's lawfulness is proper considering that their authenticity was confirmed by the signature of the acting General Manager of the legal entity "Birač" as a responsible person, who is also responsible for the delivered information correctness, because, in the given circumstances, any insistence on the verification of each document individually would unjustifiably affect judicial economy and efficiency. As indicated above, certain comments of the Panel members given to the Prosecutor about certain evidence presentation do not mean that such evidence is unlawful. Also, certain attachments to an original text neither affected the evidence legibility nor brought into question its lawfulness because they are just minor supplements which did not change the contents or the essence of the evidence itself. The fact that unverified copies were tendered with a supporting document which justified it, as well as certain additions to the text, need not mean that the judgment is based on unlawful evidence. In addition, it is important to note that this was not the only set of evidence on which the Trial Judgment was based.

1.5. Appellate grievances concerning essential violations of the procedure under Article 297(2) of the CPC BiH

(i) Appellate grievances of the accused's defense

46. The defense submits that the investigation records were used in breach of Article 273(1) and Article 281(1) of the CPC because the essence of the referenced provision is that the statements given during the investigation should be used as evidence for the purpose of contesting or explaining the previous statement.

47. The appeal indicates that the Trial Panel did not evaluate all documentary evidence presented by the Defense, individually or in combination, or in relation to the testimony of the defense's witnesses. The defense also points to an erroneous evaluation of witness Dušan Nikolić's main trial testimony and the statement he gave at SIPA.

48. The Defense's points to the Trial Panel's erroneous finding and indicates that witness SB-4 did not recognize the accused in the courtroom in the context of the events related to the Red Mud Dam, but rather stated that the referenced person (the accused) resembles a driver who had visited him in 2003-2004 asking for a job.

49. In its appeal, the Defense also indicated that the Trial Panel erroneously found that the Defense's objection that Exhibit T-9 was not concretized by stating that there is nothing in either this evidence or witness Milisav Mirković's testimony which is related to the event covered by the Indictment or the accused's role in this event.

(ii) Conclusions of the Appellate Panel

50. In reviewing the referenced grievances, being mindful of Article 273(1) of the CPC BiH, this Panel concluded that the statements given during the investigation may be used as evidence at the main trial. The fact that witness M.K. gave statements as a witness during the referenced investigation conducted within the same criminal case, does not exclude an option that the statements given by the witness during the investigation be used during the main trial. Along this line, it is also indicated in the Commentary on the Criminal Procedure Code of BiH² that the statements given by the witnesses, expert witnesses or the suspect being directly examined at the main trial can be used as evidence at the main trial, and, even if they are used at the main trial, the Court may, at its own discretion, provide all examined persons with an opportunity to explain or deny their previous statement, as was done in the concrete case, wherefore the Witness Examination Record concerning the referenced witness was, after his examination at the main trial in the capacity of a witness, tendered in the case record as the Prosecution's evidence. In addition, during this witness's examination procedure, the Prosecution obviously acted pursuant to the relevant provisions of Article 81 and Article 86 of the CPC BiH (to which he also referred in the referenced Record), whereupon a witness examination record was made pursuant to Article 152 of the CPC BiH, which contains the key elements prescribed by law. Considering Articles 82, 83, 84 and 85 of the CPC BiH, providing for the requirements which shall be satisfied in order to use a witness examination record as evidence in the criminal proceedings, the Trial Panel properly examined the lawfulness of the acts of proof by reviewing the case record, that is, by evaluating the examination records of witness M.K. tendered by the prosecution. Therefore, the Appellate Panel holds that the provisions of the CPC of BiH's referenced articles were completely applied, and concludes that the witness's statement was obtained in a lawful manner, and that it is not unlawful in terms of Article 10 of the CPC BiH, as indicated in the appeal. Since the Court is neither bound nor restricted by special evidentiary rules, the factual issue in any

concrete case is whether it will accept the previous or subsequent statement, certain parts of one of the other statement, or dismiss all statements as inadmissible.

51. Contrary to the appellate grievances, this Panel holds that the Trial Panel took into account all evidence tendered during the proceedings by both the defense and the prosecution, individually and in combination. The Appellate Panel indicates that witness Dušan Nikolić's statement given at SIPA's shows that his evidence given before the Court and the statement he gave during the investigation are consistent, namely that he identically spoke about the same event in his both statements, so there were no inconsistencies which required explanation, and, also, there was no need to evaluate the witness's statements. Specifically, the Trial Judgment referred to each piece of the defense's evidence individually, and concretely explained the reasons for which the evidence was admitted or not. Considering that counsel did not concretely indicate what is an unconscientious evaluation, or which Trial's findings were made on the basis of an unconscientious evaluation of evidence, this Panel holds that counsel has just arbitrarily indicated that the evaluation of the defense's evidence was unconscientious.

52. Having analyzed the defense's complaint, that witness SB-4 did not identify the accused in the context of the events at the Red Mud Dam, but rather on the occasion when he was looking for a job in 2003-2004, this Panel points to the Trial Judgment's note that the witness indeed identified the accused, but did not mention at all that the accused was identified with regard to the events that had taken place at the Red Mud Dam. Thus, the Trial Judgment nowhere stated that the accused was identified in the light of the event which is the subject of the indictment, but rather just noted that the accused was identified by the witness. The foregoing fact has neither aggravated the accused's procedural position nor has this witness's testimony incriminated the accused in any way.

53. In this Panel's view, contrary to the defense's assertions, the Trial Panel properly dismissed the defense's complaint regarding the relevance of witness Milisav Mirković's statement given during the investigation and his trial testimony. Primarily, counsel did not explain the referenced complaint, although he should have done it in order for the Court to be able to examine it. On the other hand, even though this witness did not testify about the events related to the Red Mud Dam and the accused's role in the critical events, it cannot be stated that this witness is irrelevant because he spoke about the events which had

² Commentary of the CPC BiH, Council of Europe/European Commission, 2005, p. 693.

preceded the events that took place at the Red Mud Ban, and this was significant for the Panel in order to broadly understand the totality of the events.

54. The defense's appeal repeatedly highlighted, also in this part, the issues of credibility of unverified copies tendered as evidence, the inconsistency between the witness M.K.'s statement given during the investigation and his trial testimony, and the testimony of witnesses and the expert witnesses who were not directly examined in the present case. In this regard, the Panel indicates that the referenced complaints were already addressed in the foregoing parts of the Judgment, in addition to a comprehensive explanation of the reasons for which they are considered as ill-founded, wherefore there is no need to reconsider such complaints.

2. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

(i) General considerations

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

56. 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.

57. 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.

58. 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 “.

59. Article 299 of the CPC BiH prescribes when a judgment may be contested on the grounds of incorrectly or incompletely established state of facts. Decisive facts shall be proved directly through evidence, or indirectly through other facts (indicia or control facts). Only the facts contained in the judgment can be considered as existent, and regardless of the existence of decisive facts, the judgment shall always provide reasons for their existence. Otherwise, the state of facts shall not be established (incompletely established facts). If a decisive fact was not determined as realistically as it existed in the reality of an event, there will be an error of fact.

60. 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.³ 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.

61. An evaluation of whether there is an error of fact will be made by the Appellate Panel in relation to the facts and findings indicated in the defense’s appeal. As indicated above, the standard to be applied for such an evaluation is the one pursuant to which all appellate grounds will be addressed and an evaluation made as to whether a certain decisive fact ensues from the adduced evidence.

(ii) Appellate grievances of the accused’s defense

62. The defense’s appeal indicates that it is unclear which evidence shows that an NN (unidentified) person did not take part in the hostilities and that such findings are arbitrary. The appeal also indicated that the grounds on which the Panel found that the accused was

³ M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits of 22 April 2005, para. 36.

a soldier are still unknown considering the opposite finding which ensues from the prosecution's and the defense's evidence. In this context, it is unclear which statement of witness M.K. was actually referred to by the Trial Panel.

63. The defense further indicated that the Panel completely credited the witnesses SB-5 and SB-6 despite the contradictory position of the Panel Presiding regarding the Trial Judgment's findings, since the Panel Presiding spoke about the irrelevance of the referenced witnesses.

64. In addition, the appeal indicated that the Trial Panel erred in finding that the Red Dam's plateau was within the responsibility zone of the 6th Zvornik Brigade, because only a military expert witness could have so concluded, but no such person was examined in the case at hand.

65. The defense's appeal indicated that the witness SB-4's evidence was not duly evaluated. This witness stated that a red tractor with a cabin arrived at the Red Mud Dam, while witness SB-1 stated that a cabinless tractor arrived there. Counsel indicated that 2 tractors did not arrive at the referenced site, and asked which of the two witnesses was credited by the Trial Panel.

66. Counsel pointed to an erroneous evaluation of the witnesses' evidence. Counsel submitted that witness Dušan Nikolić's statement given during the investigation is consistent with his trial testimony, which is contrary to the other witnesses, whose statements were inconsistent. The defense's appeal further indicated that the Court is bound to evaluate the evidence presented at the main trial, and points to the misapplication of Article 281 of the CPC BiH due to the lack of conscientious evaluation of each piece of evidence, individually or in combination with the other evidence. Counsel also indicated that the Trial Panel applied double standards in evaluating the prosecution's and the defense's evidence. In this context, Counsel indicated that his client is entitled to have all evidence evaluated pursuant to the principle of *in dubio pro reo*.

67. In his appeal, Counsel comprehensively analyzed the testimony of witnesses SB-1, SB-4 and M.K. and pointed to their inconsistencies in the light of the incorrectly and incompletely established facts. Thus the appeal indicated that the witness SB-1's evidence is imprecise regarding the date on which the critical event took place which was, according to him, a day after St. Peter's Day. Also, the defense claims that this witness stated that he had not seen the young boy's killing, but rather that he assumes that the accused

Bošković killed him. The defense also pointed to imprecisions in the witness SB-1's statement regarding the presence of soldiers in a forest near the Red Mud Dam, the rifle carried by the accused, the accused's education, the clothing worn by the accused and the other persons present there at the time. The defense further points to witness SB-1's statement that it was he who had brought the brandy there, rather than witness SB-4. On the other hand, the defense indicates that, at the Red Mud Dam site, witness SB-4 saw no persons other than 3-4 prisoners. In addition, witnesses Dušan Nikolić and Radovan Đokić contested witness SB-1's testimony claiming that they had never visited that site. The same witnesses stated that, due to his hatred towards the Nikolić men, witness SB-1 stated that witness Dušan Nikolić took part in the referenced events. This is so because, at his wedding party, this witness (Dušan Nikolić) had beaten the witness SB-1's son, and because Dušan Nikolić's uncle had taken witness SB-1's first spouse to live with him in community. The defense further pointed to witness S-4's statement, that there were no persons at the referenced site other than armed soldiers; that he had personally brought the brandy there; and that the tractor was driven by a plain man over age 60. Counsel also submitted that the Trial Panel did not confront these witnesses' evidence and did not explain which witness was credited.

68. The defense further analyzes the witness M.K.'s statement given during the investigation and his trial testimony, indicating that the Law on the Protection of Witnesses was misused, and that the apprehension of this witness and his wife was ordered several times. The defense indicated that, in his first statement given at the SIPA's, this witness stated that he had not seen any murder. In addition, the defense indicated that this witness wanted to recant the statement he had given to the Prosecutor, but that he was not allowed to do so.

69. The defense further indicated that the accused was not a member of either the VRS or the MUP, but rather a pupil at the secondary school in Karakaj, and subsequently a student at the Military Academy. In this way, the defense tried to contest witness SB-1's evidence regarding the accused's status.

70. The appeal pointed to the Court's finding that, at the critical time, witness Radovan Đokić was a worker at the *Birač* Company, while according to witness SB-1's statement, Radislav Đokić was a member of the Petkovci Unit. The appeal indicated that the Judgment is unclear and incomprehensive.

71. In addition, the defense indicates that witness SB-1 indirectly concluded that the accused had killed a young boy, and that he assumed that witness M.K. had seen it. The defense further indicates that a judgment of conviction cannot be based exclusively, or to a decisive extent, on the protected witness's statement only, namely that there is no ground for a conviction if there is only an uncorroborated statement of one witness confirming the Indictment allegations.

(iii) Conclusions of the Appellate Panel

72. With regard to the appellate grievance that the finding that the NN person did not take part in the hostilities is arbitrary, this Panel indicates that it was indisputable between the parties during the whole proceedings that the captured Bosniak civilians had been brought first to the Petkovci School, and subsequently to the Red Mud Dam, including the NN person. On the basis of the testimony of witnesses SB-1 and M.K., who had personally seen the referenced young age person in civilian clothing, the Panel found that it was a minor civilian, who could not even take any part in war activities. The referenced finding is also upheld by this Panel, with a note that the killed person's age indicates that he could not have taken any part in war activities. Also, that the referenced person (and the other prisoners) had a civilian status is confirmed by the other evidence showing that the captured civilians used to be brought to the Red Mud Dam site, about which witnesses SB-5 and SB-6 also gave evidence.

73. As to the accused's status, the Appellate Panel points to the Trial Panel's finding that, at the critical time, the accused had no capacity of a VRS soldier, that is, he was not a member of either the army or the armed forces, as consistently indicated by the witnesses for both the prosecution and the defense (who knew the accused's identity),⁴ which is also indisputable for this Panel. Contrary to the appellate grievances, the Panel found that the accused was not a soldier, and it rather credited the witness M.K.'s statement that, on the critical occasion, he saw a soldier lifting up his rifle and firing. In doing, so, the Trial Panel just referred to the witness's statement that he had seen a soldier, but its finding concerning the accused's status was made on the basis of other evidence. Therefore, witness M.K. spoke about the accused as a soldier mostly because he had perceived him as a soldier at the referenced moment, while the witness had no

⁴ Page 61, para. 230 of the Trial Judgment.

reason to know if the accused indeed was a soldier. On the other hand, the Panel was determining the accused's status (that he is not a soldier) also on the basis of other evidence, since it is indisputable that the criminal offense at issue can also be committed by a person who is not a soldier. The Panel was certainly led by the statement given by witness M.K. during the investigation, considering that, only in that statement did the witness present all the details related to the referenced event.

74. The Appellate Panel also considers as ill-founded the appellate grievance pointing to the contradictions between the Trial Judgment and the indications of the Trial Panel's Presiding after the testimony of witnesses SB-5 and SB-6. Specifically, as indicated above, the fact that the Panel Presiding criticized and warned the Prosecutor regarding the presentation of certain evidence does not mean that such evidence is irrelevant. The Panel Presiding had no intent of diminishing, in any manner, these witnesses' importance, but rather to direct the prosecutor to focus more on the witnesses who would testify about the concrete event which is the subject of charges. Although they did not speak about the young boy's murder and the accused's role therein, these witnesses gave evidence about the events which had preceded the murder, and the events that took place at the Red Mud Dam site during the burial of the killed prisoners' bodies. In addition, the referenced witnesses are very important in relation to the description of the site where the crime was committed.

75. The defense's grievance, that the Red Mud Dam was not within the responsibility zone of the 6th Battalion of the Zvornik Brigade, is also ill-founded. This is so because the witness SB-4's testimony showed that, at the critical time, this site was indeed within the zone of responsibility of 6th Battalion of the Zvornik Brigade, because the witness went on a loader to Petkovci, where the Command of the 6th Battalion of the Zvornik Brigade was seated, and where he got further instructions to act (to go to the Dam). This undoubtedly proves that the referenced area was within this Battalion's zone of responsibility. Otherwise, had this been a responsibility zone of any other battalion, the witness would not have received any instructions in the described manner.

76. With regard to the issue of inconsistency between the witnesses' statements concerning the external look of the tractor that had arrived at the Red Mud Dam (with or without a cabin), raised by counsel, the Appellate Panel indicates that the referenced issue is completely irrelevant for the proving of decisive facts in this case considering that the two witnesses consistently stated that the tractor indeed came to the referenced site, while

the details concerning its detailed external look are irrelevant to the correctness of the established state of facts. Witnesses SB-4 and SB-1 consistently stated that there was a tractor at the site, which is quite logical, considering that their statement differed only in relation to certain details given the elapsed period of time between the time when the referenced event took place and the time of the referenced witnesses' testimony.

77. As stated above, the Trial Panel evaluated the evidence pursuant to Article 15 of the CPC, in the manner that the court is not bound by the formal legal rules. In its appeal, the defense tried several times to contest the correctness of the evaluation of certain pieces of evidence indicating that the Trial Panel credited the prosecution evidence while, on the other hand, it did not credit the defense's evidence. Contrary to the defense's grievances, however, this Panel indicates that not only that the contested Judgment provided a comprehensive explanation by reference to the prosecution's evidence, but it also both referred to the evidence adduced by the defense and explained the reasons for which it did not credit this evidence. It is noteworthy that all the evidence referred to by the Judgment was tendered at the main trial, and that the Trial Panel evaluated both the evidence given directly by the witnesses and their respective statements given during the investigation. Truly, witness Dušan Nikolić gave two consistent statements, which does not mean, at the same time, that the Court should credit this witness, particularly because this witness tried both to protect himself against incrimination and to point to his personal conflicts with the witness SB-1's son, which is why the Trial Panel did not credit this witness. In addition, it is true that witness M.K. gave inconsistent statements; but, as stated above, this witness did not logically explain the reasons for which his trial testimony was different, even though he was cautioned, while giving his statement at the Prosecutor's Office, about all procedural requirements concerning a lawful statement. In evaluating the evidence, the Court is not bound by the legal rules or instructions. The Court can freely evaluate the evidence, and on the basis of such an evaluation it can render a legal finding as to whether a certain fact is proved, while in the reasoning of the judgment it shall describe the process of evaluation of each piece of evidence individually and in combination with the other evidence, and conclude whether the facts are proved. This was done in the concrete case because, in drawing certain conclusions, the Trial Panel correlated the prosecution's and the defense's evidence. It should be also noted that no comprehensive explanation is required for each piece of evidence, or each argument advanced by the parties individually. Along this line, the defense did not prove that there was any arbitrariness in the evidence evaluation. Specifically, the defense's grievances,

that not all pieces of evidence, particularly the defense's evidence, were evaluated, and that the same evidence was evaluated by a double standard application, are ill-founded.

78. With regard to the defense's complaint that the evidence was not considered pursuant to the principle of *in dubio pro reo*, the Appellate Panel indicates that the Trial Panel properly found the accused guilty, and explained the evidence on which it based the Judgment, from which it ensues that the accused indeed committed the criminal offense at issue. In the concrete case, the Trial Judgment is mostly based on witness SB-1's trial evidence and witness M.K.'s statement (given at the Prosecutor's Office during the investigation), which were consistent with regard to the decisive facts, and confirmed by the other circumstantial evidence. Thus, both witnesses confirmed that, at the referenced site, they had seen a pit containing the bodies of killed prisoners; that they had seen a young boy, who was offered a cigarette and with whom a short conversation was made; that they had seen a person who had first addressed the boy and told him that he could leave, and thereupon went after the boy and started firing in his direction, and ultimately killed him. Therefore, the defense's assertion, that the principle of *in dubio pro reo* should have been applied to the concrete case, is ill-founded because, as it ensues from the Trial Judgment, all the facts to the prejudice of the accused were proved with complete certainty, namely the key witnesses' testimonies are mostly consistent with regard to the decisive facts, and corroborated with the other adduced evidence. It cannot be stated that the Judgment is based on a single piece of evidence, but rather to a deceive extent on the testimony of the two witnesses, who had been directly present at the scene at the time of the critical event.

79. Despite the justified indications in the appeal that there are certain contradictions among witnesses SB-1, SB-4 and M.K., this Panel notes that the nature of the referenced contradictions is not such as to effectuate the rendering of a different decision. This is so considering that witnesses SB-1 and M.K. (the statements given at the Prosecutor's Office BiH) are consistent with regard to the decisive facts, that is, the act of a minor boy's killing. According to this Panel, the fact that there are certain inconsistencies in the witnesses' testimony regarding the time of the crime commission, the number of persons present at the Red Mud Dam site, the rifle carried by the accused, the tractor's external look, the tractor's driver, the clothing worn by the accused and the other persons, the person who brought the brandy, etc., is not crucial for the correctness of the established state of facts because those were just the details differently perceived by different persons, and were not remembered at that particular moment considering that, probably, none of these

witnesses paid any particular attention to these details. The Appellate Panel holds that the witnesses cannot be expected to remember all details pertaining to a certain criminal offense, and to identically describe the referenced event after a long period of time elapsed. It is therefore quite logical that all witnesses cannot remember all details. Accordingly, if the irrelevant discrepancies observed in the witnesses' testimony did not bring into question the existing essence of the event which is being proved, they cannot significantly affect the credibility of evidence. The Court certainly expected that there would be certain inconsistencies in the witnesses' testimony as a result of different objective and subjective circumstances such as: the elapsed period of time, the witness's personality or his individual characteristics, the circumstances surrounding the event, the witnesses' different ability of perception and different capacity to interpret the same event, as well as a quite normal process of minor importance details forgetting. The referenced inconsistencies are less important and irrelevant to be able to more seriously bring into doubt the very existence of the critical event. What is crucially significant in this case is the consistence of the witnesses who had been present at the site and saw the killing of a minor boy, and who described the development of the event as elaborated on above. Exactly such events related to the very act of murder, or the character of the act departing from the common rules of conduct and traumatizing the witnesses, cannot be seen on a daily basis, are being pushed to the back of one's mind, which is why the referenced witnesses were credited. It should be also noted that these witnesses (SB-1 and M.K.) met each other exactly on the day when the referenced murder took place, and have never met again. Therefore, it is not possible that these witnesses discussed this event among them, or created their own constructs to unjustifiably charge anyone. The Appellate Panel also holds that had the witnesses' statements been completely identical, and with no differences, there would have been much more grounds for a doubt. Had the testimonies been completely identical, they would have raised much more doubts if the witnesses indeed agreed on the contents of their testimony to the prejudice of the accused.

80. This Panel indicates that the inconsistencies between the witness M.K.'s statement given during the investigation and his trial testimony were adequately explained. This is so because, before the Prosecutor, the witness stated that he did not want to speak about the murder at SIPA's in order to protect himself against being summoned before the Court as well as due to his own fear that someone would kill him. On the other hand, as indicated above, the witness stated at the main trial that he did not remember his statement given to

the prosecutor, but he neither provided any adequate explanation for that nor justified his assertion that he has health problems, as already explained above in the Judgment.

81. The Appellate Panel considers as ill-founded the defense's allegation that the Law on the Protection of Witnesses was abused in relation to witness M.K., because the Prosecutor had told this witness that he has an option to ask to be examined under protective measures granted pursuant to the Law on the Protection of Witnesses, while the witness himself stated that it suited him even "better". Therefore, the Trial Panel properly found that the witness consented to testify under protective measures granted. Thus, the prosecutor notified the witness of his right to be examined as a protected witness, and the witness consented to it. In addition, counsel unjustifiably indicates that the witness was arrested along with his wife and taken for interrogation. As properly found by the Trial Panel, this witness was indeed brought to the Prosecutor's Office for examination because the witness personally stated that he did not know Sarajevo, and voluntarily consented to be brought there along with his wife, because they both had to give statements. It follows from the foregoing that the witness was neither arrested nor apprehended for interrogation. Also ill-founded is the defense's assertion that the witness was deprived of the right to recant his statement, considering that an official note was made at the Prosecutor's Office about the witness's new arrival, which was both tendered as evidence in this case and evaluated by the Trial Panel. Importantly, the witness came to the Prosecutor's Office only three days after he had given his previous statement in compliance with all legally prescribed requirements for taking a statement. In addition, the witness had an opportunity to provide before the Trial Panel the reasons for which he tried to recant his previous statement, and he ultimately did so, while the Trial Panel accordingly explained the reasons for which it did not credit the witness's main trial testimony.

82. With regard to the appellate complaint that the Trial Panel did not indicate the witnesses who were credited, this Panel notes that the Trial Panel indeed provided a comprehensive explanation of the reasons for which the Court credited or did not credit certain witnesses. Thus, the Trial Panel indicated that it credited the statements of witnesses SB-1 and M.K. (given at the Prosecutor's Office of BiH), because they are consistent with regard to the decisive facts. The Trial Panel also provided the reasons for which it could not credit certain assertions of witness SB-4 considering the witness SB-4's above described difficulties in making observations, as apparent from the facts that he had

felt fear due to which he never left the loader; that flies were all around the place; that he felt a bad smell; and that the job was rather unpleasant.⁵ The Trial Panel also found that the witness had known the accused from before, which is why it found that no decision could be based on this witness's testimony, as also upheld by this Panel. Thus, contrary to the defense's assertions, the Trial Panel explained the reasons for which it accepted the statements of witnesses SB-1 and M.K., and not the statement of witness S-4. The Panel also did not credit witnesses Dušan Nikolić and Radovan Đokić considering that they had included personal motives in their testimony while speaking about witness SB-1 (witness Nikolić spoke about his conflict with witness SB-1's son, while witness Đokić tried to contest the witness's personality/credibility by stating that he was lying all along), as addressed above in the Judgment.

83. With regard to the defense's grievance, that the accused was not a member either the VRS or the MUP but rather a school pupil, and subsequently student at the Military Academy, this Panel reiterates that it is indisputable that, at the critical time, the accused was not a soldier, which anyway is not a requirement for the existence of crime because the perpetrator of the referenced crime can also be a person who is not a soldier. As to the accused's status at the school, the Trial Panel properly assessed the defense's Exhibit O1⁶, which shows that the accused graduated from the secondary school on 20 June 1995 and that at the time of the crime commission he could not have even been a school pupil. The Trial Judgment properly indicated that witness SB-1 had remembered somewhere in his mind that the accused was a Military Academy student because the accused had already started the enrolment procedure at the Military Academy. This is why the witness concluded that the accused had started his studies, even though it did not, in fact, mean that he had realistically started studying.

84. As to the defense's comment that the Judgment is incomprehensible with regard to witness Radovan Đokić, this Panel indicates that the Trial Panel properly found that he had been an employee of the *Birač* Alumina Plant, as corroborated with both the presented evidence and Exhibit T-48. On the other hand, the Panel merely communicated the statement of witness SB-1, who stated that Đukić was a member of the Petkovci Brigade. The Panel gave no significance to this statement considering that the other

⁵ Trial Judgment, page 111, para. 429.

⁶ Verified copy of the Certificate of completed education at the Zvornik Technical Schooling Center for the school year 1994/1995 issued to the name of Srećko Bošković.

evidence shows that Đukić was employed at the *Birač* Plant. For the foregoing reason, this Panel considers as is ill-founded the defense's grievance that the Judgment is incomprehensible, considering that the accused's status was established beyond a doubt, while a mere indication of what the witness had stated in that context does not raise any doubts in the correctness of the Judgment findings.

85. In considering the defense's grievance that the judgment cannot be based only on a protected witness's statement, this Panel notes that, in the concrete case, witness SB-1 is not a protected witness, namely that he is not a witness whose statement was obtained pursuant to the rule of Article 11, or the provisions of Article 14 through Article 22 of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses (although the prosecutor misinterprets the instrument of a protected witness), but rather the witness, who was granted protective measures to testify and whose testimony does not imply an option that a judgment cannot be based exclusively, or to a decisive extent on such a testimony. In addition, the Trial Judgment is not based solely on this witness's testimony, because this testimony is, with regard to the decisive facts, consistent with the witness M.K.'s statement (given during the investigation at the Prosecutor's Office of BiH). Truly, witness SB-1 stated that he had not seen the very act of the young boy's killing, but rather assumes that the accused did it, considering that he saw the accused returning from the direction from which he had heard the shooting, whereupon Jovo Lazić criticized and slapped the accused. However, the witness SB-1's statement is corroborated with the statement of witness M.K.. This witness described a young boy's killing by a younger person (around age 20, whose physical description is identical with the accused's physical appearance), who fired at the boy, despite the fact that the boy had been previously told that he was free to go. Therefore, the defense's grievance, that the contested Judgment is based only on the witness SB-1's testimony, is ill-founded because it is also based on the testimony of witness M.K., also an eye-witness to both the boy's killing and the events developing at that particular moment at the Red Mud Dam site.

3. SENTENCING

(i) General considerations

86. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

87. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

88. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

89. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

90. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

91. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

(ii) Grounds of the appeal filed by the Prosecutor's Office of BiH

92. The Prosecution's appeal indicates that the Court erred in sentencing the accused to imprisonment for a term of 10 years, which is obviously a lenient sentence. In this

context, the prosecution indicates that the accused demonstrated insensitivity while depriving a person of his life, and that he showed no remorse but rather indifference. The prosecution also indicates that the aggravating circumstances were not sufficiently taken into account, while the extenuating circumstances were arbitrarily accepted. Thus, the prosecution moved the Appellate Division Panel to revise the Trial Judgment and impose a lengthier prison sentence.

(iii) Appellate grievances of the accused's defense

93. According to the appeal, the Trial Panel was not mindful of the general purpose of punishment provided for in Article 33 of the CC SFRY. In addition, the Trial Panel disproportionately applied Article 41 of the same Code, which provides for the principles in fixing punishment. The defense indicates that the Trial Panel gave unnecessary importance to the mental traumas experienced by SB-1 and M.K. as the eye-witnesses to the referenced incident. The appeal also indicated that the Trial Panel should have been mindful of the type and length of punishment for the same or similar criminal offenses that were imposed by the Court of BiH and the other courts of both Entities and the Brčko District.

(iv) Conclusions of the Appellate Panel

94. According to the Appellate Panel, counsel's appeal justifiably indicates that, in deciding on sentence, the Panel was not sufficiently mindful of both the purpose of punishment and the general principles in fixing punishment. In this context, the Appellate Panel holds that the Trial Panel did not sufficiently take into account the accused's personal circumstances, namely that he is a father of two minor children and that he has no prior convictions.

95. In addition, the Trial Panel did not, to a sufficient extent, take into account the circumstances pertaining to the perpetrator's personality, that he had already turned age 20 at the time of the crime commission, namely that he was a young adult. Therefore, the Appellate Panel decided to revise the Trial Judgment with regard to the sentencing decision, and impose on the accused a prison sentence for a term of 8 years.

96. The Appellate Panel ultimately notes that, in fashioning a punishment, the Court should take into account that the purpose of punishment is the achievement of a legitimate

objective – the serving of justice as a universal principle. Therefore, in any concrete situation, the Court shall also take into account whether the referenced purpose of punishment will be achieved by the accused's punishment, or the selection of an appropriate type and length of sentence.

97. This Panel holds that the general purpose of punishment will also be achieved by the imposed sentence of 8 years in prison, in the manner that it will deter the accused from perpetrating any criminal offenses in the future, that it will rehabilitate the accused and deter others from perpetrating criminal offenses. In addition, this Panel holds that the imposed punishment adequately reflects the condemnation of the offense by the community.

98. On the other hand, the Appellate Panel holds that the Trial Panel properly evaluated all the aggravating circumstances in relation to the accused, particularly his ruthlessness in the crime commission and a minor's vulnerability, and therefore dismisses the prosecution's appeal as ill-founded.

99. Pursuant to Article 50(1) of the CC SFRY, the time the accused spent in custody in relation to the referenced criminal offense, running from 15 September 2014 to 17 September 2014, shall be credited towards the imposed prison sentence.

100. For the foregoing reasons, pursuant to Article 313 and Article 314 of the CPC BiH, the Appellate Panel Division decided as stated in the Judgment.

Record-taker:

PANEL PRESIDING

Legal advisor-assistant

JUDGE

Nedim Muminović

Meddžida Kreso

LEGAL REMEDY NOTE: No appeal lies from this Judgment.