SUD BOSNE I HERCEGOVINE **СУД БОСНЕ И ХЕРЦЕГОВИНЕ**

Case No. S1 1 K 013789 15 Krž 11

Judgment: Delivered on 3 March 2016
Written copy sent out on 4 May 2016

Panel: Judge Tihomir Lukes, presiding
Judge Senadin Begtašević, reporting judge
Judge Dragomir Vukoje, PhD

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Aleksandar Cvetković

SECOND-INSTANCE JUDGMENT

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

Dubravko Čampara

Counsel for the accused:

Attorneys: Petko Pavlović and Miloš Perić

Number: S1 1 K 013789 15 Krž 11

Sarajevo, 3 March 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as an Appellate Division Panel composed of Judge Tihomir Lukes as the presiding judge, and Judges Senadin Begtašević and Dragomir Vukoje, PhD, as the Panel members, with the participation of legal adviser Bojan Avramović as the record-taker, in the criminal case against the accused Aleksandar Cvetković charged with the criminal offense of Genocide in violation of Article 171(a) and (b) of the Criminal Code of Bosnia and Herzegovina in conjunction with the provision of Article 22 thereof, having deliberated on the appeal by the Prosecutor's Office of BiH dated 16 November 2015 filed against the Judgment of the Court of Bosnia and Herzegovina S1 1 K 013789 13 Kri dated 2 July 2015, having held an open session in the presence of Prosecutor of the Prosecutor's Office of BiH Dubravko Čampara, the accused Aleksandar Cvetković and his counsel Petko Pavlović and Miloš Perić, pursuant to Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina, delivered on 3 March 2016 the following

J U D G M E N T

The appeal by the Prosecutor's Office of BiH dated 16 November 2015, filed against the Judgment of the Court of BiH S1 1 K 0013789 13 Kri dated 2 July 2015, **is dismissed as ill-founded** and the impugned judgment is upheld.

R E A S O N I N G

PROCEDURAL HISTORY

FIRST-INSTANCE JUDGMENT

1. Under the Judgment of the Court of Bosnia and Herzegovina (Court of BiH) S1 1 K 013789 13 Kri dated 2 July 2015, the accused Aleksandar Cvetković was acquitted of the charge of committing the criminal offense of Genocide in violation of Article 171(a) and (b) of the Criminal Code of Bosnia and Herzegovina (CC BiH), in conjunction with Article 29

thereof. Under the cited judgment, pursuant to Article 189(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), the accused was relieved of the duty to reimburse costs of the criminal proceedings, and the costs shall be paid from within the Court's budget appropriations.

2. Pursuant to Article 198(1) of the CPC BiH, the injured parties are instructed to take civil action to pursue their claims any under property law, if any.

APPEAL AND RESPONSE THERETO

3. The Prosecutor's Office of BiH filed a timely appeal against the referenced judgment on the grounds of: essential violation of criminal procedure provisions under Article 297(1)(h) and (k) and Article 297(2) of the CPC BiH and erroneously and incompletely established facts under Article 299(1) of the CPC BiH. The Prosecution petitioned the Appellate Panel to grant the appeal, revoke the impugned judgment on the grounds of Article 315(1) of the CPC BiH and order a trial at which violations of the CPC BiH would be redressed and the evidence that led to the erroneously and incompletely established facts repeated, followed by a finding that the accused Aleksandar Cvetković is guilty of the criminal offense of Genocide in violation of Article 171(a) and (b) of the CC BiH.

4. Attorneys Petko Pavlović and Miloš Perić, counsel for the accused Aleksandar Cvetković, filed separate responses to the appeal by the Prosecutor's Office of BiH, petitioning the Panel of the Appellate Division of the Court of BiH to dismiss the appeal by the Prosecutor's Office of BiH as ill-founded in its entirety and uphold the first-instance Judgment of the Court of BiH S1 1 K 0013789 13 Kri dated 2 July 2015.

5. At the session of the Panel held on 3 March 2016, pursuant to Article 304 of the CPC BiH, Prosecutor and defense counsel maintained, respectively, the written complaints/arguments and their responses to the appeal. The accused joined the submissions of his counsel from the responses to the Prosecutor's appeal.

6. Having reviewed the impugned judgment insofar as it was contested by the appeal, pursuant to Article 306 of the CPC BiH, the Appellate Panel has ruled as stated in the enacting clause above for the following reasons:

GENERAL CONSIDERATIONS

7. 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.

8. 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. The applicant shall, along this line, concretize the appellate grounds for which he/she contests the judgment, specify which part of the judgment, evidence or the procedure is being contested and provide a clear line of arguments explaining the reasons for the complaints advanced.

9. 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 summarily dismissed as ill-founded the unreasoned and unclear appellate complaints, in line with the established case law of appellate chambers/panels[1].

GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC BIH: ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

STANDARDS OF REVIEW

10. A Judgment may, pursuant to Article 296 of the CPC BiH, be contested on the grounds of an essential violation of criminal procedure provisions. Essential violations of the criminal procedure provisions have been defined under Article 297 of the CPC BiH.[2]

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[1] See ICTY: Appeals Chamber judgment in *Krajišnik*, para. 17: Appeals Chamber judgment in *Martić,* para. 15; Appeals Chamber judgment in *Strugar,* para. 17. Several appeals panels of the Court of BiH followed this practice in their decisions (see second-instance judgment in *Trbić*, X-KRŽ-07/386, 21 October 2010).

[2] Article 297. **Essential violations of the criminal procedure provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the judgment who did not participate in the main trial or who was disqualified from trying the case by a final decision, b) if a judge who should have been disqualified participated in the main trial, c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the

11. With respect to the gravity and importance of the procedure violations, the CPC BiH distinguishes between the violations which, if found to exist, create an irrefutable assumption that they have adversely affected the validity of the judgment (absolutely essential violations) and the violations where the Court has discretion to evaluate, on a case-by-case basis, whether a found procedure violation affected or could have affected the rendering of a proper judgment (relatively essential violations).

12. Absolutely essential violations of the CPC BiH are specified in subparagraphs (a) through (k) of paragraph 1 of Article 297 of the CPC BiH.

13. If the Appellate Panel finds any of the substantial violations of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC BiH, revoke the trial judgment, except in the cases provided for in Article 314(1) of the CPC BiH.[3]

14. Unlike absolute violations, relatively essential violations are not specified in the law, but rather exist if the Court, during the main trial or in the rendering of a judgment, did not apply or improperly applied a provision of the Criminal Procedure Code, which affected or could have affected the rendering of a lawful and proper judgment.

15. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper judgment, 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 judgment. 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

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course of the main trial in his own language, d) if the right to defense was violated, e) if the public was unlwafully excluded from the main trial, f) if the Court violated te rules of criminal procedure on the question whether there existed an approval of the competent authority, g) if the Court reached a judgment and did not have subject matter jurisdiction, or if the Court rejected the charges improperly due to a lack of subject matter jurisdiction, h) if, in its judgment, the Court did not entirely resolve the contents of the charge; i) if the judgment is based on evidence that may not be used as the basis for a judgment under the provisons of this Code, j) if the charge has ben exceeded, k) if the enacting clause of a judgment is incomprehensible, internally contradictory or contradicted the grounds of the judgment, or if the judgment had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of criminal procedure provisions if the Court has not applied or has improperly applied some of the provisions of this Code during the main trial or in rendering the judgment, and this affected or could have affected the rendering of a lawful and proper judgment.

[3] Article 314. **Revision of First-Instance Judgment:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a judgment revising the judgment of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the judgment of the first instance and that in view of the

the rendering of a lawful or proper judgment. That is, where the Appellate Panel is satisfied that a lawful and proper judgment was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC BiH was not violated.

Prosecution submits that the Court violated criminal procedure provisions under Article 297(1)(k) of the CPC BiH as well as Article 297(2) in conjunction with Article 14 of the CPC BiH

16. Prosecution argues that the Panel improperly applied the provisions of Articles 14 and 254(2) of the CPC BiH and did not apply the provisions of the Law on the Transfer of Cases despite having an obligation to evaluate the statement given by Aleksandar Cvetković as a suspect in accordance with the Law and the Rules of Procedure and Evidence of the ICTY and not only in terms of the provisions of the CPC BiH on suspect questioning, which resulted in an unlawful and improper judgment. Furthermore, the Trial Panel was not allowed to review the lawfulness of evidence following the completion of the evidentiary procedure in this case but was required to rule on the lawfulness of the statement of the then suspect during the trial; the Panel ruled on the statement in the judgment in a way that prevented the Prosecution from adducing evidence that would eliminate the doubt about the unlawfulness of the evidence, thereby violating the principle of equality of arms under Article 14 of the CPC BiH as well as the Court's duty to ensure that the subject matter is fully examined in terms of Article 254(2) of the CPC BiH. This amounted to another essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH. In the Prosecution's view, the legal basis for acceptance of this statement is Article 3 of the Law on the Transfer of Cases from the ICTY and the Use of Evidence Collected by the ICTY. The foregoing clearly indicates that the Law on the Transfer of Cases is *lex specialis* compared to the CPC BiH. In the case in question, on the subject of the statement of the suspect, the Panel should have performed a detailed analysis of whether the requirements of the ICTY Rules of Procedure and Evidence have been met, allowing the use of the said piece of evidence in this case as lawful on the basis of the Law on the Transfer of Cases. The Panel did not do that, thus failing to examine the subject matter fully and provide reasons concerning decisive facts. An analysis has shown

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state of facts established, a different judgment must be rendered when the law is properly applied, according to the state of facts and in the case of violations as per Article 297(1)(f), (g) and (j) of this Code.

that the statement given by the accused to the ICTY Office of the Prosecutor was obtained lawfully because the procedural requirements under Rules 42, 43 etc. of the ICTY Rules of Procedure and Evidence were not violated, while the Defense failed to offer any proof of unlawful conduct. Consequently, the Panel should have adopted a conclusion that Article 10(1) of the CPC BiH prohibiting extortion of a confession or any other statement was not violated.

17. The Appellate Panel holds that the Prosecution's complaints citing Article 297(1)(k) of the CPC BiH and Article 297(2) in conjunction with Article 10(1) and Article 14 of the CPC BiH are ill-founded.

18. First of all, the Appellate Panel finds that it is beyond dispute that the statement of the then suspect Aleksandar Cvetković dated 18 October 2005 was obtained pursuant to the Rules of Procedure and Evidence of the ICTY ("RoPE"), with the specific provisions of Rules 42 and 43 of the RoPE – governing, respectively, "Rights of Suspects during Investigation" and "Recording Questioning of Suspects" – being properly applied in that regard.

19. However, what was disputable in the case in question is whether the statement-evidence obtained in that matter met the requirements prescribed by the provisions of the Law on the Transfer of Cases from the ICTY and the Use of Evidence Collected by the ICTY in Proceedings before the Courts in BiH ("LOTC").

20. Having examined the provisions of Articles 3, 5 and 6 of the LOTC as the only relevant provisions in ruling on this issue, the Panel observes that the referenced provisions do not stipulate a possibility of using statements of suspects given before the ICTY. To wit, it follows from the cited provisions that only testimony/statements of witnesses and expert witnesses can be used as evidence collected in accordance with the Statute and RoPE, but the Law does not refer to statements of suspects given before the ICTY.

21. Consequently, with regard to the contents of the LOTC on the use of evidence collected by the ICTY as evidence before courts in BiH, the legislator evidently intended to limit the possibility of using evidence collected by the ICTY to include testimony of witnesses and statements of expert witnesses, but the Law did not envisage the use of statements of suspects in proceedings before courts in BiH primarily on account of a

suspect's status and the degree of protection of rights of suspect prescribed in broader terms in the CPC BiH than they are in RoPE.

22. As the LOTC did not envisage the possibility of using statements of suspects given before the ICTY in proceedings before the courts in BiH, there is no purpose in assessing which provisions (those of the CPC BiH or RoPE) need to be taken into account as a basis for assessing the admissibility of the statement given by suspect Aleksandar Cvetković to ICTY's officers.

23. With regard to the argument that the Trial Panel, by ruling on the lawfulness of the said piece of evidence in the judgment, prevented Prosecution from eliminating the doubt about the lawfulness of that piece of evidence although it was required to do so at the moment when the evidence was tendered, the Appellate Panel finds that the Trial Panel's action did not amount to a violation of the principle of equality of arms under Article 14 of the CPC BiH.

24. First of all, the Appellate Panel recalls that the Criminal Procedure Code does not stipulate an obligation of a trial panel to rule on the lawfulness of a particular piece of evidence during the evidentiary procedure. Consequently, the time of adoption of a ruling on the lawfulness of a piece of evidence presented during the evidentiary procedure falls within a trial panel's discretion and the Trial Panel could have ruled on the lawfulness of that piece of evidence at the moment it was tendered, but was not required to do so. Adopting a decision on the lawfulness of a piece of evidence in a judgment does not rule out the possibility of refuting such a decision; it merely imposes a limitation that that decision can be refuted in the appeal against the judgment, which the Prosecution took advantage of in the case in question by making this argument in the appeal against the first-instance judgment.

Prosecution submits that the Court violated criminal procedure provisions under Article 297(1)(h) and (k) of the CPC BiH as well as Article 297(2) in conjunction with Article 14 of the CPC BiH

25. In contrast to the provision of Article 290(7) of the CPC BiH, the Trial Panel failed to specifically and completely state in the reasoning of the judgment which facts from the operative part of the Indictment are found to be proven or unproven and on what grounds, which amounted to an essential violation of the criminal procedure provisions under Article

312(1)(h) and (k) of the CPC BiH. In the Prosecution's view, in order to deliver a judgment acquitting the accused under Article 284(c) of the CPC BiH, the Panel first needed to establish the existence of the criminal offense and all of its essential elements followed by a decision on the criminal responsibility of the accused. However, the Panel failed to do so. Prosecution contests the Panel's view that it is not necessary to deal with “an exact establishment of factual allegations in the Indictment” as a result of lack of evidence that the accused perpetrated specific acts. By taking this position, the Panel in effect acknowledged in the judgment that it did not entirely resolve the contents of the charge and that it did not provide reasons concerning decisive facts. Prosecution argues that the Trial Panel was required to first establish the existence of the criminal offense with which the accused is charged (which implied determination of all the many elements of the offense), whereupon the guilt of the accused would be determined, as the purpose of Article 284(c) of the CPC BiH is that a criminal offense was committed but there is no proof that it was committed by the accused. The existence of the criminal offense under the Indictment is not resolved by the judgment. Finally, Prosecution also pointed to the terminology used in the impugned judgment, citing the qualification from the judgment “an atrocious crime” that is not in line with the criminal legislation.

26. The Appellate Panel finds that the Prosecutor's complaints are ill-founded.

27. Specifically, the reasoning for a judgment acquitting an accused of a charge needs to include an explanation of the reasons referred to in Article 284 of the CPC BiH. The explanation states all the established facts serving as the basis for a decision acquitting an accused of a charge. Therefore, the Trial Panel was not required to reason all the elements of the offense and determine in detail all the factual allegations in the Indictment or to give a legal qualification of the offense in a situation where particular elements of the offense have not been proved, i.e. the specific participation of the accused has not been proved. With regard to what Prosecution characterized as the inappropriate terminology in the impugned judgment along the lines of “an atrocious crime committed in Srebrenica”, this Panel finds that while the said expression is not legal terminology it does not call into question an irrefutable fact that the offense was committed by members of the 10th Sabotage Detachment (to which the accused belonged) at the time and place charged. This also ensues from the fact that the Trial Panel (footnote 209 in the impugned judgment) cited final judgments of the Court of BiH and the ICTY finding beyond doubt that the criminal offense of genocide was committed in Srebrenica.

Prosecution submits that the judgment does not cite reasons concerning decisive facts in the part pertaining to the arrival of the accused and other members of the Detachment at the front of the "Kula" school in Pilica, whereby the Court violated criminal procedure provisions under Article 297(1)(k) of the CPC BiH as well as Article 297(2) in conjunction with Article 14 of the CPC BiH

28. As alleged in the appeal, the Trial Panel made a reference to this fact in two paragraphs of the judgment only (315 and 316); in that context, the Panel failed to assess testimony of witnesses who saw an officer (Vujadin Popović) and the soldiers who arrived in a van, but merely listed the names of those witnesses in the footnote. If the court merely refers to the trial testimony of a witness without citing and assessing the contents of his/her testimony in the reasons adduced for the judgment, the judgment does not contain reasons concerning decisive facts. Had the Panel analyzed the testimony of those witnesses with the testimony of witness C-1, it would have found proved beyond doubt that the accused and other members of the Detachment were outside the school before the captured Bosniacs were loaded onto buses, the fate of the Bosniac would be clear to them considering that Popović was shouting at the members of the 1st Infantry Battalion on that occasion blaming them for not killing the prisoners; this is an important fact attesting to the knowledge and awareness of the accused of the goals and tasks.

29. Having reviewed this argument of Prosecution, the Panel finds that that it is not well-founded, and while the impugned judgment does not expound on the testimony of the listed witnesses but only lists them in the footnote, the judgment's reasoning clearly suggests a conclusion that this decisive fact has not been proved, and this Panel upholds the reasoning provided.

30. First of all, the Panel finds that the testimony of the referenced witnesses was not left unassessed individually and in correspondence with the other evidence, primarily the testimony of witness C1 to which the appeal alluded. Specifically, if one takes into account the fact that the testimony of the witnesses listed in footnote 172 of the impugned judgment have been elaborated in terms of circumstances surrounding the detention of captured men at the school in Pilica and the presence of persons and units in the vicinity of the *Kula* school in Pilica (witness Slavko Perić was shown a transcript from the trial in *Vujadin Popović*), on which occasion none of the witnesses was able to claim with certainty that members of the 10th Sabotage Detachment and officer Vujadin Popović were present on that location, it was not necessary to reiterate the testimony of those witnesses with regard to these circumstances; what was sufficient, and the First-Instance Panel did

that properly, was to refer to the testimony and note that fact. Consequently, the Trial Panel, upon a proper examination of the evidence, found that the presence of members of the 10th Sabotage Detachment in the *Kula* school in Pilica was not proved beyond reasonable doubt. Consequently, the contention that the First-Instance Panel violated the criminal procedure provisions under Article 297(1)(k) of the CPC BiH cannot be accepted.

Prosecution submits that the Court violated criminal procedure provisions under Article 297(2) of the CPC BiH

31. Prosecution pointed out in the appeal that the Trial Panel did not accept as authentic the document tendered as Prosecution Exhibit T-3. It is a wartime document of Milorad Pelemiš, Commander of the 10th Sabotage Detachment, which contains all the operations of the Detachment as well as members of the Detachment who took part in those operations. As alleged in the appeal, Defense objected on the grounds of lawfulness and authenticity although Prosecution obtained this piece of evidence from a defense team in *Franc Kos et al.,* and that piece of evidence was admitted by the Panel in that case. However, the Trial Panel's ruling to sustain Defense's objection on the grounds of document authenticity was included in the judgment, denying Prosecution a possibility to present additional evidence to confirm the authenticity of that document. Namely, this document is relevant to, respectively, proving the participation of the accused in the operations of the Detachment and his knowledge of the character of the attack on Srebrenica; it also contains important facts that corroborate other evidence and it would have led to different factual findings had it been admitted. In addition, Prosecution argued that the Trial Panel does not distinguish between a lawful and authentic piece of evidence.

32. With regard to the objection about the First-Instance Panel's ruling not to admit the referenced piece of evidence as authentic, this Panel finds that the Prosecutor's appeal contains a baseless claim that the wartime document of Milorad Pelemiš, Commander of the 10th Sabotage Detachment, can be used as evidence.

33. Specifically, Article 274(2) of the CPC BiH provides that to prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, unless otherwise stipulated by this Code. Exceptions from this rule – cases in which a copy of a piece of writing can be used as evidence – are laid down in paragraph 3 of Article 274 of the CPC BiH. That statutory provision explicitly provides that notwithstanding paragraph 2 of this article, a certified copy of the original may be used as evidence or the

copy verified as unchanged with respect to the original. In the case of the document that has been tendered in the file, this Panel finds that it is an uncertified copy, i.e. a copy with the contents not verified as unchanged by any other document-evidence except the oral argument by the Prosecutor that the original evidence is tendered in *Franc Kos et al.*; this was the Prosecutor's duty according to the cited provisions, and the Prosecutor failed to fulfill that duty. On this note, one must not overlook the fact that this case does not involve an illiterate party, meaning that this situation is about an omission on the part of Prosecution and not an omission on the part of the Court. Finally, the rules of the new adversarial procedure do not allow the parties to be passive, especially Prosecutor who is doubtless aware of the rights and duties prescribed by Article 35 of the CPC BiH that constitute the basis for his actions.

34. Consequently, as Prosecution failed to offer any arguments to confirm the credibility of the mentioned document although Defense questioned the document's authenticity during the trial, the Trial Panel, according to this Panel, made a proper decision not to accept the said document and use it as evidence in the criminal trial.

35. Lastly, with regard to an alleged omission on the part of the Court to rule on the objection filed on the grounds of authenticity of the document by issuing a procedural decision and not in the judgment, this Panel finds that there is no purpose in reiterating its previous stance and refers the appellant to the reasons adduced in paragraph 24 of this Judgment.

GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC BIH: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

STANDARDS OF REVIEW

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

37. 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 judgment, 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.

38. 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 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 by a Trial Panel.

39. 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 judgment, 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."

Appeal allegations

40. The important facts that, in Prosecution's view, were established erroneously and resulted in the acquittal are as follows: the accused did not learn about the plan to execute the captured Bosniacs until he was at Branjevo; the accused and other members of the Detachment were not outside the *Kula* school in Pilica together with Vujadin Popović; the accused did not take part in the execution of Bosniacs at Branjevo farm. According to the appeal, the judgment does not resolve the issue that the accused was acting on the orders of Major Dragomir Pećanac and Milorad Pelemiš, but merely states that witness C-1 is not a credible witness. However, there is no conclusion as to the nature of the order, who issued the order, or why the accused and others left the base in the first place. In particular, Prosecution questions the manner in which the Panel weighed the statements of witness C-1. Namely, this witness was consistent in his statements beginning from 2004 up until his testimony at the trial and, according to Prosecution, his statements are consistent with the testimony of Dražen Erdemović in terms of decisive facts. The reason why the Panel refused to accept this portion of his testimony is that, as stated, it has not been corroborated by other evidence. Aside from that not being true, the Panel made one more error in assessing this piece of evidence. Prosecution pointed out the view taken by the ICTY Appeals Chamber in *Tadić* (the Chamber) which notes that "it has been the practice of this Tribunal and of the ICTR to accept as evidence the testimony of a single witness on a material fact without need for corroboration." As argued by Prosecution in the

appeal, the CPC does not provide that a witness's testimony must be corroborated. Furthermore, the Constitutional Court of BiH and the ECtHR stressed that a decisive proof can be obtained through the testimony of a witness who concluded a plea agreement, provided that the accused may face him. Rather than giving credence to the testimony of witness C-1 who was consistent in his testimony at trial, the Panel concludes that the respective testimonies of Franc Kos, Vlastimir Golijan and Zoran Goronja are more credible despite the fact that the Panel heard clear evidence that those witnesses changed their statements; Goronja and Golijanin, in addition to attempting to protect Cvetković in every possible way, prepared in advance a defense for Brano Gojković who is on the run. To support its views, Prosecution quoted portions of testimony of key Prosecution witnesses and correlated them with the statements of witnesses Kos, Goronja, Kojić and Golijanin given during the investigation and at the trial conducted against them before the Court of BiH, finding as the only logical conclusion that Cvetković could not have been allowed not to shoot and thus become a witness against the others. Furthermore, there is ample evidence that Cvetković was not in the barn as concluded by the Panel, primarily the statements of Franc Kos (who confirmed that Cvetković was shooting too), Dražen Erdemović, [redacted] Stanko Kojić and the accused who deviated from his defense when he said that he left Branjevo in order to take Popović back to Karakaj. This is very important because the accused, by making this statement, undermines his alibi that he built at the trial by claiming that he was in the barn all day long.

41. In relation to the facts of the attack on Srebrenica and the second arrival of the 10th Sabotage Detachment in Srebrenica on 11 July 1995, Prosecution referred to the investigative statement of witness Kos. In that statement this witness gave a clear description of the departure of the 1st Platoon from Bijeljina to Vlasenica where they picked up Golijan, Gojković, Cvetković, Jokić and Pelemiš. These facts have been confirmed by witness Dragan Todorović in his testimony; this witness testified that they set out to Srebrenica in their vehicles: a minibus, a Golf and a van, while witness C-1 [redacted]. Defense witness Milosav Tomić testified that Željko Vuković drove the Detachment to Srebrenica whereas Vuković, another Defense witness, stated that he and Cico were the drivers. However, witness Kos avoided reiterating all this at the trial, as he attempted to diminish the role of Cvetković. In that respect, Prosecution referred to the testimony of witness C-1 who [redacted]; his testimony gains more credibility when he, answering the Prosecutor's question whether the accused was in the operation on

Srebrenica through a tunnel (the first operation), said [redacted]. The Panel found in the judgment that a minibus, a Golf, a van and a TAM 110 were the vehicles that were used in this operation, and that Cico, Željko Vuković and Zoran Stupar were the drivers. Consequently, it follows that one driver is missing, and that driver was the accused. Finally, as a ground for accepting the discrepancies between the investigative statements and the trial testimony of Kos, the Panel accepted that during the investigation he, in anger, confirmed some of the allegations that were not true, but failed to provide a logical explanation as to why Kos would "pin the blame" on Cvetković given that the latter did not incriminate Kos in any way.

42. With regard to the preparations of the Detachment to depart for Branjevo, Prosecution argues that evidence confirms beyond doubt that Aleksandar Cvetković, Franc Kos, Stanko Kojić, Vlastimir Golijan, Zoran Goronja, Brano Gojković and [redacted] went to Branjevo on 16 July 1995 and that they were the ones who carried out a mass execution of captured Bosniac boys, men and the elderly. The accused did not deny going to Branjevo or driving a van. In this connection, Prosecution referred to the testimony of witnesses Kos and Todorović who testified about an altercation between Pećanac and Zoran Obrenović; on that occasion Pećanac requested from Kos to assemble a group of 8-10 soldiers, which he did, and the accused Cvetković was a member of that group along with the others. These facts were also confirmed by witness [redacted] who stated [redacted]. Pećanac and Popović entered Pelemiš's office on that occasion, whereupon Pećanac told them that all the prisoners from Srebrenica would be executed. With regard to this, Prosecution commented on the part of the trial testimony of witness Kos where he said that the order meant the guarding of prisoners who would be exchanged later on. One must take into account that the first time Kos told this version of the incident was in his own case, and that he had a number of reasons to conceal the facts that they knew what would happen to the captured Bosniacs even before they arrived in Branjevo. On the other hand, it is clear from the testimony of C-1 that he gave a credible account of all the events, including the task of guarding the prisoners at the stadium in Bratunac. His testimony matches the factual finding [redacted], which is ultimately confirmed by the intercepted conversations between Major Golić and Milorad Trbić. The accused Cvetković himself said in his statement given as a suspect that the day prior to leaving for Branjevo Pelemiš told

him to be in the base on the following morning at 07:00 hours. They set out from the base at around 09:00 hours and made a stop at the Zvornik Brigade HQ; Gojković, Cvetković and Kos went in there to receive further instructions. Witnesses Erdemović, Kos and Goronja were consistent on these facts as well. Admittedly, at the trial witness Kos changed the part from his prior statements in which he claimed that Cvetković entered the HQ with Gojković. However, as alleged in the appeal, that is not the only change in the testimony, all with a view to protecting the accused and clearing him of responsibility. When they, they were escorted by two military police officers and an officer, they entered a red Opel Kadett, and Cvetković followed them.

43. With regard to the thesis that the accused and other members had knowledge that the prisoners would be executed, Prosecution referred to witness C-1 who testified unequivocally at the trial [redacted], which is consistent with what happened afterwards, that is [redacted]. Consequently, Pelemiš, as the commander of the unit that was directly subordinated to Ratko Mladić, had reason to know about the task to which he was sending his subordinates who were not ordinary soldiers. This is further supported by the testimony of Dragan Obrenović in *Blagojević* where he said that the order to execute the prisoners came directly from Mladić and that everyone knew that, and that Popović, Beara and Nikolić (Drago) were picking the men for the job. Furthermore, Erdemović was certain in his testimony that Pelemiš must have known about Branjevo because *"no operation or task in our unit was possible without the commander of our unit. He does not believe that Pelemiš would do anything without their (Pećanac's) knowledge*." Prosecution further argued in the appeal that the fact that da witness C-1 was the only one who spoke about the actual task assigned to them does not undermine the credibility of his testimony, considering that all the other perpetrators of the crime had the intention from the start to protect both themselves (Kos, Kojić, Golijan and Goronja in the trial against them) and Pelemiš.

44. In relation to the fact that members of the 10th Sabotage Detachment were outside the school in Pilica before going to Branjevo, Prosecution referred to testimony of several witnesses: Rajko Babić, Dragan Jovanović, Juroš Jurošević, Stevo Stević and Mile Tejić; they confirmed that on the afternoon of 16 July they saw a tall middle-aged officer outside the school with a dozen soldiers in a van. All the witnesses confirmed that on that day 7-10 soldiers unknown to them showed up in a van, wearing black uniforms; this is in full agreement with the testimony of witness C-1 who stated [redacted]

[redacted]. In essence, no one knew where those unknown soldiers came from, but it was clear to everyone that they were different; they later heard that those special forces were involved in the killings on Branjevo. Consequently**,** the testimony of the aforementioned witnesses corroborates the testimony of witness C-1 [redacted], yet the Trial Panel has not taken into account the referenced testimony in the judgment, which results in the judgment not containing reasons concerning decisive facts. Furthermore, Erdemović, Kos and [redacted] testified that [redacted]. The difference is that Erdemović claims that the lieutenant-colonel told that to Brano Gojković, Kos claims that Popović told that to Erdemović, Gojković and C-1, whereas C-1 claims that [redacted]. Prosecution does not exclude the possibility that they were again told on Branjevo what needed to be done, but that does not diminish the truthfulness of the allegation by witness C-1 that [redacted]. Moreover, Prosecution is of the view that the Panel did not take into account the survivor accounts at all; those accounts are completely consistent with the testimony of the accused in *Kos et al.* where the accused themselves described the manner of execution of the prisoners.

45. Consequently, in the Prosecution's view, had the Trial Panel weighed each and every testimony as a whole, it would have arrived at the conclusion that the testimony of Kos, Goronja and Golijan is not credible, as Prosecution showed beyond doubt that Kos, Kojić, Golijan, Goronja, C-1, Erdemović, Gojković and the accused Cvetković were shooting, and that there could not be anyone who would testify about the crimes or anyone who could refuse to carry out the task. The accused's defense rested on the thesis that the accused was with Milivoje Nikolić in a barn the entire time. However, the Trial Panel should not have given credence to that witness (Nikolić) as he proved to be a credibility-lacking witness who completely changed his statement at the trial compared to his prior statements, in particular in relation to his testimony in *Momir Pelemiš et al*. Regarding the testimony of Golijan and Goronja respectively, Prosecution finds that the purpose of their testimony was to help the accused be exonerated, but also Brano Gojković who is still unavailable to the law enforcement agencies of Bosnia and Herzegovina.

Appellate Panel's findings

46. In contrast to the allegations in the appeal by the Prosecutor's Office of BiH, the Appellate Panel finds that in the impugned judgment the First-Instance completely and fully established all the facts relevant to a decision in this criminal matter, in particular with regard to the facts raised in the appeal. The First-Instance Panel fully complied with Article 281(2) of the CPC BiH, conscientiously evaluating every item of evidence and its correspondence with the rest of the evidence and, based on the evaluation, arrived at the conclusion on all the facts relevant to a proper clarification of all moot issues, primarily the existence of awareness of the accused in Dragaševac that the captured Bosniacs were to be executed on Branjevo, the fact of the presence of the accused and other members of the Detachment outside the *Kula* school in Pilica together with Vujadin Popović and, finally, the issue of whether the accused took part in the execution of the Bosniacs at the Branjevo farm.

47. When weighing the evidence, i.e. the testimony of key witness C-1 as the only Prosecution evidence directly incriminating the accused in terms of [redacted], who had previously been placed-detained at the *Nikola Tesla* (*Kula*) school in Pilica, previously visited by members of the Detachment for the purpose of implementation of the said plan, the Trial Panel, in the Appellate Panel's view, properly applied the principle of *in dubio pro reo* on the grounds that it is evident that the testimony of the referenced witness has not been corroborated by any other witness or a piece of documentary evidence, which was of vital importance as this is a witness who has been found guilty of the said acts pursuant to a plea agreement with the Prosecutor's Office of BiH. This Panel too finds that, in relation to the accused, those facts have not been proved excluding any reasonable doubt.

48. In that connection, the Trial Panel first of all gave an assessment of the testimony of witnesses Dragan Todorović, Franc Kos, Vlastimir Golijan, Stanko Kojić and Zoran Goronja as well as the testimony of witness Dražen Erdemović given before the ICTY, correlating them with the testimony of witness C-1 who was the only one who stated [redacted]. An analysis of the said witnesses' testimony clearly shows that none of them confirmed the aforesaid; on the contrary, they all stated that they learned about the plan to execute the prisoners

only after they arrived in Branjevo. Specifically, witness Kos stated clearly that after he picked seven soldiers on Pećanac's order he thought that their task would be to guard the prisoners, whereas witness Vlastimir Golijanin pointed out that during the ride in a van (driving behind a red Opel Kadett) there was no discussion as to the location or the purpose of leaving the base. Witness Dražen Erdemović stated similarly in connection with those circumstances; in his interview to the ICTY Office of the Prosecutor on 24 April 1996 Dražen Erdemović stated "...*We arrived, that is when a lieutenant-colonel took us to a farm located in Pilica. That is when the lieutenant-colonel spoke to Brano and the lieutenant-colonel said that a bus is supposed to arrive in half an hour, and the lieutenant-colonel and two police officers left immediately thereafter. There Brano told us that a bus carrying civilians who had surrendered was supposed to arrive. That is when I learned what our task was and what we were supposed to do. I did not know before that*..."; he maintained those allegations in his testimony given as a witness in *Prosecutor v. Vujadin Popović et al.* before the ICTY on 4 May 2007.

49. Consequently, the Trial Panel properly observed that with the exception of witness C-1, none of the witnesses confirmed the fact, which was the Prosecution's thesis, [redacted]; that fact was of decisive importance to the determination of the knowledge and awareness of the accused of what was going to happen.

50. Admittedly, the allegations of some witnesses confirming that they made one stop upon leaving the base at the Zvornik Brigade HQ may indicate a possibility, i.e. a certain degree of probability that there were some talks at the HQ with regard to the purpose of their departure to Branjevo farm. However, if one takes into consideration the fact that no one confirmed it, those allegations do not satisfy the "beyond reasonable doubt" standard that would question the view of the Trial Panel to apply the principle of *in dubio pro reo*.

51. Consequently, relying solely on the testimony of witness C-1 not corroborated by any other compelling evidence, the Court was not able to reliably find that the accused were familiar with the order to execute the captured Bosniacs from Srebrenica prior to leaving for Branjevo farm, not even in the context of facts concerning the possibility that members of the Detachment were briefed in detail about their "mission" at the Zvornik Brigade HQ, as alleged in the Prosecutor's appeal. Accordingly, the Trial Panel, by

applying the principle of *in dubio pro reo*, properly concluded that that decisive fact has not been proven.

52. Having analyzed the Prosecution's arguments as part of this ground of appeal, referring to allegedly erroneously established facts in connection with members of the Detachment stopping at the “Nikola Tesla” school in Pilica prior to their arrival at the farm in Branjevo, the Appellate Panel finds that they are ill-founded.

53. Namely, in this Panel's view, the explanation in the impugned judgment contains complete and proper factual findings that that fact has not been proved.

54. This Panel is also of the view that the impugned judgment properly states that, during the evidentiary procedure, the Prosecution, with the exception of witness C-1, failed to produce evidence confirming the existence of that fact, considering that none of the witnesses confirmed it.

55. Admittedly, the appeal properly points out that witnesses Rajko Babić, Dragan Jovanović, Juroš Jurošević, Stevo Stević and Mile Tejić confirmed in their respective testimonies that on the day in question (16 July 1995), while guarding and transporting the prisoners from the school in Pilica, they observed the presence of members of other units, among them an officer and a dozen unknown soldiers wearing black uniforms, which on the face of it may suggest that they were members of the 10th Sabotage Detachment. However, the First-Instance Panel was not able to arrive at a reliable conclusion that that was the case. Namely, taking into consideration the fact that a large number of members of the Army of the Republika Srpska took part in the capturing of Srebrenica, it is quite possible that the uniforms similar to the ones used by members of the Detachment belonged to another unit, so the Prosecution’s thesis that those were members of the 10th Sabotage Detachment is therefore reduced solely to the claim by [redacted], and that testimony, as properly concluded by the Trial Panel, has not been corroborated.

56. With regard to proof of the accused's participation in the attack on Srebrenica on 10-12 July 1995, having examined the appeal arguments above, the Panel upholds the reasoning in the first-instance judgment and finds that Prosecution's arguments do not call into question the judgment's finding in that respect.

57. The Appellate Panel, concurring with the Trial Panel, finds that it has been properly established that the said attack was carried out and that, among others, the 10th Sabotage

Detachment took part in that attack (the accused Cvetković was a member of this Detachment). However, what was at issue and needed to be resolved in this case was whether the accused personally took part in that attack, as claimed by witness [redacted] and, in some of his statements, witness Franc Kos as well.

58. The Prosecutor does not see unreliability in the testimony of witness C-1 and the investigative statement of witness Franc Kos given on 9 August 2010 to the Prosecutor's Office of BiH. According to this Panel, the testimony and the statement contain major deficiencies presented in paragraphs 246 through 259 of the impugned judgment. Upon the assessment of the presented evidence, the judgment properly finalizes its analysis with the conclusion on the absence of evidence of participation of the accused in the second attack on Srebrenica, i.e. the beyond reasonable doubt standard has not been satisfied.

59. Specifically, if one correlates the testimony of witnesses Stanko Kojić, Zoran Goronja, Dragan Todorović, Željko Vuković, Srđan Brezo and Nemanja Bobar in relation to the alleged participation of the accused Cvetković in the second attack on Srebrenica with, respectively, what witness C-1 stated at the trial and what witness Franc Kos said during the investigation, that leads to the conclusion that the testimony of witness C-1 is not supported in terms of decisive facts, which is explained clearly in the trial judgment. As a participant in this attack, witness Kos, when testifying at the trial about the accused's participation in the attack, deviated from the allegations made during the investigation in their entirety and, in this Panel's view as well, gave a reasonable explanation as to why he mentioned the accused as a participant in the attack during the investigation. This, coupled with the fact that his trial testimony is consistent in that respect with his statement given on 8 May 2010 to an investigator at the ICTY Office of the Prosecutor, leads to a logical inference that witness Kos, guided by a revenge motive, as he himself said, groundlessly designated the accused as a person who, together with other members of the Detachment, took part in the attack on Srebrenica. This Panel too shares the view that the statement of witness Kos given as a suspect, from which he departed with regard to the involvement of the accused in the attack on Srebrenica and gave a plausible explanation for the departure, could not have been regarded as being corroborative of the testimony of witness C-1, as properly reasoned in the trial judgment.

60. With regard to the Prosecutor's arguments that the Trial Panel determined that four vehicles were used during the attack on Srebrenica, that Cico Vukašinović, Željko Vuković and Zoran Stupar took part in the operation as drivers, and that it was logical that the

accused was the fourth driver, this Panel observes that the Trial Panel did not reach any such conclusion. On the contrary, the Trial Panel found that a number of vehicles were used in the attack, but the exact number could not have been determined in light of the inconsistency between witness accounts and documentary evidence (paragraph 237), and this Panel upholds that view. This in particular because the evidence indubitably suggests that the commission of the crime involved a large number of persons and vehicles, supporting the thesis that the accused need not have been one of the drivers in the case in question. Consequently, this Panel has not seen the requisite compelling evidence that the accused was one of the drivers during the second attack on Srebrenica in addition to the evidence already confirmed.

61. Having examined the complaint in terms of participation of the accused in the execution of the captured Bosniacs on Branjevo farm, the Appellate Panel has arrived at the conclusion that the impugned judgment did not violate a methodological approach in the course of establishment and examination of decisive facts stipulated in Article 14 of the CPC BiH (the *equality of arms* standard), as it examined all the facts with equal attention without overlooking any fact that was relevant to adjudication.

62. The Appellate Panel holds that the Trial Panel is in the best position to weigh the credibility of witnesses, which it did, providing adequate reasons in that regard. Consequently, the Appellate Panel concludes that the Trial Panel properly assessed the statements by Prosecution witnesses, in particular the testimony of witness C-1 and the statements of witness Dražen Erdemović given as a suspect, also including other cases tried before the ICTY on the same circumstances, and that the Trial Panel's finding regarding the unreliability of these witnesses has been reasoned and well-founded.

63. The Appellate Panel, notwithstanding the view taken in the Decision of the Constitutional Court[4] that witnesses who previously concluded plea agreements constitute evidence that has the same value as any other evidence, finds that the Trial Panel was right in taking the view that the cited witness testimony could not constitute evidence that could be given credence without qualification, as alleged in the appeal, and to rely on them to find beyond reasonable doubt that the accused is guilty for his participation in the execution of several hundreds of captured Bosniacs of Srebrenica. Specifically, the Trial Panel, taking into account the fact that those are witnesses who concluded plea

agreements, and the fact that witness Dražen Erdemović was not cross-examined by Defense (refused to testify in this case), properly observed a whole series of deficiencies (paragraphs 357, 361, 362, 363, 365, 381, 382 and 383 of the impugned judgment), inconsistencies as well as lack of corroboration by other reliable evidence, and properly concluded that they are insufficient to find the accused guilty of the acts charged.

64. In addition to the aforesaid, this Panel, the same as the Trial Panel, was unable to find any rational explanation as to why other witnesses (in particular, Kos, Golijanin, Goronja and Kojić) would be interested in protecting the accused and giving false evidence to his benefit, particularly in light of the fact that they have been sentenced for the same incident. On the contrary, it is for that very reason that it is logical that once their trial is finalized they would "open up" and present the whole truth about the events at the Branjevo farm, thus avoiding a situation where they would be labelled as the only guilty parties for this criminal offense. Finally, their trial testimonies are corroborated by the testimony of witness Milivoje Nikolić; Mr. Nikolić was consistent with his prior statement and asserted at the trial that there was a soldier with him in a barn, which is consistent with the Defense's thesis.

65. Therefore, having examined all the circumstances in their totality, this Panel, with the same proper finding in the trial judgment as well, was unable to determine beyond any reasonable doubt that the criminal offense at issue – which undoubtedly occurred – was committed by the accused and, being guided by the CPC BiH principle of *in dubio pro reo* whereby a doubt with respect to the existence of facts composing characteristics of a criminal offense or on which an application of certain provisions of criminal legislation depends shall be decided by the Court with a judgment and in a manner that is the most favorable for accused, this Panel upholds the Trial Panel's view that it has not been proved that the accused Aleksandar Cvetković committed the criminal offense as charged.

66. The Panel notes that the Trial Panel ruled that "the injured parties are instructed to take civil action to pursue their claims any under property law, if any", invoking the provision of Article 198 of the CPC BiH. As the Appellate Panel reviews a judgment only insofar as it is contested by the appeal (Article 306 of the CPC BiH) and as the said part of the impugned judgment was not appealed, the Appellate Panel did not entertain the merits of this view of the Trial Panel. However, the Panel finds that a decision on a petition to

[4] Decision of the Constitutional Court of BiH, M.Š., para 38.

pursue a claim under property law, including an instruction to injured parties to take civil action as one of the ways of adjudication, can be taken only if a claim under property law was filed. If no claim is filed, the Court does not take a decision within the meaning of Article 198 of the CPC BiH. That the Trial Panel's decision is disputable is further underlined by the fact that the Trial Panel indirectly questions the existence of such a claim by using the wording “if any”. The title of the provision of Article 198 of the CPC BiH is “Ruling on the Claims under Property Law”. If the title of this provision is interpreted first of all linguistically and then logically and purposefully – including the opening part providing that “the Court shall render a decision on claims under property law” – one arrives at the conclusion that the Court rules on a claim under property law only if such a claim exists.

67. Based on the foregoing, pursuant to Article 313 of the CPC BiH, the appeal of the Prosecutor's Office of BiH is dismissed as ill-founded and the first-instance judgment is upheld.

Record-taker:

Legal adviser

Bojan Avramović

PRESIDING JUDGE

Tihomir Lukes

LEGAL REMEDY: No appeal is allowed against this judgment.