Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case Number: S1 1 K 003369 16 Krž 36

Delivered on: 7 November 2016
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Before an Appellate Panel composed of: **Judge Mirko Božović, presiding**
Judge Redžib Begić, reporting judge
Judge Tihomir Lukes, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MENSUR MEMIĆ *et al.*

SECOND-INSTANCE JUDGMENT

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

Counsel for the accused Mensur Memić: attorneys Hamdija Veladžić and Safet Medošević
Counsel for the accused Nedžad Hodžić: attorneys Midhat Kočo and Nedžla Šehić
Counsel for the accused Nihad Bojadžić: attorneys Vasvija Vidović and Edina Rešidović

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Sarajevo, 7 November 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting as a Panel of the Appellate Division of Section I for War Crimes composed of Judge Mirko Božović, presiding, and judges Redžib Begić and Tihomir Lukes, as the Panel members, with the participation of legal officer Selena Beba as the record-taker, in the criminal case against the accused Mensur Memić *et al.* for the criminal offenses of War Crimes against Prisoners of War under Article 175(1(a) of the Criminal Code of Bosnia and Herzegovina and War Crimes against Civilians under Article 173(1)(a), (b), (c), (e) and (f), in conjunction with Article 180(1), Article 29 and Article 53(1) thereof, having deliberated on the appeal by counsel Hamdija Veladžić for the accused Mensur Memić, the appeals by counsel Midhat Kočo and Nedžla Šehić for the accused Nedžad Hodžić, and the appeal by counsel Vasvija Vidović and Edina Rešidović for the accused Nihad Bojadžić, filed against the Judgment of the Court of Bosnia and Herzegovina S1 1 K 003369 10 KrI dated 1 September 2015, having held an open session, in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Emir Neradin, the accused Mensur Memić and his counsel Hamdija Veladžić and Safet Medošević, the accused Nedžad Hodžić and his counsel Midhat Kočo and Nedžla Šehić, and the accused Nihad Bojadžić and his counsel Vasvija Vidović and Edina Rešidović, delivered on 7 November 2016 the following:

J U D G M E N T

The respective appeals by the counsel for the accused Mensur Memić, Nedžad Hodžić and Nihad Bojadžić **are dismissed** as unfounded, and the convicting part of the Judgment of the Court of Bosnia and Herzegovina S1 1 K 003369 10 KrI dated 1 September 2015 **is upheld**.

The remaining unrefuted part of the first-instance judgment is otherwise unaffected.

R e a s o n s

1. Under the Judgment of the Court of Bosnia and Herzegovina S1 1 K 003369 10 KrI dated 1 September 2015, the accused Mensur Memić, Nedžad Hodžić and Nihad Bojadžić, by their acts described in the operative part of the convicting part of the impugned judgment, were found guilty as follows: *the accused Mensur Memić*- the criminal offense of War Crimes against Prisoners of War under Article 144 of the Criminal Code of the Socialist Federal Republic of Yugoslavia adopted on the basis of the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY (hereinafter: the CC of SFRY) in conjunction with Article 22 thereof, *the accused Nedžad Hodžić* - the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC of SFRY in conjunction with Article 22 thereof, and *the accused Nihad Bojadžić* - the criminal offenses of War Crimes against Civilians under Article 142 and War Crimes against Prisoners of War under Article 144 of the CC of SFRY. The First-Instance Panel, pursuant to the cited statutory provisions as well as Articles 33, 38 and 41 of the CC of SFRY, imposed the following sentences: *the accused Mensur Memić* - ten (10) years' imprisonment, *the accused Nedžad Hodžić* - twelve (12) years' imprisonment. As for the accused Nihad Bojadžić, the First-Instance Panel imposed on him twelve (12) years' imprisonment for the criminal offense of War Crimes against Civilians under Article 142 of the CC of SFRY and ten (10) years' imprisonment for the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC of SFRY; by applying Article 48 of the CC of SFRY, the First-Instance Panel imposed on him a compounded sentence of imprisonment for a term of fifteen (15) years.

2. Pursuant to Article 50 of the CC of SFRY, the time that the accused spent in pretrial custody awaiting trial was credited towards the imposed sentence of imprisonment, as follows: *the accused Mensur Memić* from 16 September 2009 until 8 February 2013, *the accused Nedžad Hodžić* from 16 September 2009 until 19 January 2010 and from 19 March 2010 until 19 March 2013, *the accused Nihad Bojadžić* from 4 November 2009 until 28 April 2013.

3. Pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: CPC of BiH) in conjunction with Article 186(2) thereof, the accused were ordered to reimburse the costs of criminal proceedings and a scheduled

amount, the amount of which was to be determined by the Court in a separate decision.

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

5. Under the same judgment, pursuant to Article 284(c) of the CPC of BiH, the accused Dževad Salčin, Senad Hakalović and Nedžad Hodžić were acquitted of the charge that by the acts described in the acquitting part of the impugned judgment they committed as follows: Dževad Salčin, the criminal offense of War Crimes against Civilians under Article 173(1)(c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC of BiH) and the criminal offense of War Crimes against Prisoners of War under Article 175(1)(a) of the CC of BiH, in conjunction with Article 180(1), 29 and 53(1) thereof; Senad Hakalović, the criminal offense of War Crimes against Prisoners of War under Article 175(1)(a) of the CC of BiH, in conjunction with Article 180(1) and 29 thereof; and Nedžad Hodžić, the criminal offense of War Crimes against Civilians under Article 173(1)(a) and (c) of the CC of BiH, in conjunction with Article 180(1), 29 and 53(1) thereof.

6. In relation to the acquitting part of the first-instance judgment, the Court decided that the accused, pursuant to Article 189(1) of the CPC of BiH, be relieved of the obligation to reimburse costs of the proceedings, and those costs would be paid from the Court's budget appropriations. Pursuant to Article 198(3) of the CPC of BiH, the injured parties were instructed to take civil action to pursue their claims under property law.

7. By Decision of the Court of BiH dated 17 March 2016, the acquitting part of the impugned judgment in relation to Senad Hakalović and Dževad Salčin became final as at 8 February 2016, considering that the Prosecution did not appeal the first-instance judgment.

8. Counsel for the accused Mensur Memić, Nedžad Hodžić and Nihad Bojadžić appealed the convicting part of the said judgment in a timely fashion.

9. Attorney Hamdija Veladžić, counsel for the accused Mensur Memić, filed the appeal on the grounds of essential violations of the criminal procedure provisions, violation of the Criminal Code, erroneously or incompletely established facts, the decision on the sentence, costs of criminal proceedings and claims under property law. The counsel petitioned that the appeal be granted, the first-instance judgment revoked and a hearing

before an Appellate Panel scheduled; at that hearing, witnesses Ramiz Bećiri, Rasema Handanović, protected witnesses “A”, “B” and “R” would be re-examined. Additionally, witness Orhan Jujić would be examined if he would agree to testify.

10. Attorney Midhat Kočo, counsel for the accused Nedžad Hodžić, filed the appeal on the grounds of essential violations of the criminal procedure provisions and erroneously established facts, petitioning the Panel of the Appellate Division of the Court of BiH to grant the appeal and reverse the first-instance judgment by acquitting the accused of the charge; alternatively, the referenced judgment should be revoked and a hearing before the Appellate Panel ordered. Attorney Nedžla Šehić, co-counsel for the accused, filed the appeal on the grounds of essential violations of criminal procedure provisions, erroneously or incompletely established facts and the decision on the sentence, petitioning the Appellate Panel of the Court of Bosnia and Herzegovina to grant the appeal and issue a decision terminating the proceedings against Nedžad Hodžić on account of his mental incompetence to stand trial.

11. Attorneys Vasvija Vidović and Edina Rešidović, counsel for the accused Nihad Bojadžić, filed the appeal on the grounds of an essential violation of the criminal procedure provisions under Article 297(1)(b), (d), (i), (j) and (k) and Article 297(2) of the CPC of BiH, and erroneously or incompletely established facts under Article 299(1) and (2) of the CPC of BiH, petitioning that the impugned judgment be reversed by acquitting the accused Nihad Bojadžić of the charges; alternatively, the judgment should be revoked and a hearing before the Appellate Panel held.

12. The Prosecutor's Office of BiH submitted a response to the respective appeals by the accused Nedžad Hodžić and Nihad Bojadžić within the time limit prescribed by law, petitioning that the appeals be refused as unfounded and that the first-instance judgment be upheld.

13. Before the Appellate Panel held an open session in this case, after the appeal was lodged, on 26 August 2016 co-counsel for the accused Hodžić filed a submission with enclosed medical documents on the accused’s name, in which she noted that a final decision regarding his status needed to be taken, i.e. termination of the proceedings in relation to this accused. Next, on 28 October 2016 the co-counsel filed a forensic-psychiatric report of the Psychiatric Clinic of the Tuzla UKC /University Hospital/ dated 26 September 2016, from the case file of this Court no. S1 1 K 018439 15 KrI, as well as a

motion for termination of the proceedings in relation to the accused Hodžić.

14. On 2 September 2016 attorneys Vidović and Rešidović, counsel for the accused Bojadžić, filed a petition for disqualification of the presiding judge and members of the Appellate Panel – judges Mirko Božović, Redžib Begić and Tihomir Lukes – from this case, and attorneys Veladžić and Medošević, counsel for the accused Memić, did the same on 5 September 2016.

15. After the cited petitions for disqualification were received, open session hearing of the Appellate Panel scheduled for 7 September 2016 was postponed, in accordance with Article 33 of the CPC of BiH.

16. The Court of BiH, having deliberated on the petitions at a plenary session held on 14 September 2016, issued Decision no. 10-335/16 dismissing as unfounded the petitions by the counsel for the accused Bojadžić and Memić, whereupon this Panel again scheduled an open session hearing to rule on the appeals by the defense counsel against the first-instance judgment on 7 October 2016.

17. On 21 September 2016 the counsel for the accused Nihad Bojadžić petitioned the Panel to postpone the hearing in this case because on that same day and hour they were scheduled to present closing arguments in another case before the Court (Stipe Prlić *et al.*), noting that given the comprehensiveness of the appeal by the Defense for Bojadžić as well as the legal and factual complexity of the case they would need more time to present the appeal. The Panel granted the petition and scheduled an open session hearing on 7 November 2016.

18. Pursuant to Article 304 of the CPC of BiH, a session of the Appellate Panel was held on 7 November 2016 and was attended by: Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Emir Neradin, the accused Mensur Memić and his counsel Hamdija Veladžić and Safet Medošević, the accused Nedžad Hodžić and his counsel Midhat Kočo and Nedžla Šehić, and the accused Nihad Bojadžić and his counsel Vasvija Vidović and Edina Rešidović.

19. At the beginning of the open session the presiding judge noted on record that the Panel received the aforementioned submissions by the counsel for the accused Nedžad Hodžić, explaining that a decision on the submissions would be made within the judgment, meaning following an evaluation of the complaints by the Defense for Hodžić within which

the issues of mental competence of the accused and the necessity of termination of the criminal proceedings against him are raised.

20. Upon the presentation of the appeals by the counsel for the accused Nedžad Hodžić and a break, the presiding judge noted on record that the accused Nedžad Hodžić left the hearing and, on the basis of Article 304(4) of the CPC of BiH, the hearing resumed without the accused's presence.

21. At the hearing, the counsel for the accused Mensur Memić, Nedžad Hodžić and Nihad Bojadžić summarized the reasons for the appeals, maintaining the presented arguments and motions in their entirety. The accused Mensur Memić and Nihad Bojadžić joined the written appeals and the oral submissions presented by their counsel. The accused Bojadžić added that he expressed his deepest condolences to the victims and that he disassociated himself from the crimes as there was no doubt that they were committed on the day in question, but his sentencing would not bring satisfaction to the victims considering that he was not guilty of the charges.

22. The Prosecutor too summarized the responses to the appeals[1] at the hearing, maintaining all the reasons and motions in writing, adding that the appeal by the counsel for the accused Mensur Memić be dismissed as unfounded as well. Thereafter, all the defense teams briefly commented on the Prosecutor's allegations.

23. In accordance with Article 306 of the CPC of BiH, the Appellate Panel reviewed the impugned judgment insofar as it was contested by the appeals, inspected the case file and then ruled as stated in the operative part for the reasons presented below.

A. GROUNDS OF APPEAL: ESSENTIAL VIOLATION OF CRIMINAL PROCEDURE PROVISIONS

1. Standards of Review

24. A judgment may, pursuant to Article 296(a) of the CPC of BiH, be contested on the grounds of an essential violation of the provisions of criminal procedure. Essential

[1] After defense counsel stated that the Prosecution's responses to the appeals were not communicated to them by the first-instance court, they were served with photocopies of the responses at the open session of the Appellate Panel and they were given an opportunity to make oral submissions on the responses.

violations of the criminal procedure provisions are defined under Article 297 of the CPC of BiH.[2]

25. With respect to the gravity and importance of the procedure violations, the CPC of 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 the discretion to evaluate, on a case-by-case basis, whether a found procedure violation affected or could have negatively affected the rendering of a proper judgment (relatively essential violations).

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

27. If an Appellate Panel finds any of the essential violations of the criminal procedure provisions provided for by law, it shall, pursuant to Article 315(1)(a) of the CPC of BiH, revoke the first-instance judgment, except in the cases provided for in Article 314(1) of the CPC of BiH.[3]

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[2] Article 297 **Essential violations of 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 course of the main trial in his language, d) if the right to defense was violated, e) if the public was unlawfully excluded from the main trial, f) if the Court violated the rules of criminal procedure on the question of 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 of a judgment under the provisions of this Code, j) if the charge has been exceeded, k) if the wording of the judgment was 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 the provisions of criminal procedure if the Court has not applied or has improperly applied some 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 the 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 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.

28. Unlike absolutely violations, relatively essential violations are not specified in the law, but rather exist if the Court, during the 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.

29. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful and 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 and 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 the rendering of a lawful and 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 of BiH was not violated.

30. The complaints from all the defense appeals – pertaining to essential violations of criminal procedure provisions – are analyzed below.

(a) Essential violation of criminal procedure provisions - Article 297(1)(b) CPC of BiH

31. Counsel for the accused Mensur Memić and Nihad Bojadžić argued in their appeals that judges Vesna Jesenković and Staniša Gluhajić, who participated in the first-instance proceedings, should have been exempted because they, also as First-Instance Panel judges, participated in and rendered a first-instance conviction in the case against Edin Džeko, a case pertaining to the same factual incident and in which the judges relied on the testimony by the same witnesses and the documentary evidence when ruling on facts in that case; in that way the judges also decided on the acts and responsibility of the accused in this case, i.e. they already formed an opinion on assessment of the presented evidence and the guilt of the accused. Existence of circumstances that raise a reasonable doubt as to the judges' impartiality, in the view of the counsel for the accused Bojadžić, is also supported by case law of the European Court of Human Rights (hereinafter: the ECtHR).

32. The counsel for the accused Bojadžić further argued that their petition for disqualification of the judges was examined and rejected by the Panel referred to in Article 24(7) of the CPC of BiH and not by the Plenum of the Court of BiH as a result of a formal

and restrictive interpretation of Article 29(d) and (f) and Article 32(1) and (4) of the CPC of BiH, which, in their view, amounted to a violation of the right to a fair trial within the meaning of Article 6(1) of the ECHR.

33. Finally, the counsel for the accused Bojadžić argued that the abovementioned led to a relative violation of criminal procedure provisions as a result of a violation of the right to the presumption of innocence under Article 3(1) of the CPC of BiH.

34. The Appellate Panel finds that the complaints are unfounded.

35. First of all, this Panel notes that the criminal case against the accused Edin Džeko was conducted under number S1 1 K 010294 14 Krž and per Indictment of the Prosecutor's Office of Bosnia and Herzegovina number T 20 0 KTRZ 0002954 12 dated 15 June 2012 against only this accused person, and that under the first-instance judgment rendered by the First-Instance Panel (with the participation of judges Vesna Jesenković and Staniša Gluhajić) the accused was found guilty of the criminal offense of War Crimes against Prisoners of War under Article 144 of the adopted CC of SFRY and War Crimes against Civilians under Article 142 of the same Code, committed on 16 April 1993 in the village of Trusina, municipality of Konjic.

36. The counsel for the accused Memić and Bojadžić were correct in noting that the accused are charged with acts perpetrated in the framework of the same events of which the accused Edin Džeko has been found guilty (the accused Mensur Memić is charged with participating in the execution of lined-up…, the accused Nihad Bojadžić is charged with ordering that same act, while the accused Edin Džeko has been found guilty of killing prisoners of war and civilians during the attack on Trusina village), and that *inter alia* the same evidence was presented in the Edin Džeko case, i.e. the same witnesses who were examined in this case were also examined in that case, including witness Rasema Handanović.

37. However, in contrast to the appeal contentions, this Panel finds that the cited facts and circumstances did not constitute such circumstances so as to require, in terms of Article 297(2) of the CPC of BiH, the exemption of judges Vesna Jesenković and Staniša Gluhajić from this case due to their participation in the panel in another case, nor do they in any way justify an objective test of existence of doubt as to the impartiality of First-Instance Panel judges. On that subject, one needs to take into consideration that the issue of impartiality of a judge is determined on the basis of both a subjective test (i.e. the

personal conduct of a judge in a particular case) and an objective test (i.e. the issue whether a judge's conduct offers sufficient guarantees necessary to exclude the existence of a reasonable doubt as to the judge's impartiality). In this Panel's view, the previously cited circumstances do not satisfy those requirements, i.e. they do not show an objectively justified fear to question the fairness of the trial.

38. In that context, one must first of all take into consideration the provision of Article 280(1) of the CPC of BiH, providing that the judgment shall refer only to the accused person and only to the criminal offense specified in the indictment, as well as the provision of Article 281(1) of the same Code, providing that the Court shall reach a judgment solely based on the facts and evidence presented at the main trial. In keeping with the cited statutory provisions, the evaluation of presented evidence and establishment of facts in the procedure of rendering a judgment pertain solely to the accused person and the criminal offense referred to in the indictment in each particular case, which cannot in any way affect the rendering of a judgment in another case. Therefore, the evaluation of the evidence and the factual findings in relation to convicted person Edin Džeko could not have affected or prejudged the factual findings in this criminal case, regardless of the fact that the charge pertains to the same incident and that the same evidence was presented in both cases.

39. With regard to the references by the counsel for the accused Bojadžić to the decisions of the European Court of Human Rights in *Procola v. Luxembourg*, *Ferrantelli and Santagnelo v. Italy* and *Rojas Morales v. Italy*, we refer to the ECtHR's recent case law in *Schwarzenberger v. Germany* (Decision dated 10 September 2006) and *Poppe v. The Netherlands* (Decision dated 24 March 2009) in which the ECtHR, with regard to the decisions cited by defense counsel in support of their claim, took a different view regarding the objective impartiality test in situations when one and the same judge participated in separate trials against co-perpetrators in the criminal offense. We also refer to the Order by the ICTY in *Prosecutor v. Ratko Mladić* dated 15 May 2012 denying Defense motion seeking disqualification of presiding judge Alphons Orie, stating that a judge cannot be disqualified from hearing two or more criminal trials arising out of the same series of events solely on the ground of being exposed to evidence relating to these events in both cases. Consequently, the hearing, reviewing and weighing of evidence in *Krajišnik* and *Galić* related to events relevant in the *Mladić* case should in and of itself not give rise to an unacceptable appearance of bias.

40. Finally, with regard to the complaint lodged by the counsel for the accused

Bojadžić that their previous petition for disqualification during the first-instance proceedings was examined by the Panel referred to in Article 24(7) of the CPC of BiH and not by the Court in plenary session, this Panel notes that the imperative provision of Article 30(2) of the CPC explicitly provides that the petition by the parties or the defense attorney for disqualification of a judge may be filed before the beginning of the main trial, i.e. there are no statutory provisions allowing a subsequent filing of the petition for disqualification under Article 29(f), so in the case in question, pursuant to Article 32(4) of the CPC of BiH[4], the petition for disqualification of the judges dated 16 June 2014 during the first-instance procedure was rightfully rejected by the Panel referred to in Article 24(7) of the CPC of BiH as the only competent body considering the circumstances surrounding the case in question (petition for disqualification under Article 29(f) of the CPC of BiH filed after the beginning of the main trial).

41. Based on the foregoing, the Appellate Panel finds that there has been no absolutely essential violation of provisions under Article 297(b), i.e. that the judges who should have been exempted participated at the trial. For the same reasons, also unfounded are the complaints by the counsel for the accused Bojadžić that the aforementioned also included a relatively essential violation of criminal procedure provisions and a violation of the right to a fair trial.

(b) Essential violation of criminal procedure provisions under Article 297(1)(d) of the CPC of BiH - violation of the right to defense

(i) Violation of the right to defense as raised by counsel for the accused Mensur Memić

42. According to counsel for the accused Memić, the right to defense was violated because the First-Instance Panel granted special protective measures to certain Prosecution witnesses and those witnesses were examined from a separate room with image and voice distortion, i.e. without the possibility of face-to-face communication, despite the opposition by the defense teams. In defense counsel's view, statutory requirements for ordering such measures were not met, considering that none of those

[4] "*If the petition for disqualification referred to in Article 29 subparagraph (f) of this Code was submitted after the beginning of the main trial or if actions were taken contrary to the provision of Article 30 paragraphs 4 and 5 of this Code, the petition shall be rejected in whole or in part. The decision rejecting the petition shall be issued by the Panel. The judge whose disqualification is sought may not participate in the issuance of that decision. No appeal shall be permissible against the decision rejecting the petition.*"

witnesses confirmed existence of a specific threat, i.e. level of threat to witnesses requiring such protection. This precluded the Defense from properly and fully examining such witnesses (protected witnesses “A”, “B” and “R”), thus not being able to exercise the right to defense to the full extent.

43. Furthermore, the defense counsel noted that the accused Memić’s right to defense was also violated by the fact that during the investigation the Prosecution contacted a number of witnesses not proposed for examination, for example Orhan Jujić and Sena Čorbo, whose examination would have been of great importance to the Defense, but, in the counsel’s opinion, the Prosecution’s contact resulted in the witnesses refusing to testify. In contrast, the Defense was not allowed by the First-Instance Panel to contact Prosecution witnesses ahead of their examination in preparation for cross examination.

44. Finally, defense counsel argued that the principle of equality of arms too was violated in the manner described above, which greatly affected the rendering of a lawful and proper judgment, constituting the ground for appeal under Article 297(2) in conjunction with Article 14(1) of the CPC of BiH.

45. The Appellate Panel finds that the complaints are unfounded.

46. First of all, this Panel finds that the First-Instance Panel provided detailed and convincing reasons behind the procedural decisions on the protective measures for Prosecution witnesses, u para. 180-249 of the impugned judgment. Specifically, in relation to witnesses “A”, “B” and “R”, the First-Instance Panel explained that under Decision X-KRN-09/786 dated 6 November 2009 the witnesses were granted protective measures (pseudonym, protection of personal details) as early as the investigative stage, During the trial, those measures were augmented by an additional measure: witnesses “A” and “B” would testify from a separate room utilizing an electronic device for image and voice distortion, while witness “B” would testify from behind a screen. In this Panel’s view, the reasons provided in the impugned judgment, contrary to defense counsel’s appeal arguments, fully justify the ordering of protective measures for those witnesses in accordance with relevant provisions of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses. Besides, this Panel finds that the ordered protective measures did not violate the accused’s defense in any way, because the witnesses testified at trial, only from a separate room or behind a screen, and following the direct examination by the Prosecutor they were cross-examined by the Defense, thereby fully

adhering to the provisions of Article 262 of the CPC of BiH pertaining to examination of witnesses at trial.

47. With regard to the examination of Orhan Jujić and Sena Čorbo as witnesses, this Panel finds that the complaint as drafted above cannot be a subject of review in the context of alleged violation of the right to defense because the Defense for Memić was given an opportunity to summon those persons as Defense witnesses and because relevant provisions of the CPC of BiH specify sanctions for witnesses who failed to answer a witness summons or refuse to testify.

48. Consequently, the Appellate Panel finds that there could not have been a violation of equality of arms that would have negative repercussions on the rendering of a proper and lawful judgment.

(ii) Complaints by the counsel for the accused Nihad Bojadžić regarding repeated violations of the right to defense

49. As argued in the defense counsel's appeal, the First-Instance Panel repeatedly violated the accused Nihad Bojadžić's right to defense, reflected in the following:

a. Concurrent criminal trials against the accused for the same crimes

50. The counsel for the accused Bojadžić maintained that three investigations were conducted against the accused Bojadžić in the same time period and for the same crimes, with the incidents charged covering the same time period (spring-summer of 1993), the same territory (Konjic and Jablanica), and the injured parties of the same (...) ethnicity, and three separate indictments filed at various time periods despite the fact that the Prosecution had knowledge of the events covered by the three indictments for some time. This was also confirmed by the Constitutional Court of BiH in its Decision AP 1381/12 dated 19 July 2012, observing that in the case in question the events in Trusina, “Muzej” building in Jablanica and Donja Jablanica involved the same criminal offenses. As a result, the Court and the Prosecution, as argued in the appeal, were required to conduct a single set of proceedings concerning those events, while a different course of action and conduct of separate sets of proceedings amounted to a gross violation of the accused Bojadžić's right to defense because of the accused's limited capacity to efficiently participate in the preparation of his defense in any of those cases, leading to a violation of Article 6 of the

ECHR.

51. In that context, defense counsel argued that such violations continued even after the impugned judgment was delivered because the judgment was delivered three months upon completion of the trial and was served on the Defense four months after it was delivered, at the time when the Defense was preparing and presenting closing arguments in another case against the accused Bojadžić (S 1 1 K 008494 12 Krl) so the accused could not physically or mentally fully concentrate on both criminal trials and effectively participate in his defense.

52. This Panel finds that the complaints are unfounded.

53. A violation of the right to defense means that rules of procedure were not applied or were applied incorrectly, to the accused's detriment, resulting in a violation of the right to defense; such an assessment requires an analysis of the proceedings in entirety and not in fragments as was done by the defense counsel. Defense counsel's arguments suggest a violation of Article 25(1) of the CPC of BiH, specifying that the Court shall decide, as a rule, to conduct joint proceedings and render a single judgment if one and the same person is charged with multiple criminal offenses, or if multiple persons participated in the commission of the same criminal offense. The cited statutory provision regulating joinder of proceedings in cases of subjective and objective connection is not imperative, because it stipulates that in such cases joint proceedings are conducted “as a rule”; the relevant factors for a decision on joinder include the stage of the proceedings, whether the accused is in pretrial custody and what are the statutory pretrial custody duration periods and some other circumstances (e.g. planned length of trial, conditioned by evidence to be presented in each of those cases), all combined with the obligation to respect the principle of the right to trial without delay provided for in Article 13 of the CPC of BiH. In any event, there are no procedural consequences in case of failure to act according to the cited statutory provision.

54. On the other hand, the Appellate Panel acknowledges that two parallel criminal trials before this Court are not a simple situation for the accused Bojadžić, but it does not find, nor did defense counsel point out any specific examples, that that situation unjustly burdened him and limited his capacity to efficiently participate in either of the two trials. This is particularly so when one takes into consideration that two *ex officio* counsel - attorney Vasvija Vidović as the principal counsel and attorney Edina Rešidović as the co-

counsel – were appointed to the case in this case for the very reason of ensuring and exercising the accused's procedural rights, as one of the reasons justifying the appointment of an additional *ex officio* counsel. Furthermore, in the other case against the accused Bojadžić a procedural decision was issued back in March 2012, stating that in acknowledgment of the accused's right to actively participate in his defense the trial hearings would not be scheduled often (twice a month), which undoubtedly confirms that the accused was able to effectively participate in his defense both these cases.

55. Finally, the right to be given sufficient time to prepare an adequate defense and the right to trial without unnecessary delay are the accused's inalienable rights, and ultimately both of those rights need to be taken into consideration when analyzing whether the right to a fair trial under the ECHR was observed.

b. Failure to disclose documents to the Defense

56. As argued in the appeal by the accused Bojadžić, the Defense repeatedly filed with the Prosecution motions for disclosure of documents. The Prosecution was obliged to comply with those motions in accordance with Article 47(3) and (4) of the CPC of BiH and not to justify itself with the statement “that is not the subject matter of the investigation,” having previously “split” the 16 April 1993 incident in Trusina into seven investigations, and that the Court failed to order the Prosecutor's Office of BiH to disclose to the Defense any and all materials from the requested files. In that context, failure to deliver the order(s) to conduct an investigation as the initial act (and relevant to evaluation of various aspects of legality of proceedings), the documents on hiring Mato Zeko (advisor to the Presidency of BiH) in the investigation, the documents taken over from the Prosecutor's Office of the HNK /Herzegovina-Neretva Canton/, archives..., ... archives and the ICTY, the statements of persons who were or are being investigated in connection with the incident covered by the Indictment (Nusret Avdibegović, Jusuf Hadžajlija, Senad Memić, Mustafa Buturović, Salko Gušić and Sefer Halilović; motions for disclosure of those statements filed with the Prosecutor, and the Prosecutor's response thereto enclosed with the appeal), amounted to a violation of provisions of the CPC of BiH and fundamental rights to defense.

57. Moreover, defense counsel argued that the First-Instance Panel, by its views regarding the (non-)submission of documents to the Defense, unjustifiably shifted the burden of proof to the Defense without even taking into consideration that statements by some witnesses, in the Defense's view, that were extremely important, i.e. exculpatory

(Mustafa Buturović and Jusuf Hadžajlija aka Homeini) were disclosed towards of the end of the trial, at a stage when nothing more could be done. In particular, the Defense was deliberately deceived in terms of the number under which the investigation against the accused was conducted, with the same number assigned to the respective statements by Nusret Avdibegović and Jusuf Hadžajlija, which is in contrast to the Prosecutor's contention at trial that it was “an accidental mistake”. Additionally, prior to the appeal the Defense was not allowed to review the Prosecutor's Office of BiH files in the investigations conducted against Senad Memić, Mustafa Buturović, Jusuf Hadžalija, Hasan Hakalović and other persons regarding the events in Trusina on 16 April 1993.

58. Defense counsel further contended that they did not receive the Wartime Log of Jusuf Hadžajlija, describing events and his everyday activities, or documentation on the communication and correspondence between the Prosecution and Zulfikar Ališpago.

59. In addition, defense counsel argued that, in this case, on a number of occasions, the Prosecution failed to disclose to the Defense prior witness statements, i.e. official notes on conversations of which the Defense was aware, or the documentation related to expert Nehru Ganić who prepared a report in this case. Moreover, the Defense claims it has sought criminal reports against SIPA inspectors Mario Kapetanović and Dženana Omerhodžić and the supporting documents, as well as disclosure of any other information and evidence involving unlawful conduct of the investigation by law enforcement agencies, including the actions of the Prosecutor in this case, but the requested information has not been supplied to the Defense by the date of drafting the appeal.

60. This Panel finds that the complaints are unfounded.

61. The complaints by the Defense for Bojadžić pertaining to alleged non-disclosure of evidence by the Prosecution have already been raised during the trial in the first instance, and they are analyzed in para. 329-331 of the impugned judgment. According to the reasons stated therein, the First-Instance Panel repeatedly ordered the Prosecution to disclose to the defense teams any evidence benefitting the accused in any way, originating from any case, which, according to the Prosecutor's response to the defense counsel's appeal, was done, so all the evidence from this case, regardless of the nature, was made available to the Defense following the confirmation of the indictment, and the Defense exercised that right under Article 47(3) of the CPC of BiH on two occasions and reviewed the whole case file. Consequently, this Panel, concurring with the First-Instance Panel,

finds that there are no circumstances raising a doubt that there might be any evidence in possession of the Prosecution, also including evidence benefitting the accused, that was not made fully available to the Defense.

62. In addition, as for the moment of disclosure of statements given by witness Mustafa Buturović and the suspects Senad Memić, Jusuf Hadžajlija and Hasan Hakalović respectively, the Appellate Panel finds, in contrast to the complaints, that the statements were disclosed to the defense teams at a moment when they could still prepare adequately, i.e. prior to the completion of the evidentiary procedure, which is confirmed by an audio recording of the hearing held on 12 January 2015.

c. Gross violation of accused's rights during his stay in pretrial custody

63. As noted in the appeal, when SIPA members were conducting a search of the prison cell of the accused Bojadžić on 25 March 2010 they failed to inform him that he could call his attorney; instead, they handcuffed him and without any reason conducted the search and inspection, making a list of all the documents in the cell; at that time he only possessed documents pertaining to the investigation that was at that time being conducted against him and that were given to him by his defense team, own notes on preparing the defense and analyses of witness statements. As a result, paragraphs 7, 9 and 10 of Court's Order dated 25 March 2010 and the actions of SIPA officers in the course of carrying out that order violated fundamental Defense rights guaranteed under Article 6(3), Article 7(1) and (3), Article 48, Article 50(1), Article 144(5) and Article 141 of the CPC of BiH, as well as Articles 6 and 8 of the ECHR, and Article 5 of the Rulebook on House Rules in Establishments for the Execution of Criminal Sanctions, Detention, or other Measures (hereinafter: the Rulebook). That, in the opinion of counsel for the accused Bojadžić, resulted in a violation of the right to defense ensuing from a violation of the right to confidentiality of the attorney-client communication, violation of the right to an adequate preparation of defense, violation of the right to remain silent and self-incrimination privileges, and a violation of the right to defense in terms of violation of rights and freedoms of persons taken into custody under Article 141(1) and (2) of the CPC of BiH and Article 5 of the Rulebook.

64. Defense counsel further argued that the cited actions additionally violated the right to the equality of arms, altogether affecting the accused Bojadžić's defense in a way that

the Prosecution contested the accused's defense even before it presented its case.

65. The Appellate Panel finds that the complaints are unfounded.

66. First of all, based on the cited complaints it remains unclear to the Panel just what a violation of the accused's right to defense during the time he spent in pretrial custody (specifically, during the search of his prison cell on 27 March 2010) consists of, so as to create an irrefutable assumption of an adverse effect on the validity of the first-instance judgment. It follows from the appeal and the case file that the search was carried out pursuant to Order of the Court of BiH X-KRN-09/786 dated 25 March 2010, whose legality, not challenged by defense counsel in their appeal, is not questionable. As for the actions of authorized SIPA officers in carrying out the order, they would be relevant to the rendering of a lawful and proper judgment if the evidence relied on in the impugned judgment was found during the search. Defense counsel did not make that claim in the appeal; on the contrary, they pointed out that no incriminating evidence was found in possession of the accused at the time. Besides, a detainee's right to have free and unrestrained communications in accordance with Article 144(5) of the CPC of BiH implies that controlling the communication between a suspect or accused and his/her attorney cannot be replaced by a total ban on communication or restricted communication between them to the point that it endangers rendering professional assistance to detainees in their defense. However, rendering professional assistance to a detainee by an attorney, implying guaranteeing the right to communication between them, must not be abused to obstruct criminal proceedings. That indubitably ensues from Article 48(2) of the CPC of BiH[5], allowing a possibility of supervision of communication between the accused and the attorney. The allegation of a violation of confidentiality of communication between the attorney and the detainee and a related self-incrimination privilege cannot be accepted either, considering that the search order referred to an inspection and list of all the written documents found in the course of the search of the prison cell. Therefore the authorized SIPA officers had a clear task, without the need to know in advance and take the documents covering the communication between the detainee and his counsel. The issue of violation of these rights raised by defense counsel in the appeal, the Panel reiterates, would become pertinent in the event of further use of such items and their repercussions on the rendering of a proper and lawful first-instance judgment.

67. Finally, this Panel finds that there has been no violation of Article 14 of the CPC of BiH, because defense counsel's assertion that the Prosecution could contest the accused's defense based on the confiscated documents has not been substantiated by anything, especially if one takes into account that Defense presents its case after the Prosecution rests its case, rendering such a blanket complaint unfounded.

(c) Essential violation of criminal procedure provisions - Article 297(1)(i) CPC of BiH

68. According to defense counsel, the cited absolutely essential violation of criminal procedure provisions – which, according to the counsel for the accused Bojadžić, was also a relatively essential violation of criminal procedure provisions as a result of a violation of the principle of legality under Article 2 of the CPC of BiH, as well as a violation of the right to defense in terms of Article 297(1)(d) of the CPC of BiH for shifting the burden of proof to the Defense in violation of Article 3 of the CPC of BiH – lies in the fact that Mato Zeko, an employee of the Presidency of BiH, took part in the investigation in this case; consent was given in 2007 for him to join the investigations conducted by the Prosecution into allegations on crimes against humanity and values protected by international law committed in the territory of Konjic and Jablanica municipalities in 1993. In defense counsel's view, this amounted to a violation of the principle of independence and impartiality by the Prosecutor seised of the case, Vesna Budimir, and also affected the legality of the investigation as well as evidence obtained during the investigation, resulting in a violation of the right to a fair trial in terms of Article 6(1) of the ECHR. This in particular when multiple documents – such as Prosecution's letter dated 23 September 2009 addressed to the MUP KS /Sarajevo Canton Ministry of the Interior/, Record of Interview of Suspect Zulfikar Ališpago dated 1 February 2010, and Prosecution's Official Note dated 5 October 2009 - confirm Mato Zeko's participation in the investigation in this case. Finally, as the Defense never received from the Prosecution all the documents relating to Mato Zeko's participation, defense counsel argued that because of that they are unable to specify particular pieces of evidence whose legality was influenced by Mato Zeko's participation in the investigation.

69. The Appellate Panel finds that the complaint is unfounded.

[5] "During the conversation, the suspect or accused may be observed, but his conversation may not be heard."

70. There is an essential violation of criminal procedure provisions under Article 297(1)(i) of the CPC of BiH if the judgment is based on evidence that may not be used as the basis of a judgment under the provisions of this Code. The evidence on which a judgment cannot be based is first and foremost defined in Article 10 of the CPC of BiH, which regulates legality of evidence. Paragraphs 2 and 3 of this Article specify that the Court may not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and treaties ratified by Bosnia and Herzegovina, on evidence obtained through essential violation of this Code (unlawful evidence) or on evidence derived from unlawful evidence (the so-called fruits of the poisonous tree). In addition, other provisions of the CPC of BiH also explicitly provide that a court decision cannot be based on certain evidence[6].

71. Having analyzed the cited complaints, this Panel first of all notes that the counsel for the accused Bojadžić failed to indicate in their appeal the exact provisions of the CPC of BiH based on which the method of obtaining evidence in this case, with the participation of the aforementioned individual, would render such evidence unlawful, i.e. evidence on which the impugned judgment could not be based. Furthermore, they failed to specify the evidence obtained with the participation of the aforementioned individual, other than stating in the appeal that the evidence was related to identification of the suspect Senad Hakalović[7], the deprivation of liberty of the then suspect Zulfikar Ališpago[8], but the impugned judgment is not based on those pieces of evidence.

72. Besides, this Panel notes that raising the issue of participation of the aforementioned individual in the investigation can in no way call into question the guarantee of an independent and impartial trial, as erroneously concluded by the counsel for the accused Bojadžić, bearing in mind the position of the prosecutor in a criminal trial defined by law, i.e. the prosecutor, same as the accused, is a party to proceedings, as explicitly provided for in Article 20(f) of the CPC of BiH, whereas the guarantees of independence and impartiality are ensured by a court of law. The same applies to the exercise of the principle of legality laid down in Article 2 of the CPC of BiH, under which the Court imposes criminal sanctions in legally prescribed proceedings under the

[6] E.g. Article 78(6) of the CPC of BiH, Article 83(4) of the CPC of BiH, Article 98(1) of the CPC of BiH, Article 121 of the CPC of BiH etc.
[7] Exhibit O-V-323.
[8] Exhibit O-V-323.

conditions provided by the CC of BiH and other laws of the State of BiH that prescribe criminal offenses.

73. Defense counsel further made an unjustified complaint that in connection with this issue the First-Instance Panel, according to the reasons given in para. 333 of the impugned judgment, erred in shifting the burden of proof onto the Defense, in view of the fact that they were required to explain the contention on unlawful evidence (also raised at the trial in the first instance) by denoting such evidence, and also provide an explanation as why such evidence was unlawful, which, as noted above, has not been done by the counsel in their appeal.

74. For the reasons above, this Panel finds that this complaint alleging an essential violation of criminal procedure provisions is unfounded.

(d) Essential violation of criminal procedure provisions – Article 297(1)(j) of the CPC of BiH - the Court exceeded the charge in the judgment

75. In defense counsel's view, the First-Instance Panel is also responsible for an essential violation of criminal procedure provisions under Article 297(1)(j) of the CPC of BiH by exceeding the charge, in a way that it omitted the designation “civilian” in front of the wording “population of the village of Trusina” from the introductory part of the operative part of the convicting part of the impugned judgment, thus characterizing the population of Trusina village differently as compared to the characterization in the Indictment, especially because the capacity of the injured parties is an important element of the criminal offenses of war crimes.

76. The Appellate Panel finds that the complaint is unfounded.

77. Defense counsel are right to insist in the appeal that there must be a correspondence between a charge and a judgment. The identity between a charge and a judgment is examined against the factual basis on one hand and the legal basis on the other. Consequently, in the indictment Prosecutor characterizes a criminal incident factually and legally. In terms of facts, the indictment first of all identifies the person being charged and against whom the trial is scheduled and held (subjective correspondence). With regard to the underlying charge that is relevant to the objective correspondence between the charge and the indictment, in the indictment Prosecutor provides a factual account as well as a legal qualification of the criminal offense with which the accused

is charged. However, one should also take into consideration the provision of Article 280(2) of the CPC of BiH, stipulating that the Court is not bound to accept Prosecutor's proposals regarding the legal evaluation of the act.

78. Having reviewed the cited complaints, this Panel, in contrast to appeal arguments, finds that the mentioned intervention in the introductory part of the operative part of the convicting part of the impugned judgment did not in any way violate the correspondence between the charges and the judgment, considering that the capacity of injured parties is referred to in the factual description of individual charges for each accused in identical terms in the indictment and the impugned judgment, as properly noted by the First-Instance Panel u para. 951 of the impugned judgment.

79. Taking into consideration that the First-Instance Panel acted exactly as described, specifying the capacity of injured parties in the factual description of individual charges and avoiding unnecessary burdening of the introductory part of the operative part of the convicting part of the impugned judgment, this Panel finds that the omission of the designation “civilian” in front of the wording “population of the village of Trusina” did not amount to an essential violation of criminal procedure provisions by way of exceeding the charge as argued in the appeal by the counsel for the accused Bojadžić.

(e) Essential violation of criminal procedure provisions – Article 297(1)(k) CPC of BiH

80. Counsel for the accused Mensur Memić argued that the impugned judgment does not cite reasons as to why the statements by the accused Nihad Bojadžić (who testified in favor of the accused), witnesses Berdihan Mešić, Nedžada Lepara and Munevera Mujala were not assessed at all; in particular, no reason was given as to why statements by Prosecution witnesses who confirmed the fact that the accused Memić did not participate in the attack in the area of Trusina village on 16 April 1993 (and could not have therefore perpetrated the act of execution of which he has been found guilty) were not assessed, which is all in violation of the requirement laid down in Article 290(7) of the CPC of BiH on the assessment of the credibility of contradictory evidence, on which the decision on the criminal responsibility in relation to exculpatory evidence is based. In defense counsel’s view, the aforementioned, in addition to the absolutely essential violation of criminal procedure provisions, also involves a relatively essential violation of criminal procedure provisions on the grounds of failure to act according to Articles 14 and 15 of the CPC BiH.

81. Counsel for the accused Nihad Bojadžić maintained in the appeal that the First-Instance Panel committed the cited essential violation of criminal procedure provisions because the operative part of the impugned judgment is incomprehensible in the part pertaining to the Court's allegation that the accused Bojadžić "in his capacity of Deputy Commander... during a previously planned and prepared attack on the population of village of Trusina of Croatian ethnicity on 16 April 1993, ordered his subordinate members...", on the grounds that the description does not show the act, written or verbal, based on which the accused Bojadžić was allegedly given the authority and delegation of a command role, since the accused, as the deputy commander, did not have that command authority. Furthermore, the description does not specify elements suggesting the attack was previously planned and prepared, there are no details on the type of order (verbal or written) and to whom it was communicated, and how and what unit parts were subordinated to him, describing the required effective control of the accused. Moreover, as alleged in defense counsel's appeal, the judgment does not cite reasons concerning several decisive facts, to wit: 1) the investigation was conducted unlawfully as a result of an unlawful keeping of witness interview records and/or suspect questioning records; 2) a violation of the accused's Bojadžić right to a defense as a result of conduct of several concurrent criminal trials for the same criminal offenses against the accused Bojadžić; 3) a violation of the right to a defense and equality of arms owing to the fact that the Prosecution failed to disclose to the Defense a single procedural order or any of the materials sought by the Defense from the Prosecutor's Office of BiH in the motions filed; 4) a violation of the right to a defense and equality of arms owing to the fact that the Prosecution failed to disclose to the Defense a wartime log – a diary of Jusuf Hadžajlija recording events and his everyday activities, which had been confiscated by the Prosecutor's Office of BiH, although it is clear that that piece of evidence would clarify facts concerning the events in Trusina village on 16 April 1993 in light of the position and role of Jusuf Hadžalija in those events; 5) a violation of the right to a defense and equality of arms owing to the fact that the Prosecution, disregarding Court's order, failed to disclose statements of persons taken before or during the investigation by Zulfikar Ališpago as well as an analysis of documents that Zulfikar Ališpago gave to the Prosecutor's Office of BiH; 6) failure to disclose documents that SIPA submitted to the Prosecutor's Office in connection with the activities of Mario Kapetanović and the allegations that the said person took a bribe from Zulfikar Ališpago; 7) a violation of the accused Bojadžić's right to a defense while in pretrial custody as a result of a prison cell search and confiscation of documents solely used for the preparation of his defense; 8) what was the basis for the

finding in the introductory part of the operative part that the attack was previously planned and prepared, who gave the attack order or who was supposed to carry out the order; 9) who were the persons who were allegedly subordinated to the accused Bojadžić, was there a *de facto* and *de iure* relationship of subordination between the accused Bojadžić and other persons, and was the accused in the position to give any order to them; 10) why the Defense evidence regarding the position of the accused Bojadžić in the chain of command within the unit was not assessed…" on 16 April 1993, nor was any explanation of this important fact given; 11) the role of the unit commander…, Zulfikar Ališpago in the events in Trusina on 16 April 1993, although the evidence shows that he was the commanding officer and had the authority to give orders, but did not delegate that authority to the accused Bojadžić; 12) how did the accused Bojadžić travel from Bradina to Parsovići; 13) not giving credibility to the testimony by Defense witness Nusret Avdibegović, with an inadequate explanation in that regard; 14) how did the accused Bojadžić travel from Parsovići to Gostovići and from Gostovići to an elevation overlooking Trusina considering that there is no evidence in that regard except a rather contradictory testimony by witness "A"; 15) lack of evidence on the perpetrators of murders of eight persons… ethnicity, by members of…; 16) failure to take into consideration the respective testimony by witnesses R, M, D and C confirming that the accused did not say that everyone in the village should be killed; 17) the view of the First-Instance Panel expressed in para. 373 on the subject of evaluation of evidence (ir)relevant to establishment of facts, which, in addition to the violation mentioned, also resulted in a violation of Article 297 paragraph 2 in conjunction with Article 281 paragraph 2 of the CPC of BiH considering that numerous pieces of evidence that directly corroborate Defense allegations were not taken into consideration; in that process the Panel failed to provide reasons for not taking that evidence into consideration and why the evidence was legally irrelevant; 18) what type of Motorola was used during the operation on Trusina village; 19) what was the reason for not taking into consideration the authentic documents issued by appropriate authorities confirming the military status of the injured parties, incorrectly found by the Court to be civilians: specifically, Tomo Drljo, Andrija Drljo, Ivan Drljo, Smiljka Krešo, Velimir Krešo, Ivan Krešo, Stipe Mandić and Milenko Mandić.

82. In this Panel's view, all the aforementioned complaints, filed by the counsel for the accused Memić and the counsel for the accused Bojadžić, are unfounded.

83. In contrast to the complaints by the counsel for the accused Bojadžić that the

operative part of the first-instance judgment is incomprehensible, the Appellate Panel finds that the factual account in the operative part of the impugned judgment is clear and specific in its entirety, and contains all the decisive facts and circumstances constituting essential elements of the criminal offenses of which the accused was found guilty. In making this finding, this Panel first of all takes into account that the accused Bojadžić was charged with acts he has been found guilty of under the impugned judgment perpetrated on the basis of individual responsibility, and not command responsibility as incorrectly assumed by defense counsel. Namely, the accused was charged under the indictment, and found guilty under the judgment, with ordering the commission of prohibited acts, which, under Articles 142 and 144 of the CC of SFRY, is punishable equally as commission of those acts. Consequently, it was not necessary to establish circumstances falling within the domain of command responsibility as insisted on by defense counsel in the appeal that there lied deficiencies in the factual account of the operative part and the reasons for the impugned judgment.

84. In contrast to the appeal arguments by the counsel for the accused Mensur Memić, this Panel finds that in the impugned judgment the First-Instance Panel cited reasons on all decisive facts contained in the factual account of the operative part of the impugned judgment; in that respect one should be mindful of the fact that decisive facts in criminal proceedings are facts on which a decision on the existence of a criminal offense and the guilt of the accused depends. When giving reasons in connection with the establishment of decisive facts, the Court, in accordance with Article 290(7) of the CPC of BiH, must specifically and completely state in the judgment's reasons which decisive facts are found to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence. Having analyzed related arguments by the counsel for the accused Memić, this Panel finds that the First-Instance Panel has fully met its obligation by giving reasons in support of establishment of all decisive facts in relation to the accused in paras. 459 through 534 of the section of the judgment entitled “Court’s findings regarding the accused Mensur Memić”, analyzing and assessing all the relevant evidence by the Prosecution and Defense alike. This also relates to the assessment of evidence used by the Defense to prove the accused's alibi, raised as a separate issue in the counsel's appeal. In this context, para. 482 and 483 of the reasons adduced for the impugned judgment also include an assessment of the respective testimony by Defense witnesses Nedžada Lepara and Munevera Mujala and the testimony by the accused Nihad Bojadžić as a witness, while the testimony by witness Berdihan Mešić is analyzed in para. 517. The

contention by defense counsel's appeal that an assessment of contradictory evidence is missing from the impugned judgment is therefore unfounded.

85. As noted above, when criticizing the judgment regarding the absence of reasons concerning decisive facts, the counsel for the accused Nihad Bojadžić first of all misjudges some of the facts as being decisive (the issue of command responsibility). As for a majority of other facts, they failed to explain why those facts are considered to be decisive, to be decided on the merits by this Panel. In contrast to such blanket complaints by defense counsel, this Panel finds that in the reasons for the impugned judgment, in the section entitled “Court’s findings regarding the accused Nihad Bojadžić”, the First-Instance Panel provided reasons concerning all decisive facts in relation to this accused as well.

86. Besides, the very manner in which defense counsel for the accused Bojadžić drafted the said complaint – i.e. the way how counsel for the accused Memić argued that not all the pieces of evidence were assessed with equal attention and that erroneous reasons were provided in that regard – suggests that the judgment is being contested on another ground – erroneously or incompletely established facts. This is supported by the fact that defense counsel link the accused Bojadžić to the arguments contesting the established facts raised in this part of the appeal in the same way as the counsel for the accused Memić who, when elaborating on the arguments on this ground, contests the First-Instance Panel's findings regarding the guilt of his client for the given charges. Consequently, this Panel will examine the validity of the arguments as part of the appeal ground of erroneously or incompletely established facts where the arguments are specified to a considerable degree, but for the time being, in the context of an alleged essential violation of criminal procedure provisions, the arguments are unfounded.

(f) Essential violation of criminal procedure provisions – Article 297(2) of the CPC of BiH

(i) Incompetence of the accused Nedžad Hodžić to stand trial as argued by his defense counsel in the appeals

87. In substance, the counsel for the accused Nedžad Hodžić argued that the accused was not competent to stand trial and that because of that he was unable to take part in the judicial proceedings. According to defense counsel, this amounted to an essential violation of criminal procedure provisions that they did not specify, but in the appeals they did refer to a violation of Article 388(1) of the CPC of BiH and submit that it affected the rendering of

a lawful and proper judgment in relation to the accused; if the complaint was valid there would be an essential violation of criminal procedure provisions made under Article 297(2) of the CPC of BiH.

88. It is emphasized in the appeals filed by both counsel for the accused Nedžad Hodžić that in the first psychiatric evaluation of the then suspect performed on 14 January 2009 on the order by the Prosecutor's Office of BiH expert Prof. Abdulah Kučukalić concluded that the examinee was not competent to take part in the judicial proceedings, to follow the trial and provide adequate answers to the questions put to him, i.e. the first evaluation showed that the accused was not fit to stand trial. However, that was ignored and, then, in violation of Article 388(1) of the CPC of BiH, at the insistence of the Prosecutor's Office of BiH, the criminal trial against the accused resumed; as for the initial report on evaluation of the suspect, defense counsel argued that efforts were made to rebut the report with unnecessary expert evaluations referred to in the reasons for the impugned judgment on pages 60-70. All that also resulted in the unlawful detention of the accused in pretrial custody as well as deprivation of his fundamental human rights, particularly the right to medical treatment, which was manifested in that the accused, both during the trial and in the Detention Unit, experienced…, and the time he spent in pretrial custody has had a considerable adverse effect on his health.

89. Moreover, the counsel contended that trial hearings were held without the presence of the accused Hodžić, and that the Court never informed the accused about trial hearings conducted in the accused's absence as required by law; rather, trial hearings, 74 of them, whenever the accused left a lengthy hearing, would resume with a standard note on record that the accused Hodžić left the courtroom and that the trial would continue without his presence.

90. In support of his claim of the accused's incompetence to stand trial, attorney Kočo, the accused's counsel, also maintained that a trial in another case conducted by this Court under number S 1 1 K 000878 13 KrI against the accused Hodžić has been suspended.

91. Attorney Nedžla Hodžić, co-counsel for the accused Hodžić, enclosed with her appeal a report on the forensic-psychiatric evaluation of the accused from the criminal case of this Court number S1 1 K 018439 15 KrI dated 5 October 2015; the report confirmed that the accused Hodžić, due to a serious injury..., with visible changes on…, suffering from… and a series of other… disorders. The counsel further argued in the

appeal that the previous expert reports accepted by the First-Instance Panel were composed while the accused was in pretrial custody, without any new X-rays, tests, examinations and participation… as the only one authorized to perform… , solely on the basis of an interview with completely… the accused, that it was allegedly "a team" examination with all the team members having the same medical specialization, yet an internist who was not competent for this type of evaluation took part in one of the evaluations, as well as expert evaluations that are not based on specific indicators, X-rays… showing damage, …, his everyday therapy that he takes, but on the fact that the accused "got a driver's license" and that he "was malingering" an illness. For all those reasons, this defense counsel was of the opinion that none of the evaluations were conducted in accordance with Article 110(3) of the CPC of BiH.

92. Regarding the contention about the accused's mental incompetence at all stages of the trial, from the trial commencement until the delivery of the judgment, defense counsel challenged the lawfulness of all procedural decisions imposing prohibiting measures on the accused, especially the decisions on pretrial custody based on which the accused Hodžić spent three years in pretrial custody.

93. The Appellate Panel finds that the complaints are unfounded.

94. Before giving an assessment of the cited arguments, this Panel notes that detailed and extensive reasons on the issue of mental competence of the accused Nedžad Hodžić are provided in para. 294-322 of the impugned judgment. The reasons also contain relevant portions of all the evaluations of mental competence of the accused Hodžić, starting from the initial evaluation dated 14 January 2009 by Prof. Abdulah Kučukalić (stressed in the appeals) until the team evaluation conducted on 30 January 2014 at the Banja Luka KCU /University Hospital/ and the examination of expert Nera Zivlak-Radulović, MD. Having analyzed all those reports in detail, the First-Instance Panel decided which reports it accepted, and provided detailed and compelling reasons for its finding, and this Panel accepts those reasons as correct in their entirety. When all the expert evaluations, performed in various time periods by various experts in this field (individually and as a team) are analyzed, they clearly lead to the conclusion that all the experts – with the exception of Prof. Kučukalić who gave an opinion in his initial report on the mental competence of the accused Hodžić dated 14 January 2009 that the accused was unable to stand trial and has maintained that assertion to the end – beyond a doubt pointed to an exceptional malingering on the part of the accused, often on the verge of

being caricature-like, with the accused naively pretending to be a person with…; such behavior is not typical of any… (Exhibit S-5), and the experts observed that such type of malingering requires a person being aware of the seriousness and danger of the situation, which requires preserved… (Exhibit S-7). Furthermore, the reasons for the impugned judgment point to the inconsistency between Prof. Kučukalić's opinion and explanation, his opposite view as compared to all the other experts who took part in the evaluations and, in particular, the fact that he is the only expert that did not point to the accused's malingering behavior as was the case with all the other experts. Consequently, this Panel finds that expert Kučukalić based his opinion on the accused's malingering behavior and, having taken a stance on that issue, he did not depart substantially from the original position in his subsequent reports, regardless of the arguments adduced by the other experts. In connection with this conclusion, this Panel, concurring with the First-Instance Panel, underlines that in his report in the Court case number S1 1 K 008978 13 KrI (O-IV-1) this expert departed from the given finding and opinion in the sense that he no longer found that the accused was suffering from a permanent disorder, i.e. a permanent… organic in nature, with no expectation of improvement of the existing state[9], but only… that results in mental incompetence.

95. For the purpose of a proper analysis of the issue of procedural incompetence of the accused and the related expert evaluations in this case, it is necessary to refer to Article 388(1) of the CPC of BiH insisted on by the Defense for the accused Hodžić. This provision clearly provides that the Court will adjourn proceedings only if the accused becomes affected by… after the commission of a criminal offense, which is of such a character that the accused is unable to take part in the proceedings. Therefore, this legal stipulation requires that there must be a…, and not… referred to in some of the expert reports (Court Exhibits S-2 and S-3), considering that no other expert except Kučukalić found that the accused Hodžić has… as the prerequisite for further consideration whether that illness caused mental incompetence of the accused and whether the procedure needs to be adjourned.

96. The complaints made by the counsel for the accused Hodžić disregard the analysis of all the expert evaluations, assessment of the evaluations in their entirety and

[9] Report by a team of experts dated 25 December 2009; the experts could not make a joint finding on the mental competence of the accused Hodžić, which is when Prof. Kučukalić gave a separate opinion (S-2).

comparison of all the arguments, as the First-Instance Panel properly did and provided reasons in that regard; rather, defense counsel focused only on the findings and opinions that benefitted the Defense, minimizing the relevance of arguments on which the First-Instance Panel relied in ruling on the accused's mental competence.

97. Moreover, with regard to a piece of evidence presented along with the appeal by the counsel for the accused Hodžić, this Panel finds that the forensic-psychiatric expert evaluation by the Psychiatric Clinic of the Tuzla UKC /University Hospital/ dated 5 October 2015 was performed pursuant to a Court's order in Case no S1 1 K 018439 15 KrI; it is therefore not possible to examine this piece of evidence from the procedural point of view as it has not been presented in the present case. According to Article 281 of the CPC of BiH, the Court shall reach a judgment solely based on the facts and evidence presented at the main trial, and a decision on the procedural competence of the accused Hodžić can accordingly be based solely on the evidence discussed at the trial in this case.

98. Furthermore, by stressing the importance of an evaluation by a team of experts in another case, the Defense for Hodžić is overlooking the fact that even this evaluation left room for possible improvement of his state of health, with a conclusion that it was a current state and that the accused was temporarily incompetent to take part in the proceedings. Consequently, the accused's competence to take part in another criminal trial conducted before this Court is not called into question as a result of his…, but…, and for those reasons it was not possible to apply Article 388 of the CPC of BiH[10]; this Panel has already addressed the issue of a proper interpretation and application of the provision.

99. In addition, with respect to the evaluations conducted in this case, the Appellate Panel, in contrast to appeal arguments, finds that they have been composed in accordance with the rules of profession and as required by relevant provisions of the CPC. The fact that the Defense could not make motions regarding the scope of evaluations and the persons to conduct evaluations, has no bearing on the validity of the conducted evaluations, considering that the procedure of evaluation is led by a body that ordered the evaluation, which in this case was the Court. This Panel finds no irregularity in the fact that the accused was examined on the pretrial custody premises, considering that the experts

[10] "*If the accused becomes affected by such a mental illness after the commission of a criminal offense that he or she is unable to take part in the procedure, the Court shall, upon a psychiatric forensic evaluation, adjourn the procedure and send the accused to the body responsible for issues of social care.*"

did not feel that... the examination needed to be conducted elsewhere, i.e. in a medical facility. Defense counsel's attempt to undermine the conducted evaluations by invoking Article 110(3) of the CPC of BiH[11] is void of necessary factual and logical basis, because relevant facts on a derangement of an accused's mental state are established only if experts previously find that the accused's mental state is deranged, which is not the case here.

100. Finally, with respect to the conducted evaluations, this Panel finds that the evaluation of the accused Hodžić at the clinic... in Banja Luka (S-9) is of particular importance, effectively giving a final confirmation that the accused is not mentally incompetent given that the accused did not display signs of a permanent... in terms of existence of a disorder... , or signs of serious damage to... functions, not even signs of a temporary mental disorder or disease, i.e. the accused was malingering the whole time..., with the accused's lack of cooperation during the examination being highly indicative (S-6, S-7 and S-8).

101. In the context of issue of procedural competence of the accused, the complaints raise the issue of lawfulness of pretrial custody of the accused Hodžić, which, given the aforesaid, appear to be irrelevant to be reviewed by this Panel, especially when one takes into consideration that the issue was repeatedly decided by final decisions – the right to be heard at two instances has been exercised – and the law does not allow a possibility of review of final decisions on ordering and continuing the pretrial custody of the accused in proceedings on appeal against a first-instance judgment.

102. Regarding the decision to hold the trial without the presence of the accused Hodžić, the Appellate Panel notes that not each instance of absence of an accused from a courtroom constitutes a trial *in absentia*, about which the First-Instance Panel provided detailed and proper reasons in paras. 275-293 of the impugned judgment. This has not been specifically contested in the appeals by providing arguments; rather, there are only blanket and incidental complaints that the accused was not informed about the trial

[11] "*Should experts establish that the mental condition of the suspect or accused is disturbed, they shall define the nature, type, degree and duration of the disorder and they shall furnish their opinion concerning the type of influence this mental state has had and still has on the comprehension and actions of the suspect or accused, we well as concerning whether and in what degree the disturbance of his mental state existed at the time when the criminal offense was committed.*"

hearings in his absence and that the accused was ordered into pretrial custody when he failed to appear in court because of illness.

103. The fact whether audio recordings and transcripts of trial hearings were provided to the accused does not call into question the validity of holding the trial in this case without the accused's presence, considering that the accused had access to the trial at any moment and that his *ex officio* counsel, principal and/or co-counsel, attended all the hearings. Furthermore, this Panel's review of the case file showed that the First-Instance Panel periodically sent audio recordings of the trial hearings held to both the accused Hodžić and his principal counsel[12], confirming beyond a doubt that the First-Instance Panel fully complied with the decision on trial without the presence of the accused Hodžić[13].

(ii) Erroneous application of the principles of *in dubio pro reo*, presumption of innocence, free evaluation of evidence and legality

104. In the view of the counsel for the accused Bojadžić, an essential violation of criminal procedure provisions under Article 297(2) of the CPC of BiH results from an erroneous application of the principles of *in dubio pro reo* and presumption of innocence under Article 3 of the CPC of BiH, the principle of free evaluation of evidence under Article 281 of the CPC of BiH, and the principle of legality under Article 2 of the CPC of BiH, which is at the same time a violation of the right to defense under Article 297(1)(d) of the CPC of BiH, because the First-Instance Panel made the following findings or failed to assess the following evidence: 1. The important fact of who prepared and planned the attack in advance and gave the attack order, with no evidence being presented in that regard; 2. Issuance of the order by the accused Bojadžić to his subordinate members, without identifying the subordinate members and evaluating evidence in terms of competences and authority of the accused Bojadžić on 14 April 1993 as well as his subordinate position in relation to Commander Zulfikar Ališpago; 3. Evaluation of evidence of resubordination of members… during the operation on Trusina village, in violation of the principle of *in dubio*

[12] See, *inter alia*, letters to the accused and defense counsel dated 17 May 2013, 10 February 2014 and 10 February 2015, with enclosed multiple audio recordings of trial hearings held.

[13] Paragraph II of the operative part of the cited Decision, *inter alia*, states that the decision referred to in Paragraph I does not preclude the right of the accused to appear in Court at any point during the trial; Paragraph III provides that the accused's counsel would attend trial hearings held without the presence of the accused, while Paragraph IV provides that during the proceedings the Court will without delay inform the

pro reo; 4. The accused's alibi that rules out his presence in the territory of Parsovići and Trusina, corroborated by witness testimony and documentary evidence that were either erroneously assessed or were not assessed at all; 5. The presence of the accused Bojadžić in Parsovići, on the basis of an unfounded evaluation of the testimony by credibility-lacking witnesses "R", Ramiz Bećiri, Rasema Handanović, "O", "A", "B", "X", "M" and Vahidin Čomor, not correlated with witness testimony (protected witnesses "D" and "C", the accused Dževad Salčin, Fata Kozić, Berdihan Mešić, Reuf Hero, Enes Jahić, Nijaz Habibija, Hasan Halaković, Atif Karović), evidence confirming that the accused never set out from Bradina towards Parsovići nor was there an objective possibility for him to subsequently come to Parsovići, or evidence of whereabouts of the accused Bojadžić in continuity in the period 14-18 April 1993; 6. The presence of the accused Bojadžić, in the company of Avdibegović aka Beg, on an elevation overlooking Trusina village, on the basis of contradictory statements by witness Rasema Handanović, witnesses "O" and "A", in the absence of a single shred of evidence that the accused set out with a part of the unit from Parsovići towards Podhum and further on foot towards Gostovići as that route could not be travelled by car, and with witness testimony confirming that neither the accused nor Avdibegović was on an elevation overlooking Trusina village on the day in question: Enes Gagula, "C", "E", Atif Karović, Berdihan Mešić, "D", "B", Muamer Huseinbegović, members… and residents of Trusina village (Himzo Hondo, Sead Ćosić, Enver Mujala, "J", Salko Sutlić, Salko Šahinović, Nusret Šahić), injured parties Janja Drljo, Luca Krešo, Marija Miškić, Bosiljka Krešo, Cecilija Šimunović, friar Zdenko Karačić, Milka Drljo, Celija Anđelić, Ruža Milkota, Dragan Drljo, F, Mara Drljo, Anđelka Šagolj and others, and members… Nikola Drljo, Mijo Anđelić, Ilija Drljo; 7. The participation of members of other units in the attack on Trusina village, solely on the grounds of testimony by unit members…, witness "R", Rasema Handanović, "O", "A", "B", "X", "M" and "E" without assessing the testimony of any member of some other unit that not only actively participated in the operation but also committed crimes; 8. failure to assess the following evidence corroborating that the accused Bojadžić was not seen in Parsovići or Gostovići or above Trusina, i.e. his name is never mentioned in connection with the incident in Trusina and pointing to the actions of the accused during combat operations in 1993: a) statements by members of the 45th Mountain Brigade or the *Tigers* unit; b) statements by injured parties; c) documentary evidence… from 1993; d) the evidence tendered by the

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accused about the course of the proceedings by providing to the accused after each hearing a complete

other defense teams; e) evidence of treatment provided to a wounded member… Ivica Bošković in the operation on Bokševica when the accused lost his cousin Izet Berberištanin aka Geza, the statement by witness Ramiz Dreković and documentary evidence of the character of the accused (05-224 and 05-225); 9. failure to assess the testimony by witness Atif Karović regarding Nedžad Hodžić's contacting the accused to inform him about Samko's wounding; the erroneous finding relies on the testimony by credibility-lacking witnesses "R", "B", "A", "X", "E" and Rasema Handanović; 10. failure to assess the respective testimony by witnesses "R", "M", "D", "C" that members… were not given an order "to kill everyone in the village"; 11. Failure to assess the respective testimony by witnesses "R", "O", "M", "D" and Berdihan Mešić that the act of execution of the soldiers… on the occasion in question occurred spontaneously because Samko and Kokić were wounded, contrary to the erroneous finding that the accused Bojadžić ordered the execution; 12. failure to assess Defense exhibits in accordance with the principles of *in dubio pro reo* and free evaluation of evidence with regard to: a) the use of Motorola during the operation on Trusina village and what type of Motorola was used, a key fact that was not established at all; b) the use of the code name 'Blek' by the accused during the operation; c) the finding that Trusina village was not a military target; d) authentic documents issued by appropriate authorities confirming the military status of the following persons: Tomo Drljo, Andrija Drljo, Ivan Drljo, Smiljka Krešo, Velimir Krešo, Ivan Krešo, Stipe Mandić and Milenko Mandić.

105. The Appellate Panel finds that the complaints are unfounded.

106. First of all, this Panel observes that defense counsel subsumed most of the aforementioned complaints under the ground referred to in 297(1)(k) of the CPC of BiH as well. With that in mind, this Panel's findings from the relevant section of this judgment will not be reiterated at this point.

107. This Panel further finds that defense counsel failed to explain in the appeal in what way such potential violations by the First-Instance Panel would affect or could have affected the rendering of the impugned judgment.

108. In that context, the allegation of a violation of the presumption of innocence is of blanket nature; it is not supported by a single example showing what violated the

audio recording of that hearing as well as a written transcript of the hearing once it is completed.

presumption of innocence during the trial or what part of the impugned judgment is in violation of this principle. Evaluation of evidence *per se* does not constitute a violation of this principle, and the presumption of innocence is not violated by the fact that in the impugned judgment the Court did not accept the Defense thesis on the existence of an alibi for the day when the incident in question occurred.

109. On the subject of a proper application of the principles of *in dubio pro reo* and legality, the Appellate Panel reiterates that the First-Instance Panel evaluated each piece of evidence individually and in correspondence with the other evidence, and based on its evaluation the First-Instance Panel made findings on the existence of legally relevant facts and the guilt of the accused beyond a reasonable doubt. Therefore, the First-Instance Panel, in formal legal terms and in substance, fully complied with the requirements laid down in Articles 15 and 281(2) of the CPC of BiH. The principles of *in dubio pro reo* or legality would have been violated if the Court had not taken into consideration one of the thesis by the Defense for Nihad Bojadžić, failed to evaluate Defense evidence in rendering the decision or failed to adduce proper reasons for not accepting a Defense thesis. However, the Appellate Panel finds that the application of the principles of *in dubio pro reo* and legality needs to be analyzed in the context of Defense complaints on whether the facts have been established properly and fully, i.e. in the context of probative value of the presented evidence. A detailed analysis will be given in the section of this judgment containing reasons on complaints against erroneously or incompletely established facts.

110. Based on the foregoing, the Appellate Panel finds that the accused's right to defense was not violated during the first-instance proceedings, resulting in a violation of the principles of legality, presumption of innocence and free evaluation of evidence or the principle of *in dubio pro reo*.

B. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH- ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

1. Standards of Review

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

112. 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.

113. In determining whether or not a First-Instance Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a First Instance 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 First-Instance Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a First Instance Panel.

114. The Appellate Panel may substitute its own finding for that of the First-Instance Panel only where a reasonable trier of fact could not have reached the original judgment, the evidence relied on by the First-Instance Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly erroneous.”

115. Article 299 of the CPC of BiH specifies when a judgment can be contested on the grounds of erroneously or incompletely established facts. Decisive facts are established directly by means of evidence or indirectly from other facts (indicia or controlling facts). Only those facts that are contained in a judgment can be regarded as existing and, regardless of the existence of decisive facts, reasons on their existence must always be given in a judgment. Otherwise, facts are not fully established. If a decisive fact has not been established as it actually existed in the reality of an incident, then the facts have been established erroneously.

2. Appeal by the counsel for the accused Mensur Memić

116. Contesting the established facts, the counsel for the accused Mensur Memić maintained in the appeal that that the First-Instance Panel made an unfounded finding in para. 461 of the impugned judgment that a number of witnesses examined at the trial clearly and convincingly refuted the accused’s defense. Furthermore, defense counsel contended that para. 465 of the impugned judgment does not cite witnesses who testified to the fact that the accused joined the unit long before the indicated date, especially taking into consideration the witnesses who confirmed that the accused Memić joined the unit on

the day referenced in the official certificate (7 April 1993); the time of the accused's joining the unit is not determined in the impugned judgment and the First-Instance Panel does not consider that fact relevant, allowing a possibility that the accused joined the unit long before 7 April 1993. In that context, defense counsel maintained that Nedžada Lepara and Munevera Mujala and the accused Nihad Bojadžić as a witness testified about this circumstance; the First-Instance Panel erred in finding that the credibility of their testimony is undermined by Exhibit T-147 on the grounds that that this document, in the counsel's view, cannot serve as evidence; specifically, the document does not show who authored it and for what purposes or who authenticated its contents (in defense counsel's view, the contents of the document are not true). This in particular because Sead Fikić, contrary to the allegation raised in that document, was not wounded on that occasion and the Prosecution did not present any evidence in that regard.

117. With regard to the respective testimony by witnesses Ramiz Bećiri, Rasema Handanović, and protected witnesses "X", "A", "B", "R" and "L", the appeal alleges that the impugned judgment contains an incomplete and one-sided analysis of the said witnesses' testimony, presenting only portions on facts that incriminate the complainant, which amounted to a violation of Article 15 of the CPC of BiH. The appeal further alleges lack of credibility of those witnesses as well as unreliability and lack of credibility of contents of their statements, particularly in relation to presented exculpatory evidence.

118. Specifically, in relation to witness Ramiz Bećiri, defense counsel submitted that the finding in para. 489 that this witness refused immunity is erroneous considering that the witness, when asked by the Defense, confirmed that he sought immunity from criminal prosecution prior to his examination as a witness and that he was granted immunity after his testimony; this circumstance is relevant to the testimony credibility, but the impugned judgment does not cite any reasons concerning the issue of this witness's immunity. Further challenging the credibility of this witness, defense counsel maintained that the presented evidence suggests a well-founded suspicion that the witness committed some crimes at the time of combat operations in the territory of Trusina village.

119. Regarding the testimony by witness "X", defense counsel argued that he, in contrast to the First-Instance Panel's finding, stated that he did not see the accused Memić between Parsovići and Trusina or on the way back.

120. Defense counsel also pointed to certain deficiencies in the testimony by witness

"R". Namely, this witness could not say where in Trusina village he saw the accused or what specific actions were carried out by the accused, rendering his testimony irrelevant and unreliable.

121. As for the testimony given by witnesses "A", "B" and Rasema Handanović respectively, defense counsel's appeal alleges that those witnesses gave statements during the investigation, providing completely different accounts of the alleged conduct of the accused Memić and the actions he took on the occasion in question. As a result, their statements are to a large degree contradictory, and that contradiction has not been properly analyzed by the First-Instance Panel.

122. Furthermore, defense counsel pointed out the fact that prior to the issuance of the indictment against witness Rasema Handanović this witness started plea bargaining with the Prosecution and that the concluded plea agreement has not been disclosed to the Defense. In addition, defense counsel analyzed this witness's testimony in detail and pointed to contradictions between her trial testimony and other evidence.

123. Moreover, with regard to witness "B", defense counsel pointed to discrepancies between this witness's trial testimony and his prior investigative statements in terms of the location from where he and other unit members went to Bradina prior to the operation in Trusina village, the name of the person who killed a man in a house when they were entering the village, the persons who killed two elderly persons and the names of unit members who took part in the execution – all suggesting that the witness was coached as to how he should testify.

124. In defense counsel's view, witness "A" is imprecise in terms of the accused's participation in the operation on Trusina, considering that he was unable to say if he saw the accused in Parsovići before reaching Trusina. The witness also stated that the group of soldiers that carried out the execution was behind his back so he could not specify the positions of the soldiers who carried out the execution.

125. Finally, it is alleged in the appeal that the impugned judgment does not contain an evaluation of the testimony given by witnesses Munevera Mujala, Nedžada Lepara, Berdihan Mešić, the accused Dževad Salčin and Nihad Bojadžić, Elmedin Ibrahimović, "N", "C", "M", "L", "O", "E", Irfan Masleša and "D", respectively, supporting the Defense claim that the accused Memić did not take part in combat operations in Trusina village on

16 April 993.

126. The Appellate Panel finds that the complaints are unfounded.

127. First of all, this Panel observes that defense counsel, by presenting the aforementioned complaints, takes a clearly partial approach to the factual findings in the impugned judgment relating to the accused Mensur Memić explained in para. 459-534 of the impugned judgment. In contrast to appeal allegations, the Appellate Panel finds that the First-Instance Panel provided a detailed argumentation on the reasons for inferring that Prosecution evidence proved beyond doubt that the accused perpetrated the acts described in the impugned judgment's operative part and thus committed the criminal offense charged under the indictment; the First-Instance Panel referred to contents of witness testimony and made its evaluation thereof, covering all the moot points raised by defense counsel in the appeal: starting from why it credited Prosecution witnesses who identified the accused as one of the participants in the execution of the lined-up... in Gaj hamlet, Trusina village, Konjic Municipality on 16 April 1992, to why it did not credited some pieces of evidence, also including trial testimony that differed in part from the corresponding prior statements.

128. With respect to the evaluation of the respective testimony by witnesses Nedžada Lepara, Munevera Mujala and the accused Bojadžić as a witness, the Appellate Panel refers defense counsel to the previous parts of this judgment that already discussed this issue, observing that para. 482 of the impugned judgment quite clearly suggests that the testimony was evaluated by the First-Instance Panel. However, the reliability of the testimony has been called into question by Prosecution Exhibit T-147 which, contrary to the complaints, does bear the protocol number (1-10-212/93) as well as the place and date of composition (Jablanica, 4 December 1993). This piece of evidence was evaluated not only in the context of evaluation of testimony by Defense witnesses Lepara and Mujala and the accused Bojadžić as a witness, but other presented evidence as well (testimony by witnesses Ramiz Bećiri, Rasema Handanović, protected witnesses "X", "A", "B", "R", and protected witness "L"; the latter having second-hand information). In other words, the Panel could not accept the Defense thesis that the accused, as a new combatant, could not have participated in the attack on Trusina.

129. On that subject, the precise time when the accused joined..., which the defense counsel correlates with the aforementioned thesis by the Defense, in this Panel's view

(concurring with the First-Instance Panel), is not a decisive fact in the context of participation of the accused in the attack on Trusina village on 16 April 1993. Even if it is accepted that the accused Memić joined the unit on 7 April 1993, that would still not call into question the First-Instance Panel's finding that the accused participated in the operation in question and took part in the execution of the captured members..., because he, as "a new combatant" could be assigned to an operation. That possibility of sending new combatants to operations is mentioned in the testimony by witnesses Mujo Pirušić and "A" respectively, which is in contrast to the testimony of Defense witnesses Nedžada Lepara, Munevera Mujala, Berdihan Mešić, "N" and "D", and the accused Bojadžić as a witness, who all claimed that it was the practice in the unit not to send new combatants to operations immediately upon their arrival.

130. With regard to the credibility and truthfulness of the testimony by witnesses Ramiz Bećiri, Rasema Handanović, protected witnesses "A", "B" and "R" respectively, in contrast to appeals allegations, the Appellate Panel, concurring with the First-Instance Panel, finds that the said witnesses' testimony are mutually compatible in terms of decisive facts, and that, when the testimony are analyzed individually and as a whole, the argument that the testimony are contradictory and unreliable cannot be accepted. This pertains to the manner in which witness testimony is refuted in the appeal: by citing portions of testimony and making blanket statements that a testimony is unreliable, or because there are grounds for suspicion that witnesses participated in the offenses charged. In that regard, this Panel does not accept defense counsel's argument that witnesses Ramiz Bećiri, "A" and "B" falsely testified against the accused Memić because they themselves participated in the incident in question. A logical question arises: what was the motive for these eyewitnesses to the incident to blame the accused Memić for the offenses charged and not some other members of their unit or other units that also participated in the attack on Trusina village on the day in question? On that note, defense counsel, other than making blanket statements, failed to indicate in the appeal why any of the aforementioned witnesses would be motivated to blame the accused Memić for the act of execution of prisoners of war if he did not commit it.

131. The First-Instance Panel examined the allegation pertaining to the alleged immunity of witness Ramiz Bećiri and adduced proper reasons in that regard in paras. 488-492 of the impugned judgment, with a remark that there was no "verbal promise" of immunity as argued in the appeal because immunity, under Article 84(3) of the CPC of BiH, is

exclusively granted by the decision of the Chief Prosecutor of BiH. The fact that witness Bećiri stated at the beginning of his cross examination by the Defense for Memić at the trial hearing on 2 November 2010 that he has been granted immunity, albeit not explicitly[14], is not relevant to the evaluation of the credibility and truthfulness of his testimony, particularly in light of the Prosecutor's position[15] and the witness's answer to the question put by the presiding judge of the First-Instance Panel[16]. Moreover, the Defense had an

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[14] **Defense counsel:** Have you been granted immunity by the Prosecutor that you would not be prosecuted for answers to questions that you will be giving during your testimony?
Witness: ***I think so, I don't know.***

[15] **Prosecutor:** Your Honor, I will say this and what I am about to say can be easily checked. The Prosecutor's Office of Bosnia and Herzegovina did not grant immunity to any of the witnesses in this criminal case. As you are aware, and I trust the defense counsel know this, immunity is granted by the decision of the Chief Prosecutor. As the Prosecutor in this case, I did not file a motion to the Chief Prosecutor to grant immunity to any witness, including Ramiz Bećiri. After all, I declare this under full responsibility. It can be checked, immunity is granted by the decision of the Chief Prosecutor. The Chief Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina did not grant immunity to anyone and he never received a proposal from me as the Prosecutor to grant immunity to any witness in this case.
Prosecutor: When interviewing witnesses, as can be seen from the records, the Prosecutor's Office acts in line with the CPC provisions pertaining to witness examination. Among other things, the witness was cautioned that he was not required to answer questions if his answer to such questions could incriminate him. The witness was also cautioned that he may seek immunity if he wanted to answer such questions. The next sentence is: immunity may be granted by the decision of the Chief Prosecutor. Your Honor, I stand by what I have said. My statements can be checked. I would ask my learned colleagues to leave aside the thesis that the Prosecutor's Office of Bosnia and Herzegovina and the Prosecutor in this case are hiding evidence and to focus their efforts on defending their clients.
Presiding Judge Marenić: Just tell us one more thing, Prosecutor: did the witness seek immunity?
Prosecutor: He did not seek it.
Presiding Judge Marenić: Thank you.
Prosecutor: *(microphone off)* Because, I apologize, if he had sought immunity that would have been noted down in the record.

[16] **Presiding Judge Marenić:** Very well. Tell me: did the Prosecution/Prosecutor warn you, advise you that you were not obliged to answer questions if a truthful reply would expose you to what you just said?
Witness: Yes, she did.
Presiding Judge Marenić: All right. Did the Prosecutor warn you that if you decided to say, if you did not want to exercise that right of yours, that you may be granted immunity not to be, as you put it, punished?
Witness: Yes.
Presiding Judge Marenić: You were warned about that as well. And what did you say to that? Did you give a statement thereafter?
Witness: Yes, I did.
Presiding Judge Marenić: Immediately, on the same day?
Witness: Yes.
Presiding Judge Marenić: All right. Did you seek immunity from the Prosecution, that the Chief Prosecutor grant you immunity?
Witness: ***No, I didn't.***
Presiding Judge Marenić: You did not seek?
Witness: ***I did not.***
Presiding Judge Marenić: You gave your statement immediately, is that correct?
Witness: On the same day.

opportunity to cross examine this witness, but it refused to do that after the witness stated that he was granted immunity although he was not aware of the meaning and implications of immunity from criminal prosecution[17], and in that way try to undermine the credibility of this witness.

132. With regard to witness Rasema Handanović, contrary to defense counsel's thesis, the issue of procedural situation of this witness was quite clear at the moment of her testimony at the trial hearing on 30 March 2012: she was summoned and examined in accordance with the CPC provisions pertaining to witness examination[18], whereas failure to disclose the plea agreement concluded between the Prosecutor's Office of BiH and Rasema Handanović in another case conducted before this Court is not relevant to evaluation of this witness's testimony because all the defense teams were given an adequate and actual opportunity to contest and examine this witness. Furthermore, the manner in which the witness answered certain questions as well as the circumstances about which she testified, do not challenge the reliability of her testimony as one of the pieces of evidence for determining the accused's participation in the acts charged, especially if one takes into consideration that that the witness has no interest whatsoever to incriminate the accused without foundation. Rather, this Panel, concurring with the First-Instance Panel, has gained an impression that this witness's knowledge of the accused and the acts that were perpetrated during the operation on Trusina village on 16 April 1993 is credible as she was a direct eyewitness and a direct participant. The Appellate Panel finds that this witness has positively identified the accused Memić[19] as the person who,

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Presiding Judge Marenić: On the same day. You did not seek that you be given immunity by the Chief Prosecutor?
Witness: ***No.***

[17] **Presiding Judge Marenić:** Are you aware of the meaning of 'immunity', to be granted immunity from criminal prosecution? Do you know what that means?
Witness: Yes, I do.
Presiding Judge Marenić: Tell us.
Witness: It is, I don't know, that if I am found guilty, right?
Presiding Judge Marenić: All right
Witness: That, that there would be no sanctions, right?
Presiding Judge Marenić: That there would be no sanctions.
Witness: That was my understanding.

[18] Title VIII, Chapter 5, Articles 81-91.

[19] **Prosecutor:** Rasema, do you recall, I am asking you again, you said "I saw all of us shooting". Can you recall who you saw shooting?
Witness: Popara, Džeko, Nedžad, ***Menta***, there were others as well, three, I cannot recall others.
Prosecutor: All right, thank you. I am sorry. Who is Menta? ...
Witness: Mensur Memić Menta from Prijedor.

together with other unit members... took part in the execution of lined-up prisoners of war in the hamlet of Gaj, village of Trusina.

133. As for the complaint indicating discrepancies between the investigative statement given by witness “B” and the trial testimony, this Panel accepts the analysis given in para. 507-512 of the impugned judgment in its entirety, particularly in light of the fact that at the trial hearing held on 18 April 2011 witness “B” was asked about all the circumstances about which the witness spoke differently during the investigation and at trial: the location from which he and other unit members went to Bradina prior to the operation in Trusina village, the name of the person who killed a man in a house when they were entering the village, the persons who killed two elderly persons, the names of unit members who took part in the execution; those circumstances, save the last one, do not carry weight as attributed to them by defense counsel, especially considering that it is not reasonable to expect with the passage of time that the witness would recall each detail of the incident in question. What is more, inconsistencies in an account may under certain circumstances suggest that a testimony is true, i.e. that there was no witness tampering. Therefore, this Panel too does not attach particular weight to potential inconsistencies in this witness’s testimony, considering that the witness resolutely and clearly explained the accused’s participation in the execution of prisoners of war and explained that he did not know why during his interview to SIPA (the initial interview) on 20 November 2008[20] he failed to mention that the accused Memić took part in the execution of the prisoners of war, which is reasonable and acceptable to this Panel, particularly if one bears in mind that his trial testimony is substantially consistent with the testimony by other witnesses who gave evidence on events in Gaj and the accused’s role in those events.

134. Moreover, based on the aforesaid, that it is not reasonable to expect from witnesses to remember each and every detail of a particular incident given the human perception and interpretation as well as a considerable passage of time, the circumstances raised in the appeal in terms of the respective statements by witnesses “A” and “R” are not relevant to the evaluation of their credibility, particularly if one takes into consideration that witness

[20] The Appellate Panel observes that the cited record has not been tendered into evidence despite the fact that the Defense for Memić announced at the trial hearing on 18 April 2011 that it would tender the record.

"R", when asked by one of the judges during cross examination, was adamant about where in Trusina village he saw the accused Memić for the first time.[21]

135. Regarding witness "X", the appeal is right in alleging that the witness stated that he did not see the accused Memić in Trusina village. However, he did previously state that he saw the accused in Parsovići, and that the accused, together with them, other unit members... set out from the Igman, the location from which unit members... set out for an attack on Trusina village, which does not call into question the First-Instance Panel's finding from para. 484 of the impugned judgment.

136. In contrast to the defense counsel's arguments citing portions of witness testimony without supplying the comments given by the First-Instance Panel, the Appellate Panel finds that para. 516-519 of the impugned judgment clearly show that the respective testimony by witnesses "O", "M", "D", "N" and Berdihan Mešić were evaluated, and it was found that they did not call into question the credibility and truthfulness of testimony by witnesses who saw the accused at the location where the lined-up prisoners of war were executed, Gaj hamlet, and that he took part in the said acts charged, particularly in a situation in which protected witnesses "M", "O" and "N" did not claim with certainty that the accused was not present in Trusina.

137. Furthermore, witnesses "C" and "E", as alleged in the appeal, were not cross examined by the Defense for Memić: during the direct examination witness "C" neither mentioned the accused nor was asked about him, which is why it was therefore unnecessary to mention and consider this witness's testimony in the reasons supporting the findings on the guilt of the accused Memić, whereas witness "E" stated that the name 'Mensur Memić' did not sound familiar, which is included in para. 515 of the impugned judgment. However, the testimony by witness "E" was considered by the First-Instance Panel in the context of describing events in the Gaj hamlet, because this witness did that in the same way as the witnesses who confirmed the presence and participation of the accused in the events in Trusina village; the witness also stressed that in addition to

[21] **Judge:** Never mind. I understand, I know this is cross examination, but I want to clarify it now, not to revisit it later. Where did you see Menta that day for the first time?
Witness: Where I saw Menta on that day? I saw him up there when we got to a hill up there, where those Croats were captured. HVO members and three or four civilians. I saw him there.
Judge: As I understand it, that was the first time that you saw him on that day?
Witness: Yes.

Nedžad, Džeko and Zolja someone else was shooting on the occasion in question, but the witness did not see who that was. Consequently, the testimony by witness "E" can be regarded as corroborative of the previously referenced evidence that the accused perpetrated the acts charged under the Indictment.

138. With regard to witness Irfan Masleša, it remains unclear to this Panel why the defense counsel argued that this witness's testimony supports Defense thesis when the witness stated that the accused was not in his group that was led by Jusuf Hasanbegović aka Juka, the group that according to the account of facts in the Indictment did not participate in the operation on Trusina village. Furthermore, the witness could not recall where the accused Memić was during that time period (late March and early April 1993 when they arrived at the elementary school in Bradina and split in two groups: one was led by Juka and the other one by late Samko in the direction of Klis) because he barely knew him.

139. With respect to witness Elvedin Ibrahimović, despite the fact that he said that he saw the accused Memić for the first time when the body of late Samko was transported to the Igman, i.e. that he did not arrive with other unit members... in Bradina and that he was not in Parsovići either, it should be noted that this witness was adamant that he never saw or knew Zolja (Rasema Handanović), which certainly calls into question the objectivity and credibility of his testimony considering that it stands to reason that he would remember the only female person who was a member of the unit..., especially in light of the fact that the witness knew very well and remembered other unit members who were in Bradina on the occasion in question[22]. In addition, witness Ibrahimović confirmed that Sead Fikić was wounded on 16 April 1993[23], as mentioned in Exhibit T-147.

140. Finally, the testimony by protected witness "L" does not support Defense thesis either, because this witness, relying on information obtained from another member of the unit (Ahmet Kokić) about the relevant incident and the participants in that incident, stated during the investigation that the accused Mensur Memić was in the attack on Trusina

[22] **Witness:** They came, they came with Samko and Juka, Džeko, Džeko, Popara, Pile, Koka, Švajc, Gala, Čems, Logo and many others.

[23] **Prosecutor:** Is it true that you saw Sead Fikić Fiki on the Igman that night?
Witness: Yes, it is.
Prosecutor: All right. Do you know if he sustained a light injury on 16 April?
Witness: Yes.

village. He maintained that contention in its entirety after being shown the said statement, but during his testimony at the trial he previously said that he could not recall whether Kokić told him anything about the accused Memić.

141. In this Panel's view, all the above does not call into question the credibility and reliability of mutually consistent testimony by witnesses Rasema Handanović, Ramiz Bećiri and protected witnesses "A", "B" and "R" respectively; those witnesses without dilemma identify the accused Memić as the person who was standing in the firing squad and killing the prisoners of war.

3. Appeals by counsel for the accused Nedžad Hodžić

142. As noted above, attorney Nedžla Šehić, co-counsel for the accused Hodžić, filed the appeal also on the grounds of erroneously and incompletely established facts. In that regard, defense counsel alleged that the facts based on which the criminal responsibility of her client was determined ensue from testimony by witnesses who lack credibility considering that they themselves perpetrated acts in Trusina on the day in question; in particular, the accused was an ordinary soldier with no command authority, while a firing squad did not formationally exist in the unit nor was membership in that squad determined during the trial.

143. As attorney Midhat Kočo, principal counsel for the accused Hodžić, made identical complaints in the appeal, these arguments of the Defense are analyzed below.

144. Attorney Midhat Kočo, counsel for the accused Hodžić, argued in the appeal that there is not a single reference in the impugned judgment to the incident involving Samko's wounding. According to the testimony by all the examined witnesses, Samko was the commander and in charge of the unit that participated in the attack on Trusina village, and whom the accused extracted by himself (and left his rifle behind) and carried to a safe location wherefrom he was transported away. Defense counsel also argued that the First-Instance Panel did not fully take into consideration witness Rasema Handanović's testimony in the part where she said that she saw the accused prior to the execution incident in a house; lying on a bed in that house was a disheveled female person and the accused Hodžić was pulling on his trousers. In particular, several witnesses stated that the

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Prosecutor: While in the part of the unit led by Juka Hasanbegović... all right.

accused Hodžić was armed with a PM /light machine-gun/, while some witnesses said that the accused used an M-16 rifle in the execution incident. On that subject, defense counsel contended that an examination of the injuries sustained by the victims, as well as cartridge cases from the site, would provide an answer to the question of weapons that were used for the execution of the captured soldiers.

145. Finally, with regard to the decisive fact concerning the clothes worn by the accused Hodžić and whether there was in fact a firing squad in that group that set out to the attack on Trusina village under Samko's leadership, defense counsel maintained that none of the examined witnesses explained what a firing squad was or who had to be in that squad; consequently, those circumstances have not been fully explained considering that the mere references by witnesses to "a firing squad" are not sufficient to make the finding as the one made in the impugned judgment.

146. The Appellate Panel finds that the complaints are unfounded.

147. First of all, on the subject of the allegation that the accused Hodžić extracted the wounded Samko by himself and that his rifle was left behind, qualified by the defense counsel as an indisputable fact, this Panel finds that this is but a blanket allegation with no reference to the presented evidence as potential support; which is why, as such, it could not have been examined by this Panel.

148. Furthermore, this Panel is still unclear on the purpose of the complaint relating to a portion of the testimony by witness Rasema Handanović describing that prior to the execution of the lined-up prisoners of war she saw the accused Hodžić in a house in the vicinity of that location; the accused was pulling on his trousers while a disheveled female person was lying on a bed. Defense counsel referred to this as a control circumstance relative to witness allegations about the type of weapon the accused Hodžić had on the occasion in question.

149. In contrast to defense counsel's contentions arguing otherwise, that the accused was armed with a light machine-gun part on the critical occasion, which could not really be examined considering that defense counsel did not provide the identity of "multiple" witnesses who testified to that effect, the examined witnesses Rasema Handanović, "E", "A", "B" and "D" were adamant that the accused Hodžić had an M16 rifle in Trusina, as additionally corroborated by witness Ramiz Bećiri's allegations that they had infantry weapons as well as allegations by witnesses "O" and "M" that there was firing

in rapid succession during the execution of lined-up prisoners of war in Gaj. On that subject, this Panel notes that neither the Defense nor the Prosecution presented evidence for the purpose of identifying the weapon(s) used to cause fatal injuries to the victims, but this issue is not relevant to the finding of perpetration of the acts which the accused is found guilty of.

150. Finally, the Appellate Panel finds that the clothes worn by the accused Hodžić on the occasion in question is not a decisive fact, and that fact in the context of issuance of the order to other members of the unit... to execute the captured members... in Gaj and the participation in the execution did not need to be established, although witnesses Rasema Handanović, Ramiz Bećiri, "D" and "A" testified about that and agreed that on the occasion in question the accused Hodžić was wearing a black uniform, i.e. a black combat jacket.

151. With regard to the firing squad issue, it suffices to say that in the case in question it was not necessary to establish the existence of a firing squad in the unit, while the words uttered by the accused Hodžić on the occasion in question, "firing squad, open fire!", were indisputably determined on the basis of concurring testimony by witnesses Rasema Handanović, "E" and "A", as well as Defense witness "D" who stated *"unfortunately, unfortunately, it was said 'firing squad', 'Džoni' said it.."*, while the words *"firing squad, get ready"* are also confirmed by the accused Dževad Salčin as a witness, although he did not recognize the voice.

152. Based on the foregoing, as this Panel finds that the cited arguments by the principal counsel and the co-counsel for the accused Hodžić do not comment critically the First-Instance Panel's findings regarding the accused Hodžić in para. 535-585 of the impugned judgment with possible counter-arguments phrased in a way that the Appellate Panel could consider them properly, the finding by the First-Instance Panel that the accused Nedžad Hodžić perpetrated the acts described in the operative part of the convicting part of the impugned judgment is accepted in its entirety.

4. Appeal by counsel for the accused Nihad Bojadžić

(a) *Erroneous finding regarding the alibi of the accused Bojadžić*

153. Insisting on the existence of proof of the accused's alibi, counsel for the accused argued that the First-Instance Panel erred in finding that the accused Bojadžić perpetrated any of the acts of which he has been found guilty, that being: a) that the accused said in

the attack on Trusina that everyone in the village should be killed; b) that the accused gave an order to execute the captured members…, as well as other circumstances reflected in the following: 1. that the accused was present in Parsovići; 2. that the accused was on an elevation overlooking Trusina village together with Nusret Avdibegović aka Beg; 3. that Nedžad Hodžić contacted the accused Bojadžić to inform him about Samko's wounding.

(i) Erroneous finding "that the accused said in the attack on Trusina that everyone in the village should be killed"

154. In this context, it is alleged in the appeal that the First-Instance Panel, on the basis of assumptions and unfounded inferences made from the testimony by three credibility-lacking witnesses (Rasema Handanović, and witnesses "A" and "O"), found that the accused said that everyone in the village should be killed, disregarding the contradiction between the testimony in terms of words uttered and the location where they were allegedly uttered, the manner in which they were uttered and to whom they were addressed, failing to explain the reason why, in relation to this decisive fact, it did not analyze at all the testimony by witnesses "R", "M", "D", "C" who said that they did not hear such an order.

155. The Appellate Panel finds that the complaint is unfounded.

156. The referenced inconsistencies in the respective testimony by witnesses Rasema Handanović, "A" and "O" have been analyzed by the First-Instance Panel, and this Panel accepts that those inconsistencies – being legitimate and expected given the passage of time, individual perception and interpretation, the character of the incident in which they took part – point to the objectivity and sincerity of their testimony on the details of the incident, in the manner in which they experienced and remembered it. The fact whether that order by the accused was issued in Parsovići or just before the operation commenced, or if it was said that not even a "chicken" or "ear" should remain alive, does not undermine the credibility of those witnesses' testimony, wherefrom it was properly concluded that the accused said about the attack in Trusina that everyone in the village should be killed, particularly in the context of the observation by the First-Instance Panel in para. 697 of the impugned judgment regarding the consequences of the attack, i.e. the number of civilians killed and wounded in the village.

(ii) Erroneous finding that “the accused Bojadžić, as commander of the operation on Trusina village, gave an order to execute the captured members…

157. Furthermore, the appeal challenged the finding in para. 763 of the impugned judgment made on the basis of the testimony by witness Rasema Handanović and protected witness “E” respectively, arguing that witness “E” neither saw nor heard anyone mentioning the accused Bojadžić on that day in Trusina, whereas witness Rasema Handanović gave a contradictory testimony on decisive facts and her testimony was not corroborated by witness Ramiz Bećiri. Defense counsel further argued that Nedžad Hodžić was not the one talking via Motorola at the time of the execution of the captured soldiers in Gaj but witness “E”, which could be inferred from a close analysis of the testimony by witnesses Bosiljka Krešo and Milka Drljo respectively (erroneously evaluated in the impugned judgment) as well as witnesses Anica Blažević and Dragan Drljo whose testimony was not evaluated. In defense counsel’s view, this also ensues from the testimony by witness “R” and a connection with other evidence from the trial confirming that witness “E” was a member…, close to Commander Seid Padalović… who was available on the Motorola the whole time (O5-110, witness Atif Karović’s statement), and also that Seid Padalović commanded or arranged the operation (statements by witnesses Sead Branković, Enes Gagula and Hasan Hakalović). As argued in the appeal, all these pieces of evidence lead to a different finding on the persons who communicated via Motorola, i.e. who issued the order to carry out the execution, especially in a situation in which Seid Padalović was the only one who had a motive because his brother had been killed in Gostovići a few days before, but that has not been considered at all. In particular, there was no proper evaluation of the testimony by witnesses of the Defense for Senad Hakalović (acquitted of the charge) who testified about the fighting at the referenced time due to the attack…, the report by expert Asim Džambasović on the character of the attack, and witness Milka Drljo about Padalović’s presence in Gaj.

158. Finally, defense counsel submitted that the First-Instance Panel failed to assess evidence suggesting that the act of execution occurred spontaneously as a result of injuries sustained by Samko and Kokić, as was pointed out by eyewitnesses to the events in Gaj: protected witnesses “R”, “O”, “M”, “D” and Berdihan Mešić. Moreover, in defense counsel’s view, the First-Instance Panel failed to consider the respective testimony by members... or unit… who testified at trial, testimony by injured parties, documents… from 1993 and evidence tendered by the other defense teams, showing that the accused was

not seen at the relevant time in Parsovići, Gostovići or above Trusina, i.e. that his name is not mentioned at all in connection with the incident in Trusina, or the evidence pointing to accused's actions during combat operations in 1993, all suggesting beyond doubt that the accused could never have given such an order.

159. The Appellate Panel finds that the complaints are unfounded.

160. With regard to the complaints against the evaluation of the witness testimony on which the First-Instance Panel relied to make a finding that the accused Bojadžić gave an order to execute the captured members…, this Panel first of all finds that, contrary to appeal arguments, the witness Rasema Handanović's testimony is corroborated by the testimony of witness "E". Although this witness stated that he did not know with whom Nedžad Hodžić was talking via Motorola and then shouted "firing squad", he knows that of those present there at that moment Džeko, Popara and Seid Padalović had Motorolas, and they were all close by, three feet from one another, as noted by the First-Instance Panel in para. 678 of the impugned judgment. Furthermore, regarding witness Milka Drljo's testimony about an unknown dark soldier who was tall (with defense counsel noting that Nedžad Hodžić is a rather short person), it is important to point out that during the cross examination by the counsel for the accused Hodžić this witness stated that at that time to her "*he seemed to be tall, perhaps he was not tall, it seemed to me so,*" especially bearing in mind the witness's position[24], adding that she was not sure whether the soldier (in a black uniform, tall) whom she saw just before the execution and the soldier who ordered them after the execution to go to Gostovići and carry ammunition boxes was one and the same person[25], whereas witness Dragan Drljo, although saying that the soldier was between 180 and 190 cm tall, further explained that the soldier was of approximately the same height as the other soldiers[26]. The respective testimony by witnesses Bosiljka Krešo and Anica Blažević can but corroborate the finding in para. 767 of the impugned judgment regarding the communication between the accused Bojadžić and Hodžić via Motorolas

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[24] **Judge Gluhajić:** All right. According to my understanding, when you were listening to that, that person talking on Motorola, the one you described, you were sitting down, is that correct?
Witness: Yes, we were sitting up there when we got up there.

[25] **Defense counsel:** Do we agree that that was the same person?
Witness: I cannot recall if that was the same person, I cannot recall.
Defense counsel: But I am telling you that you...
Witness: I gave a statement, at this point I cannot recall if he was the same person.

[26] **Defense counsel**: So, can we say that he was taller than the other soldiers, correct?
Witness: About their height.

when leaving the village and taking away women and children. Therefore, defense counsel's claim that on the occasion in question the accused Hodžić was talking to commander… Seid Padalović cannot be accepted, particularly in the context of testimony by Prosecution witnesses regarding the person who gave them orders, i.e. who commanded the operation, as well as the participation of members of other units referred to in paras. 619-648, additionally corroborating witness Milka Drljo's testimony[27] (contrary to appeal arguments) on the nonexistence of possibility of the accused Hodžić talking to Padalović. The testimony by witness "E" is along those lines; the witness first stated that he could not recall Padalović being present in Gaj, only to say next that they were all close by[28]; consequently, and in light of the alleged participation of witness "E" in the firing squad, it appears to be without foundation that at the relevant time in Gaj witness "E", and not the accused Hodžić, was talking to Padalović, or that possibly Rasema Handanović's conduct was the immediate cause for the execution. The proper finding by the First-Instance Panel in this part is not called into question by defense counsel's reference to a possible revenge motive by Seid Padalović.

161. This Panel finds that defense counsel's allegation that the execution occurred spontaneously is unfounded as well. In contrast to that allegation, this Panel supports the finding from the impugned judgment based on the testimony by witness Rasema Handanović and witness "E" respectively (indirectly confirmed by witness Milka Drljo's testimony) that the accused Nihad Bojadžić, after the attack ended, gave an order to the accused Hodžić, who became the leader of members of the unit after Samko (Samir Šemsović) was wounded… in the field in Trusina, to execute the captured members…, lined up in Gaj. In this Panel's view, this finding is not undermined by the testimony by witness "O" with respect to whom the appeal is right in alleging that he did not hear the execution order, but what is being disregarded is a portion of his testimony when he said "*I*

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[27] **Prosecutor:** Milka, at the moment when you saw that man, the unknown soldier that you described talking on Motorola and asking 'what shall we do with them?', do you see in, do you also see Seid Padalović?
Witness: He was there, standing a bit farther away. I cannot recall who replied to him that, er, that he did not know what to do with us, not to take to Gostovići...

[28] **Prosecutor:** No. All right. Up there in Gaj, before he said 'firing squad', he also used the Motorola, who from among you with Motorolas was in Gaj at the time?
Witness: Džeko, myself, Džoni, if Popara had it, I am not aware, that he had.
Prosecutor: All right.
Witness: I do not recall Seid being there.
Prosecutor: He talked on Motorola with one of you?
Witness: No, we were all within three feet.

heard many comments there, you know, there“ before the firing in rapid succession started. Furthermore, witness “R” only initially agreed that the execution was closely linked to the news of Samko's wounding, only to subsequently point out that the accused Hodžić ordered the execution[29]. Witness “D” did not say what is mentioned in the appeal; rather, he resolutely explained that the accused Hodžić gave the order “firing squad” before one of the members... started fleeing and when Zolja (witness Rasema Handanović) cocked her rifle, the same as witness Berdihan Mešić explained that the accused Hodžić did say “firing squad”. The witness explained his allegation that there was no firing squad with the words *”those may have been four rifles”*, and that he thought Zolja was the first to open fire after the accused Hodžić gave the order. Talking about Hodžić, the witness said *”I loved Nedžad, but I was scared because of the way he looked.”* As a result, the cited witness testimony does not corroborate Defense’s thesis that the execution occurred spontaneously.

162. Regarding appeal allegations on the failure on the part of the First-Instance Panel to consider the evidence associated with the principal Defense thesis on the accused’s alibi, those allegations are analyzed below as that was the way in which the appeal by defense counsel was drafted.

(iii) Other circumstances

a. Presence of the accused Bojadžić in Parsovići

163. Counsel for the accused argued that the Court’s erroneous finding in para. 609 of the impugned judgment relied on the testimony by witnesses “O”, “A”, “B”, “X”, “M” and Vahidin Čomor respectively. The cited testimony, in defense counsel’s view, is clearly contradictory with regard to decisive facts, which is a point that was overlooked by the First-Instance Panel. Counsel further argued that the First-Instance Panel did not take into

[29] **Defense counsel:** All right. So, as soon as the news of the death arrived, there was a spontaneous reaction and shooting at...
Witness: Just a moment.
Defense counsel: Yes.
Witness: Džoni assumed that Samko would die, he assumed it.
Defense counsel: Can I just ask....
Witness: Whether it arrived, I do not know, I did not see if the news of Samko's death arrived, whether someone informed him via Motorola or a radio set, that is what I want to say.
Defense counsel: Please, how can you know what Džoni assumed?
Witness: I know what he ordered.

consideration the testimony by some witnesses at all: the testimony by witnesses “C” and “D” who stated that there was no lining up in the Parsovići Elementary School, the testimony by the accused Dževad Salčin as a witness who too stated that there was no lining up in the Parsovići Elementary School and that Samko told them that they would be going to an operation, and the testimony by protected witness “X” who stated that there was no usual lining up in Parsovići but a rally.

164. Moreover, it is noted in defense counsel’s appeal that even witnesses who testified to have been lined up by the accused in Parsovići (Ramiz Bećiri, and protected witnesses “O”, “B” and “R”) did not confirm that the accused was standing in front of the ranks in the presence of Nusret Avdibegović aka Beg, as erroneously determined in the impugned judgment relying on the testimony by witnesses Rasema Handanović, “A” and “X”, but their testimony have been incorrectly evaluated in that regard.

165. With regard to the testimony by witness Vahidin Čomor, it is noted in the appeal that the witness made it clear that he was not in Parsovići on that day. Furthermore, the Prosecutor failed to offer a single piece of evidence, rule or order based on which a senior officer has a duty to escort his unit or hand it over to another command; as this witness was present neither in Bradina nor in Parsovići, it remains unclear how he was able to see the accused taking some of the members of the unit… towards Parsovići. This in particular when one takes into consideration that the testimony by this witness regarding his attendance at the meeting in Bradina has not been confirmed by any of the participants of that meeting (Hasan Hakalović, Esad Ramić and Nusret Avdibegović), particularly his presence at the time when the unit set out… towards Parsovići, nor does that ensue from any other piece of evidence.

166. Moreover, it is argued in the appeal that the evidence showing that a part of the unit was led to Parsovići by Samir Šemsović aka Samko (the testimony by witness Irfan Masleša, investigative statement by witness R dated 8 March 2010 and his trial testimony), who was a leader in operations and was one of the most experienced officers as well as a member of the unit command staff (the accused Bojadžić, O5-364 and T-348), was not evaluated at all i.e. that the accused did not receive any orders or approvals for combat operations from the Chief of Staff Sefer Halilović (T-347 i O5-362). Also, Salko Gušić kept his promise given to Esad Ramić at a meeting in Bradina in the evening of 14 April 1993 about deploying a part of OG Igman units as assistance to the territory of Konjic and

Jablanica (O5-44 and T-34, the accused Bojadžić and witness Elvedin Ibrahimović).

167. Counsel for the accused stressed in the appeal that the accused Bojadžić attended a meeting in Bradina on the morning of 15 April 1993, with his driver Elvedin Ibrahimović aka Ekac, having spent the night in his girlfriend's place, and that Nusret Avdibegović aka Beg, considering that members… did not know the road towards Parsovići, showed the road on a map to Samir Šemsović and explained the manner of travel, whereupon some members… led by Samir Šemsović left towards Neretvica, while another group went with Jusuf Hasanbegović towards Konjic. These decisive facts have been corroborated by witness Irfan Masleša, "C", the accused Dževad Salčin, witnesses "B" and Hasan Hakalović, but their testimony has not been assessed at all by the First-Instance Panel, resulting in erroneous facts.

168. In addition, the appeal challenged the finding in para. 787 of the impugned judgment relating to not giving credence to witness Nusret Avdibegović, considering an incorrect citation of contents of that witness's testimony regarding the commencement of the meeting in Bradina and the attendance of the accused at that meeting after members of his unit went towards Parsovići, as well as the preparation of the document after the meeting ended. It is further alleged that this witness did not testify as to whether the accused meanwhile left Bradina, with other pieces of evidence from the trial referring to the accused's whereabouts following the departure of members of his unit from Bradina.

169. With regard to the testimony by witness Salko Gušić, it is maintained in the appeal that the accused did not claim that Salko Gušić was in Bradina the whole time, and also that this witness did not testify about the accused's whereabouts in the first place.

170. According to the counsel for the accused, the accused's alibi is also corroborated by a piece of documentary evidence, namely a request for taking measures in that area sent by the ŠVK /Supreme Command Staff/ on 15 April 1993 (O5-105). With regard to that piece of evidence, the Defense, contrary to the findings in the impugned judgment, did not claim that the document was sent through a packet via communications line from Bradina (although such a possibility existed), but that it ensued from the testimony by, respectively, Elvedin Ibrahimović and the accused Bojadžić as a witness, that the message was handed over to a communications officer who was in Bradina that night. The findings from the impugned judgment about the possibility of witness Ibrahimović's remembering that very document and that witness Gušić had a motive not to tell the truth before the Court in light

of his duty at the relevant time and his capacity as a suspect in this case are regarded as arbitrary. Gušić's testimony should have been evaluated in the context of other presented evidence (O5-365 and T-348, O-361 or T-352). When correlating the testimony by witness Elvedin Ibrahimović with the testimony given by his cousin-medical orderly Nusret Đelilović, in defense counsel's view, the First-Instance Panel is overlooking the type of the situation and, in connection therewith, the ability of a person taking over wounded men to notice other persons, even if that person was a cousin. Moreover, as argued in the appeal, the testimony by witness "V" was not evaluated properly; this witness testified about the whereabouts of the accused in the night of 15/16 April 1993, after the meeting in Bradina.

171. Finally, it is stressed in the appeal that the First-Instance Panel failed to consider evidence confirming that prior to the departure of members… from Parsovići towards Trusina, even if the accused had not spent the night in his girlfriend's house, he could not have reached Parsovići and be seen there by members of his unit prior to leaving for Trusina, considering that the only free and passable road towards Parsovići at that time was via Mt. Nitovina down the Neretvica River canyon, which in April 1993 was a forest and muddy road and difficult to negotiate; it would take at least three to four hours to make that trip. This is particularly important when one takes into consideration that some witnesses stated that they set out from Parsovići towards Trusina early in the morning, before dawn, at around 5 o'clock, and that the witnesses who were in Parsovići on 16 April 1993 and whose testimony was not taken into consideration ("D", "C", the accused Dževad Salčin as a witness, Fata Kozić, Berdihan Mešić, Reuf Hero, Enes Jahić, Nijaz Habibija, Hasan Hakalović), were absolutely sure that they did not see the accused or hear that he was in Parsovići.

172. The Appellate Panel finds that all the complaints referred to above are unfounded.

173. The First-Instance Panel's finding on the lining-up of members… in Parsovići by the accused Bojadžić, with him standing in front of the line-up in the presence of Nusret Avdibegović aka Beg and before a part of the unit set out… to the attack on Trusina village on 16 April 1993, should be viewed exclusively in the context of the accused's presence in Parsovići, as opposed to the Defense thesis that the accused Bojadžić was in Bradina in the night of 15/16 April 1993. In contrast to appeal arguments, this Panel finds its finding fully reliant on the respective testimony by witnesses Ramiz Bećiri, Rasema Handanović, and protected witnesses "O", B", "R", "M", "A", "X" that were analyzed in detail by the First-Instance Panel in the reasons for the impugned judgment on the following points:

was there a classic lining-up or more of an informal gathering ahead of the operation and notification of the direction of operations, the person who lined them up and stood in front of the line-up, the location of the lining-up, and discrepancies in the investigative statements. This in particular when one takes into account that the First-Instance Panel was in the best position to assess the testimony by witnesses given in court, their objectivity, credibility and truthfulness when describing events, without expecting the witnesses to give identical accounts; i.e. logical discrepancies in certain details regarding circumstances about which they were testifying, the discrepancies that, when the testimonies are taken individually and as a whole, do not call into question such finding. This Panel notes that it will not analyze witness testimony as was done by the Defense for Bojadžić, using an approach according to which anything that does not suit the Defense is *a priori* an erroneous or incomplete fact.

174. Furthermore, this Panel finds that even the testimony by witness Vahidin Čomor should be viewed in the context corroborating the consistent testimony by unit members regarding the accused Bojadžić's presence in Parsovići. In this respect, one should be mindful of the fact that this witness, as a military professional, when answering Prosecutor's questions, presented his opinion about a situation involving the attachment of units and the person whose duty it was to escort such a unit, linking that to the accused's presence at a meeting in Bradina on 15 April 1993 and the departure of a part of the unit… towards Parsovići after that meeting, as a result of which he confirmed that the accused Bojadžić did that. The fact that witness Čomor did not state that until the redirect examination did not preclude the Defense, if it found necessary to refute the witness's testimony, from summoning the witness and examining him with regard to those circumstances, which was not done. In this Panel's view, the complaint raised by the counsel for the accused as to whether other participants of the referenced meeting confirmed that witness Čomor attended the meeting does not undermine the credibility of his testimony in terms of the decisive facts mentioned above.

175. Likewise, this Panel, concurring with the First-Instance Panel, acknowledges that Samir Šemsović aka Samko led the unit members… in the attack on Trusina village up to the moment of his death; this ensues from the consistent testimony by witnesses-members of this unit, on the basis of which the accused Bojadžić's presence in this operation was determined.

176. Finally, this Panel fully upholds the finding in the impugned judgment on the

non-acceptance of the accused Bojadžić's alibi whereby his whereabouts in the period 14-16 April 1993 excludes the possibility of him being in Parsovići and Trusina; exhaustive reasons in this regard are provided in paras. 770-777 of the impugned judgment. In that context, this Panel takes into account that several members of the unit… testified about the presence of the accused in Parsovići and Trusina, as well as his orders. Furthermore, despite the Defense's use of a selective analysis of the testimony by witness Nusret Avdibegović aka Beg in an attempt to show that the testimony is consistent with that of the accused Bojadžić as a witness, this Panel finds that an analysis of witness Avdibegović's testimony as a whole unequivocally suggests a different finding. To that end, this Panel notes that witness Avdibegović gave a different account of the course of the meeting held in Bradina, including who attended the meeting. In addition, in contrast to appeal arguments, this Panel finds that other witnesses such as Esad Ramić, Ćazim Ćibo and Salko Gušić did not confirm Defense contentions regarding the accused's whereabouts either.

177. This Panel finds that the accused's alibi is further called into question by the sending of a letter via packet communications in Bradina in the night of 15/16 April 1993. In that respect, the Defense for Bojadžić apparently contradicts itself because on the one hand it refutes the testimony by witness Gušić who stated that there was no packet communications in Bradina on 15 April 1993 and that at that time documents could be sent only through Mt. Igman; on the other hand, the Defense claims that that was never its thesis, although such a possibility existed. If one analyzes the contents of the testimony by respectively the accused Bojadžić as a witness and witness Elvedin Ibrahimović, it is obvious that they claimed that the letter (O5-105) was sent via packet communications from Bradina in the night of 15/16 April 1993. The accused Bojadžić alleged "*we sent and drafted that document, I drafted it and gave it to my driver to carry it, er, to the communications center that was about 10, 15 meters from...*", while witness Ibrahimović stated that Nihad personally gave him the letter a little after 02:00 hours and that he then gave it to a communications officer.

197. Lastly, in this Panel's view, the First-Instance Panel was also right in pointing to inconsistencies in the testimony by, respectively, witnesses Elvedin Ibrahimović and Nusret Đelilović (Ibrahimović's close relative), and in that regard this Panel upholds the finding contained in the reasons for the impugned judgment (paras. 813 through 817).

b. The accused in the company of Nusret Avdibegović aka Beg on a hill overlooking Trusina village

178. Defense counsel maintained in the appeal that the First-Instance Panel erred in making this finding, relying on the contradictory testimony by witness Rasema Handanović aka Zolja and protected witnesses “O”, “A” and “X” respectively.

179. Refuting that finding, counsel for the accused argued that there is not a single piece of evidence confirming that the accused Bojadžić set out with a part of the unit from Parsovići towards Podhum and from there on foot towards Gostovići, particularly because that section of the road could not be traveled by a vehicle, excluding what the unreliable protected witness “A” stated and then denied it during his testimony. Furthermore, it is stressed in the appeal that there is not a single piece of evidence suggesting that the accused came from Gostovići to an elevation overlooking Trusina village and remained on that spot with Nusret Avdibegović; in contrast, witnesses Ibrahim Turak, Enes Gagula, Atif Karović, Ismet Redžić, Redžo Poturović, Mustafa Hakalović and Muharem Hakalović stated that on the day in question they did not see the accused either in Podhum (through which one was bound to pass on the Parsovići-Gostovići road) or in Gostovići, but their testimony was not considered at all.

180. Finally, counsel for the accused noted that it ensued from the testimony by, respectively, witnesses Enes Gagula, Atif Karović, Berdihan Mešić, “C” and “E” that neither the accused Bojadžić nor Nusret Avdibegović were on an elevation overlooking Trusina village on 16 April 1993, just like none of the members… and residents of Trusina village, the injured parties and members… heard that the accused was in that area on the day of the operation, particularly taking into account the testimony by witness Avdibegović that he was not in Trusina on that day and served as a guide to members…, as further confirmed by witnesses “D”, “B” and Muamer Huseinbegović.

181. The Appellate Panel finds that the complaints are unfounded.

182. The issue of how the accused came from Parsovići to Gostovići and from there to an elevation overlooking Trusina village is not of decisive importance to this Panel in light of the essentially consistent testimony by witnesses Rasema Handanović, “O”, “A” and “X”. The First-Instance Panel, having analyzed the said testimony, found that the accused Bojadžić was with and remained in the company of Nusret Avdibegović aka Beg on an elevation overlooking Trusina village, and from there had a good view and was able to

communicate with the group leaders on the ground. In contrast to an appeal argument that was used to try to undermine the credibility of witness Rasema Handanović by pointing out that she stated during the cross examination that she did not know who Beg was, that, in this Panel's view too, does not call into question the reliability of her testimony as a whole, particularly taking into account that she stated during the direct examination *"…and there was also a man from that other brigade, I think Nihad called him Beg; he was balding, tall, a bit thinner than, than, than Nihad."* Consequently, witness Handanović's knowledge of Nusret Avdibegović aka Beg is based on what she heard about him from the accused Bojadžić and not because she knew him personally. Moreover, the appeal incorrectly interprets the testimony by protected witness "A", considering that he said that he assumed that Avdibegović went there as a guide and not that he assumed that he was present there[30], while witness "X" accounted for the discrepancy in relation to his investigative statement in the following way *"my final, statement as to where, where I saw Niha., Avdibegović Beg, in, in, in the area of Bradina and Parsovići is that 'yes, I did see'"*. Furthermore, the Defense for Bojadžić attached importance to the fact that witnesses described the location where they saw the accused to be "by a trench" or "on an elevation overlooking Trusina village," but this Panel does not share that view considering that one cannot expect that witnesses describe and present their perception and memory of a complex incident in an identical manner. Besides, contrary to a different interpretation in the appeal, witness "A" describes the location from which the accused Bojadžić and Avdibegović followed the course of the operation as a hill overlooking the village; as for his words "downhill to the left of the cemetery towards Buturović Polje", they relate to the positions manned by members...[31].

183. Finally, the fact that some witnesses did not hear or see the accused Bojadžić or Avdibegović does not diminish the quality of witness testimony relevant to the

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[30] **Prosecutor:** All right. In addition to you, in addition to you as the unit members, did anyone else take that road?
Witness: Yes.
Prosecutor: Who?
Witness: There was Nusret Avdibegović aka Beg. He was, I think, I assume because he was going with us, because we did not know the way there, he was also like a guide.

[31] **Witness:** Well, deployment was, it was, it was free in one area and one could enter the village from there, while in one area near the cemetery and behind the church-tower, I think that, ***they manned positions there and that they had there, I don't know exactly, I think, that is what I heard, that they had two or three trenches up there***.
Prosecutor: Where "up there", did you know where that was?

establishment of decisive facts and on which the First-Instance Panel properly relied to make a finding regarding the presence of the accused with Nusret Avdibegović on an elevation overlooking Trusina village.

c. The accused Hodžić contacting the accused Bojadžić to inform him about Samko's wounding

184. In contesting the finding presented in para. 680 of the impugned judgment, the counsel argued in the appeal that the First-Instance Panel erred when not crediting the testimony by protected witness "D", and also failed to evaluate the testimony given by witness Atif Karović with regard to the fact that he, as a person responsible for administering medical aid, whose code name was 'rebro' /a rib/, had a Motorola on the day in question.

185. In contrast to the said complaints, the Appellate Panel finds that witness Rasema Handanović testified clearly and convincingly that after Samko and Kokić were wounded the accused Nedžad Hodžić informed the accused Bojadžić about it on a Motorola means of communication, telling him that Samko and Kokić are 'rebro'. Protected witnesses "R", "B", "X" and "E" too confirmed that the accused Hodžić communicated on a Motorola after Samko was wounded, although not explicitly confirming that he communicated with the accused Bojadžić. For example, witness "B" alleged that the accused was informing "deputy commander Nihko most likely", the same as witness "X".

186. In this Panel's view, the fact stressed in the appeal that Seid Padalović, commander of unit…, also had a Motorola on the day in question does not call into question the factual finding of a communication between the accused Hodžić and Bojadžić, particularly taking into account the testimony by protected witness "E". Namely, according to this witness's testimony at that moment the accused Hodžić could not have possibly been communicating with other persons who had Motorolas on that occasion (Džeko, Seid Padalović, Popara) because those persons were standing nearby, within one meter from one another. The same applies to the testimony by witness Atif Karović, considering that it stands to reason that information about the wounded is given to the person responsible for administering medical aid, but also to the person leading an operation, which was the accused Bojadžić.

Witness: Above, from the cemetery downhill to the left towards Buturović Polje.

d. Stopping a vehicle transporting wounded men in Bradina

187. In the appeal, defense counsel argued that stopping a vehicle transporting wounded men at the checkpoint in Bradina and the accused's leaving with the wounded men to the hospital in Suhodol was one of the circumstances that in the Defense view supported the accused's alibi; this was confirmed by testimonies of some witnesses that were not properly assessed by the First-Instance Panel. In that context, the appeal alleges that the First-Instance Panel erred in evaluating both the accused Bojadžić's investigative statement and his trial testimony with regard to who told him about the wounded men at the relevant time, as well as his presence together with Avdibegović in Bradina on 16 April 1993; in that context one should take into account the accused's state of shock when the charges were presented to him for the first time during his interview on the premises of the Prosecutor's Office. In support of the appeal, the Defense supplied a certificate dated 23 September 1993 to the effect that Muharem Cero, MD, performed the duty of Head of Suhodol Wartime Hospital from 24 January 1993 until 8 September 1993, referring to the accused's allegation during the investigation about an encounter with Dr. Cero. The First-Instance Panel erred in its evaluation because it relied on the testimony by witness Aida Volić, MD, that Dr. Cero came to the hospital after the incident in question.

188. The Appellate Panel finds that the complaints are unfounded.

189. The issue of whether the vehicle transporting the wounded Samko (Samir Šemsović) stopped in Bradina is not of decisive importance to this Panel, either from the aspect of establishment of legally relevant facts or the aspect of proving the accused's alibi, but it does however point to para. 796-803 of the impugned judgment containing an analysis of the testimony by the witnesses who were escorting the wounded man and who confirmed that Samko did not make it alive to Bradina, and that they did not see the accused Bojadžić that day until they arrived in Suhodol.

190. In this Panel's view, the discrepancies between the accused Bojadžić's investigative statement and his trial testimony that the appeals attempts to justify appear to be irrelevant in light of all the previously analyzed evidence that directly calls into question the testimony given by the accused Bojadžić as a witness at the trial.

(b) *An erroneous fact that the attack on the population of Trusina village was planned and prepared in advance*

191. Counsel for the accused Bojadžić contended that the finding in para. 724 of the impugned judgment that the attack on Trusina village was planned and prepared in advance is erroneous. In support of this contention, they first of all maintained that the First-Instance Panel should not rely on the testimony by protected witness "E" because this witness stated he was surprised that there was an operation taking place that day. Furthermore, there is Defense Exhibit O5-85, a strategic document of the ŠVK /Supreme Command Staff/ containing a clearly expressed position of the Army of BiH towards a conflict with the HVO (i.e. the efforts by the Army leadership to stop the conflict between the Army of RBiH and the HVO), also confirmed at trial by expert Asim Džambasović (who qualified the operation in Trusina as a typical raid) and witnesses Mirsad Čaušević and General Jovan Divjak, but their testimony has not been evaluated at all by the First-Instance Panel.

192. Furthermore, the appeal alleges that, according to Exhibit O5-105 and the testimony by Nusret Avdibegović aka Beg and the accused Bojadžić as witness, nobody spoke about attacking the Trusina village; rather, unit members… were deployed having received an urgent call for help. This is further corroborated by Exhibits O5-104, O5-44, T-34 etc. Besides, protected witnesses "L" and "C", witness Ramiz Bećiri and the accused Dževad Salčin confirmed that the members… who set out from Mt. Igman did not know where they were going until they reached Parsovići, and that they had guides who were members… who pointed the direction of movement and which of the houses needed to be searched.

193. The Appellate Panel finds that the complaint is unfounded.

194. By presenting the aforementioned arguments, defense counsel manifestly disregard the contents of para. 723 of the impugned judgment, containing factual findings concerning the arrival of a part of the unit..., on account of the conflict... and... to Bradina on 15 April 1993 (the same time when the meeting at which, among others, Zulfikar Ališpago and Nihad Bojadžić were present took place), the departure of one part of the unit to Homolj and another part to the Elementary School in Parsovići (the HQ of the 45th Brigade) where they were given bed and board, the lining-up and being informed about being deployed to an attack mission on Trusina, being given a certain number of guides

who joined them in the operation because the terrain was unknown to the members..., securing an ambulance and a medic as well as a PAM /anti-aircraft machine-gun/ support and, finally, splitting into groups just before the attack (who would go together and who were the group leaders), all of which was confirmed by the analyzed testimony of numerous witnesses-participants in the operation, referred to in paras. 593-722 of the impugned judgment. In the same context, the First-Instance Panel also properly analyzed the testimony by protected witness "E" who was a member of the 45th Brigade, especially taking into account that at the moment of learning about the attack the witness was already in a house in Gostovići with Seid Padalović when members... were arriving and that he was just surprised that Seid did not tell him anything[32]. Further in his testimony the witness explained the contents of the conversation about the attack between Samko and Seid, whereupon they set out in the attack; the witness added that it was said where each of them would go[33].

195. The circumstance raised by the defense counsel in the appeal that unit members..., due to a new, sudden attack and blockade of the area of Konjic and Jablanica by... in mid-April 1993, upon an urgent call from the area units they were deployed as reinforcement to those units, does not in any way undermine the validity of those established facts.

196. Furthermore, the circumstance regarding the moment when the members... learned where the operation to which they were going was taking place does not corroborate the Defense's thesis that the attack was not prepared and planned in advance. On the contrary, before they came to Trusina the members of this unit were informed by the command staff about where the operation would take place. Therefore, they did not set out from Mt. Igman, via Bradina, to Parsovići and then to Trusina of their own initiative; rather,

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[32] **Prosecutor:** Aha. And how did you learn about the attack?
Witness: They started talking there, where, how, who was supposed to go and stuff like that. I was surprised, I was surprised that Seid did not tell me.

[33] **Prosecutor:** Witness, tell us, er, who, who was making arrangements on where to go, how to proceed?
Witness: Seid, Samko and others were present, but I think it was Seid, Samko and Džeko.
Prosecutor: All right. Tell me: how long, how long did you remain after, how long did the conversations in that room in the house where you were sleeping last from the moment they entered the room?
Witness: Perhaps 20 minutes or so.
Prosecutor: All right. And then?
Witness: Nothing, we put on clothes, I put on a bulletproof vest, grabbed a rifle and outside the house. They spent some time there talking. Later on, above that house, when you go up, the road going down here, that is the way to Križ, straight forward it goes down to Seonica, to the left you go uphill to our line towards, towards Žitače, we again rallied there and said who should go where.

they were sent to that area by their superiors. Witness Elmedin Čaušević aka Mesar, one of the members of the unit „...“, gave the most complete account of that in his testimony.[34]

(c) *Erroneous finding of the Court “that members of other units did not actively participate in the attack”, that their role was to “protect the line of withdrawal, if necessary” and “that the SOPN Zulfikar unit was the only one that passed through the village”*

197. Refuting this finding by the First-Instance Panel from Para. 646 of the impugned judgment, defense counsel pointed out that the First-Instance Panel mostly referred to testimony by members of the SOPN unit – Prosecution witnesses (witnesses “R”, Rasema Handanović, “O”, “A”, “B”, “X”, “M” and “E”) who did not need to, and, objectively, could not have known all the ways in which other units participated in the attack, while disregarding the testimony by other witnesses, namely Enes Gagula, Edin Čolak, protected witness “E”, Atif Karović, Elmedin Čaušević, as well as the report by expert Asim Džambasović – all confirming that members…, of the Tigers unit and a unit from Gornji Vakuf, as well as some “mavericks”, participated in the operation and that they committed crimes.

198. As argued by defense counsel in the appeal, that was further supported by the fact that there was an improvised infirmary formed by…, situated in the basement of the so-called Ilića houses, which was confirmed by witnesses Atif Karović, Enes Begeta, Enes Gagula and the accused Dževad Salčin. Moreover members of the unit from Vakuf had a motive to commit crimes because some of the members… did some fighting in the territory of Vakuf, as witnessed by Salko Šahinović. In defense counsel’s view, the presence of members of the unit from Vakuf and the commission of crimes against the residents and buildings in Trusina village also ensues from the testimony by witness-injured party Janja Drljo and witness Nijaz Habibija. Finally, the counsel argued that witness “E”, as a member of another unit, participated in the execution of members… taking into account the

[34] **Prosecutor:** Could late Samko have given an order of his own initiative to Detachment members for deployment to operation?
Witness: No.
Prosecutor: From whom did he receive orders?
Witness: From his command.
Prosecutor: All right. When you say “command”, who are you referring to?
Witness: Command Zulfikar.
Prosecutor: Who is “Command Zulfikar”, tell me the names.
Witness: Well, there was Nihad, Zuka, Juka.
Prosecutor: All right.
Witness: The command that was up there.

description of a person who was in the firing squad, as given by protected witness “R” (prominently dark complexion, thin, tall, speaking with the accent of a person from Sandžak); his presence in Trusina has been confirmed by witnesses-injured parties Milka Drljo and Dragan Drljo whose descriptions are similar to that of witness R.

199. The Appellate Panel finds that the complaint is unfounded.

200. First of all, this Panel finds that defense counsel erred in arguing that the First-Instance Panel did not find that other units participated in the operation on Trusina village because para. 645 of the impugned judgment contains a finding to the contrary. However, as it explicitly ensues from para. 646 of the judgment, the First-Instance Panel found that the Defense failed to prove the contention that members of other units took part in the attack itself, but rather found that their participation was reduced to acting as guides and, if necessary, to protect the line of withdrawal. In particular, the Defense thesis that they committed crimes in Trusina has not been proved. In this Panel's view, the First-Instance Panel's finding fully relies on the testimony given by witnesses “R”, “O”, “A”, “B”, “X”, “M”, “E” and Rasema Handanović as direct participants in the attack, who gave objective and credible accounts of the entire course of events during the attack on Trusina on the day in question. Besides, even the witnesses on whose testimony defense counsel insisted have explained the form of participation of members of other units. Specifically, witness Enes Gagula explained that his role in the group that was going towards Križ – composed of members of the unit... and... – was to act as some kind of a “pointer guide”, additionally explaining that that meant *“someone who has spent some time there and knew the terrain to a certain degree”*. According to witness Edin Čolak’s testimony, he did not walk down to Trusina village at all on 16 April 1993, nor was he aware of any member … walking down to and being in Trusina that morning. Finally, the witness heard from others who attacked Križ and Trusina on that day and therefore his testimony is not relevant to determining the role of other units on the day in question considering that he did not have first-hand knowledge about it. The same applies to witness Atif Karović. Namely this witness said that he heard that members of the Tigers unit participated in that operation, but could not say whether one Mrčo (a member of a unit from Gornji Vakuf) participated. Witness Elmedin Čaušević stated that he remained on Mt. Igman on the day in question, preparing for some other operation.

201. Furthermore, this Panel finds that, in contrast to appeal arguments, witnesses Salko Šahinović and Janja Drljo did not corroborate that members of the unit from

Vakuf committed crimes, i.e. played a different role than the one established, especially taking into account that witness Šahinović saw four soldiers on the way back, after the shooting in Gaj ended, after the operation ended. As regards the testimony by witness Janja Drljo who described looting, knife threats and the throwing a hand grenade by a person who introduced himself as being from Vakuf, that too cannot support the aforementioned Defense thesis for the reason that the person may have lied about where he was from, i.e. the person may not have been a member of a unit from Gornji Vakuf.

202. With regard to the complaint relative to witness "E", defense counsel's intention to include him in the firing squad on the occasion in question is not supported, considering the testimony of witness "R" who described that a member of Haso's unit (in his opinion, originally from Sandžak), who was one of their guides, at the beginning of the operation (prior to the execution of the prisoners of war and the incident by the store) discharged a burst of fire on the back of a man who had been previously injured, as well as the testimony of witnesses Milka Drljo and Dragan Drljo who, in contrast to defense counsel's contentions, do not support this thesis given that Dragan Drljo spoke about a man in a black uniform who saved his life by taking him out of the line of persons to be executed. On the other hand, Milka Drljo, in the part of her testimony on the transcript page referred to by defense counsel, spoke about how they were taken out of the house, mentioning only two men and a woman with rifles drawn at her son Dragan. Consequently, these witnesses do not mention a person with a Sandžak accent at all, and it is also interesting to note that witness "E", answering a question put by the then second accused, stated that he could not recall the child that was saved from the line of persons to be executed.

203. Based on the foregoing, this Panel, concurring with the First-Instance Panel, finds that members of other units did not play an active role in the acts charged.

(d) *Erroneous and incomplete facts that the members… were subordinated to the accused and that the accused gave and could have given an order*

204. Counsel for the accused Bojadžić submitted that the First-Instance Panel failed to establish an important fact whether a part of the unit was subordinated to the fifth accused and, if so, what part of the unit considering that the requisite subordinate-superior relationship – as a requirement for the criminal responsibility of the accused Bojadžić – is not apparent from the enacting clause of and reasons adduced for the impugned judgment, particularly taking into account that many units participated in the operation on

Trusina village and that members… were deployed to Trusina village as support. Defense counsel raised the same issue in the part of the appeal referring to the ground of essential violations of criminal procedure provisions; the issue is addressed in the relevant portion of this judgment so the reasons given therein will not be reiterated at this point.

205. Defense counsel argued in the appeal that the First-Instance Panel's finding in para. 644 of the impugned judgment is erroneous, as the First-Instance Panel failed to comply with the principle of *in dubio pro reo* and Article 281 of the CPC of BiH when evaluating the testimony of witnesses Vahidin Čomor, Hasan Hakalović, Rasema Handanović, witnesses "R", "O", "A", "B", "X", "M", "E" and "L" respectively, and that it also failed to assess the position of the accused Bojadžić as it was on 16 April 1993 in the chain of command… and, in connection therewith, his responsibility for the acts of members of that unit in a situation when the commanding officer (their superior) was present and gave orders. In the counsel's view, Commander Zulfikar Ališpago, as the unit commander, had effective control and at no point prior to or during the operation on Trusina village on 16 April 1993 did he delegate that authority to the accused Bojadžić. In support of that claim, counsel for the accused Bojadžić argued that the impugned judgment erred in drawing proof of presence of the accused and issuance of the order during the attack on Trusina village from the lining up of the units, as well as testimony of witnesses lacking credibility, without analyzing the specific meaning of the term 'lining up' with respect to which Sabro Hasković testified. Finally, in connection with the military term 'resubordination', counsel were of the opinion that the First-Instance Panel considered the issue but superficially, and in a way that contradicts the presented documentary evidence (O5 37, O5 41, O5 44), the testimony of witness Fikret Muslimović, as well as the reports of experts Asim Džambasović and Nehru Ganić.

206. The Appellate Panel finds that the complaints are unfounded.

207. Maintaining the previous reasons on the lack of relevance of defense counsel's complaints indicating the absence of elements of command responsibility, this Panel will address the complaints pertaining to the status of the accused *de iure* and *de facto* in the context of the third element of criminal offenses under Articles 142 and 144 of the CC of SFRY (i.e. the accused's influence on the ability to commit the criminal offenses) and not in relation to the existence of authority to give orders to subordinates (i.e. effective authority of the accused), which, according to the ICTY case law referred to in the appeal, is relevant only to the existence of command responsibility. Accordingly, this

Panel will not assess complaints relating to command responsibility, as they do not constitute valid arguments for testing the First-Instance Panel's finding in para. 644 of the impugned judgment.

(e) *Use of Motorola during the operation on Trusina village as a means of communication*

208. The appeal also raised the issue of use of a Motorola handset as well as the type of Motorola to which the witnesses referred. Specifically, it is alleged that in that regard the impugned judgment did not assess all the presented evidence but the First-Instance Panel confined itself to the testimony of a few witnesses lacking credibility, such as the testimony by, respectively, protected witnesses "A" and "B" that are mutually contradictory regarding the type of Motorola that was used (GP 300). In contrast, defense counsel stressed that experts Nehru Ganić and Asim Džambasović, the accused Bojadžić, witnesses Aziz Mušanović, Salko Gušić, Ifran Masleša, Z, Nusret Šahić, Jovan Divjak, Hasan Hakalović and protected witness "C" gave evidence on the means of communication used in that time period (the situation in the Army of BiH and the Zulfikar unit, features of a Motorola, factors affecting their range, the type of Motorola in possession in the unit…, the use of Motorola on the day in question by the accused). The allegation that the unit… did not have Motorolas at the relevant time and that Ališpago requested means of communication "with panic", is supported by an audio recording of an intercepted conversation (T-348, O5 364); he also requested that they also be given chargers without which the requested Motorolas were useless, and a base radio station (O5 364). On the other hand, it is alleged in the appeal that protected witness "J" corroborated that the members… who were in Gostovići and on Marevac had means of communication, Motorolas, and their Commander Seid Padalović was aware of what was going on in Trusina and that he was the one who ordered – via courier or Motorola – that the civilians be moved away.

209. The Appellate Panel finds that the complaints are unfounded.

210. In contrast to the appeal arguments, this Panel finds that the First-Instance Panel was entirely justified in relying on testimony of witnesses-participants in the operation to find that Motorolas as means of communication were used during the operation. In that context, according to the respective testimony by witnesses Rasema Handanović and Ramiz Bećiri, protected witnesses "R", "O", "A", "B", "X", "C", "A" (analyzed in para. 668-673 of the impugned judgment), in addition to the accused Bojadžić, Motorolas were also had by other "privileged" members of the unit… who were close with the command staff,

persons of accused Bojadžić' confidence, Samir Šemsović aka Samko, the accused Hodžić, Džeko, Popara, and commander… Seid Padalović, further corroborated by the testimony of witness "J" referred to in para. 560 of the appeal. The geographical position of the accused Bojadžić from which he monitored the operation and communicated with members of his unit has already been discussed above; this is best illustrated by the investigative statement of witness "O" that Nihad was the operation leader and that the witness was absolutely sure that from Nihad's position he could communicate with Samko and his men. Consequently, the Defense's complaint that communication on that terrain was not possible on account of distance and configuration of the terrain appears to be unfounded. The testimony of witness Atif Karić is of interest in this regard. The Defense claimed that he was informed about the wounded men via Motorola. At that time he was in a dugout "*in a shelter, a sheltered spot above a cemetery, on a crossroads, in a grove*" behind Gostovići, towards Žitače.

211. With regard to the testimony of protected witness "L", it is correctly noted in the appeal that the witness stated that it is possible that he confused events when he was talking to the accused via Motorola, but what is being overlooked is that in the direct examination he categorically claimed that he talked to the accused Bojadžić twice via Motorola on the morning of 16 April 1993. The accused ordered him to reposition PAM /anti-aircraft machine-gun/ in order to provide support to unit members who were supposed to attack down there in Trusina; when he informed him that he did not do that because he would be out of range, the accused used abusive language so the witness turned off his Motorola. Moreover, in redirect examination, having said that he could not specify the time period, he reiterated that he spoke to the accused regarding the repositioning of PAM "*in order to provide support to the men down there, towards Trusina*." Consequently, it may be inferred from the above that it is possible that the witness was confused about the time of the operation in Trusina, but not about having a conversation with the accused in connection with Trusina, especially when one takes into account the witness's statement that that was his sole altercation with the accused Bojadžić.

212. Besides, the testimony of witness "L" regarding him being in charge of a PAM in Trusina is also corroborated by the respective testimony of witnesses Mustafa Hakalović, Rasema Handanović, "A" and "X" referred to in para. 659 of the impugned judgment. It is clear that the conversation between witness "L" and the accused Bojadžić via Motorola could have taken place only during the operation on Trusina village.

213. In the end, the issue of what means of communication was used on the occasion in question – a GP-300 Motorola or some other – is not of decisive importance in order to result in facts not being established completely, considering that it ensues from the Indictment facts and the enacting clause of the impugned judgment that the accused Bojadžić used a means of communication to lead the attack on Trusina village. Besides, according to the testimony of witness "Z", Commander of "Silver Fox" Unit in the period March-April 1993, on one occasion the witness gave Zuka (Zulfikar Ališpago) four or five GP-300 Motorola stations that had been previously confiscated in Hrasnica.

(f) *Code name 'Blek'*

214. According to the appeal, the accused did not use the code name 'Blek' at the relevant time or during the operation on Trusina village. Specifically, protected witness "L" said that he could not recall the exact date and incident to which he was referring; witness "X" mentioned the term 'Veliki Blek'; witness "R" alleged that the accused used the codename of 'Blek' when talking over Motorola, but "it depended, in some operations;" however, with regard to the Trusina operation he did not hear anyone using that term to refer to the accused over the means of communication.

215. It is further argued in the appeal that the accused Bojadžić did use the code name 'Blek' in communication, but in a later period, which ensues from the testimony by, respectively, witness Irfan Masleša and protected witnesses "Z" and "D". Moreover, it is alleged that there were several code names using various forms of the term 'Blek' and that several persons used those names in 1993, which ensued from Exhibit O-V-452 and the testimony given by witness Zoran Barun. In addition, the Defense pointed to the methodology of drafting codebooks and the absence of practice of using one code name in several operations, i.e. over a long time period, as confirmed in their respective testimony by witnesses Jovan Divjak, Irfan Masleša, Aziz Mušanović, protected witnesses "L" and "D", the accused Bojadžić as a witness, and also by Exhibit O-V-368.

216. Finally, defense counsel argued on 16 April 1993 and immediately after that day the code name 'Blek' was not registered as a participant in the event, whereas the code name 'Jastreb' /Hawk/ used by Ališpago was, adding that Prosecution Exhibit (T 150) relates to the period of Vrdi operation.

217. The Appellate Panel finds that the complaints are unfounded.

218. According to the reasons adduced for the impugned judgment in para. 660-666, the First-Instance Panel analyzed the respective testimony by witnesses "L", "R", Ramiz Bećiri, Rasema Handanović, protected witnesses "O", "A", "X", "C", "M", "D", "Z" and relied on their testimony to find that the accused Bojadžić used the code name 'Blek' in communication on the occasion in question. This Panel accepts this finding as valid, holding that its validity is not called into question by the portion of the testimony of protected witness "X" reading that the accused used the name 'Blek' or 'Veliki Blek' via Motorola. With respect to the testimony of protected witness "L", this Panel reiterates that it is possible that the witness was describing an incident that occurred in another operation and that his testimony suggests that he spoke to the accused on two occasions and that he recognized his voice; the witness stressed that he was absolutely sure that the accused started the first conversation via Motorola using the words "This is Mr. Blek."

219. The fact that some witnesses linked the accused's code name 'Blek' to other operations, i.e. another time period (see the testimony of witnesses "R", "Z" and "D" respectively) does not call into question that the accused used that name in the operation on Trusina village, particularly taking into account that, according to the recollection of the examined witnesses, they linked the code name 'Blek' exclusively to the accused and associated that name with the accused's name. Besides, witness Irfan Masleša links the code name 'Blek' of the accused Bojadžić to the Grabovica operation in May 1993 for the reason that it was only at that time that this witness was given a Motorola.

220. In addition, the alleged existence of multiple code names in various forms of the term 'Blek', supported in the appeal by an HVO report dated 11 June 1993 and the testimony by witness Zoran Barun, does not call into question the aforementioned finding because that report and the witness's knowledge do not relate to the incident in question.

221. In the view of this Panel, the same applies to the methodology of drafting codebooks and the practice of using the same code name in several operations, i.e. those are not circumstances relevant to determining the code name used by the accused in the operation on Trusina village, particularly taking into account the allegation by witness Irfan Masleša that "a new codebook was made, but sometimes the names remained the same."

(g) *Village of Trusina was not a military target*

222. In their appeal, defense counsel refuted the finding explained in paras. 719, 720,

725 and 726 of the impugned judgment that Trusina village was not a military target, arguing that according to the presented evidence, analyzed in detail in the appeal, the Trusina village was a legitimate military target and that well-armed members…, i.e. entrenched and fortified forces... were constantly present there. In that context, defense counsel stressed that the Križ position, overlooking the Trusina village, was of great importance to the forces… from the area of Konjic and Jablanica, because that part of Trusina was on a very important hill from which it… was linked with other positions on Žitače, Metlica and Grlić, Lepen and Drenovci all the way to Buturović Polje and Kostajnica, for the purpose of preventing passage of forces…; there had been clashes in that area prior to 16 April 1993, but they intensified in March and early April 1993 following several clashes in that area and a full-scale blockade of that area by…, … mounted an operation on Trusina village and faced fierce resistance… from Obari; two members… were wounded, the wounding of one and the deaths of two members…, begging the conclusion that the undertaken activities were necessary and justified from the military aspect.

223. Finding that the aforementioned finding from the impugned judgment is correct in its entirety and accepting the reasons supplied in that regard in the cited parts of the reasoning, this Panel notes that the issue of whether Trusina village was a military target or not can be addressed only in the context of a link (nexus) between the offense and the armed conflict and, in connection therewith, the status of the perpetrator and the status of the victim.

(h) *Status of victims Tomo Drljo, Andrija Drljo, Ivan Drljo, Smiljka Krešo, Velimir Krešo, Ivan Krešo, Stipe Mandić and Milenko Mandić as civilians*

224. As argued in the appeal, the First-Instance Panel, notwithstanding the documentary evidence (certificates attesting to the circumstances surrounding the deaths of the victims), erred in finding that the said persons were not combatants without citing reasons for not accepting the said certificates as having credibility.

225. In contrast to the said complaint, the Appellate Panel finds that the First-Instance Panel examined the same complaint in para. 437-439 of the impugned judgment, and found that the certificates stating that the aforementioned persons were members… cannot be accepted as reliable proof of status of those persons on the grounds of age of the persons and the existence of other testimonial evidence given by witnesses Jure

Krešo, Nikola Drljo, Tomislav Mlikota, Ilija Drljo, Cecilija Šimunović and Ruža Mlikota who do not classify those persons as members of... Besides, in that regard the First-Instance Panel took into account the reports stating that 15 civilians were killed and 7 soldiers-members... were executed on that day. This complaint is therefore unfounded as well.

(i) *The accused was aware of the meaning and consequences of his order that "no one can remain alive in the village"*

226. According to the appeal, the First-Instance Panel's finding that the accused knew that there were civilians in the village solely on the ground that a village was being attacked is completely incongruous, illogical and not related to the circumstances that prevailed during the war, considering that there is not a single piece of evidence confirming that the accused had such knowledge.

227. The Appellate Panel finds that this complaint appears to be irrelevant to the existence of the accused's guilt, considering that it has been found beyond doubt that on the relevant day, during the operation on Trusina village, the accused Bojadžić gave an order to members of the unit… that "no one should remain alive in the village"; the attack resulted in the deaths of 15 civilians and serious injuries of four civilians, two of whom were children.

(j) *The murders of Tomo Drljo (born in 1926), Andrija Drljo (born in 1947), Kata Drljo (born in 1937), Ante Drljo (born in 1936), Kata Drljo (born in 1918), Ivana Drljo (born in 1939), Velimir Krešo (born in 1934) and Ivica Krešo (born in 1935)*

228. In the defense counsel's view, disagreeing with the finding from the impugned judgment, there is not a single piece of evidence as to who committed those murders, in particular that they were committed by members of...

229. The Appellate Panel finds that this complaint too is unfounded.

230. By presenting this argument, counsel for the accused Bojadžić obviously disregard that the accused not only ordered the attack on Trusina village but also ordered the unit members under his command that no one should remain alive in the village, with the presented evidence unequivocally showing that the referenced civilians were murdered in the course of that attack. Accordingly, the identity of the participant(s) of the operation who killed those persons is irrelevant in the context of determining the accused's

criminal responsibility. Besides, the role of members of other units who participated in the operation on Trusina village has already been addressed so the issue will not be revisited at this point.

(k) *Witness credibility*

231. Defense counsel strongly emphasized, as stated during the first-instance trial, that witnesses Rasema Handanović and Ramiz Bećiri and protected witnesses "O", "A", "E", "R" and Ramiz Bećiri themselves participated in the acts with which the accused is charged and are therefore personally motivated to falsely portray events in Trusina in order to evade criminal prosecution. Furthermore, defense counsel singled out traits of personalities of the cited witnesses that, in the counsel's view, call into question their credibility.

232. Moreover, defense counsel analyzed inconsistencies in the testimony of witnesses "A", "L", "E" and "B" respectively, and pointed to an arbitrary evaluation of witness Vahidin Čomor's testimony.

233. With regard to protected witness "X", defense counsel stressed that he did not participate in the operation concerned, as confirmed by the inconsistencies between his investigative statements and his trial testimony. Besides, this was a person who was sent to prison for absence without leave, drinking and fighting, and who took part in torturing prisoners in Donja Jablanica.

234. The Appellate Panel finds that the complaints are unfounded.

235. First of all, with respect to the alleged inconsistencies in the testimony of the aforementioned witnesses, the role of witness "E" in the operation in question and the testimony of witness Čomor, this Panel has examined them in the relevant sections of this judgment so it will not revisit those issues. The Panel reiterates that possible inconsistencies in witness testimony but confirm that witnesses testify about the incident in a way that they perceived it and committed it to memory; as a result, one cannot expect that every detail in their testimony is identical.

236. Furthermore, this Panel finds that witness testimony is consistent in terms of decisive facts, inasmuch as witnesses Handanović, Bećiri, "O", "A", "L", "R", "B" and "X", without exception, confirmed and described the actions of the accused Bojadžić in the

operation on Trusina village; consequently, this Panel, concurring with the First-Instance Panel, holds that such testimony is reliable and sincere, and finds that the testimony could be given full credibility. Defense counsel have not undermined the reliability of the cited testimony with their arguments. Having made this finding, this Panel does not accept defense counsel's argument that witnesses Handanović, "O", "A", "E", "R" and Ramiz Bećiri were motivated to give false evidence against the accused on the grounds that they themselves perpetrated the charged acts in Trusina or in other events. Witness Handanović, who confessed her guilt for the acts referred to in the concluded plea agreement, is hardly motivated to make false accusations because at the time of her testimony at trial she was already aware of the sentence that she would serve. Besides, in this Panel's view, the following question arises: why would the witnesses-participants in the operation at issue had a motive to blame the accused Bojadžić for the charged acts and not some other members of their unit or other units that too participated in the attack on Trusina village on the day in question? Defense counsel failed to indicate in their appeal why any of the examined witnesses were motivated to blame the accused Bojadžić for leading the attack on Trusina and issuing the orders if he did not do that, and how would that exonerate them for potential criminal acts perpetrated on the day in question.

237. With regard to all the other circumstances mentioned by defense counsel in relation to particular witnesses – involving traits of their personalities, inclination towards alcohol, lack of discipline within the unit and the fact that they themselves committed crimes – this Panel, concurring with the First-Instance Panel, finds that in the present case the circumstances pertaining to the traits of their personalities, with several mutually compatible testimonies, do not call into question the testimony reliability with regard to decisive facts concerning the charges.

238. Finally, in this Panel's view, all the aforementioned arguments do not call into question the proper evaluation of evidence by the First-Instance Panel in any way, nor the established facts. For all these reasons, this Panel finds that defense counsel's arguments have not called into question the First-Instance Panel's findings concerning decisive facts relating to the criminal offenses of which the accused Bojadžić has been found guilty, and such arguments have been accordingly refused as unfounded.

C. GROUNDS OF APPEAL UNDER ARTICLE 298 OF BiH CPC - VIOLATION OF CRIMINAL CODE

239. Counsel for the accused Mensur Memić refuted the first-instance judgment on this ground. However, considering that the appeal does not contain specific reasons that could be subsumed under a violation of the Criminal Code, the Appellate Panel was not able to examine the appeal on this ground.

D. GROUNDS OF APPEAL UNDER ARTICLE 300 OF BiH CPC - SENTENCING

1. Appeals by defense counsel

240. Although not explicitly refuting the judgment on this ground, counsel for the accused Bojadžić argued that not all the extenuating circumstances on the part of the accused Bojadžić were properly taken into account when the sentence was being meted out; specifically, that the evidence attesting to the character of the accused Bojadžić as a person who is not a fundamentalist or nationalist was not evaluated at all. This is supported by the testimony of witnesses Jovan Divjak, Enes Jahić, "V", "N" and "X" respectively, along with medals, a commendation for humaneness, official assessments, letters of commendation, orders to be awarded items in gratitude for his service (especially for his contributions to the defense), as confirmed by Defense exhibits D-V-224 and D-V-225.

241. Attorney Nedžla Šehić, co-counsel for the accused Nedžad Hodžić, incidentally alleged that the First-Instance Panel merely listed the extenuating circumstances without properly assessing them. Furthermore, her client received a harsher punishment when compared to other individuals convicted of the same criminal offense.

242. Attorney Midhat Kočo, counsel for the accused Nedžad Hodžić, did not explicitly refute the decision on the sentence in the first-instance judgment. Counsel for the accused Mensur Memić refuted the judgment on this ground as well, but failed to adduce reasons in that regard in his appeal. However, as Article 308 of the CPC of BiH provides that *an appeal filed in favor of the accused due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment*, this Panel, in line with the extended effect of the appeal, was under obligation to review the decision on the sentence in relation

to the accused Memić and Hodžić as well.

2. Appellate Panel's finding

243. In contrast to the arguments submitted by the counsel that not all the circumstances on the part of the accused were properly taken into account, the Appellate Panel finds that the First-Instance Panel properly established and assessed all the facts and circumstances that under Article 41 of the CC of SFRY are relevant to fixing the punishment, including the status of the accused (i.e. circumstances relating to the personality of the accused), the gravity and degree of criminal responsibility of the accused (bearing in mind that the accused ordered that acts be carried out by members of the unit...) and the ensuing consequences (i.e. the number of killed and wounded civilians and prisoners of war). In this Panel's view, all those circumstances, extenuating and aggravating alike, have been taken into account, properly assessed and adequately represented in the procedure of fixing the punishment for the accused.

244. The aforementioned finding on a proper evaluation of all the circumstances relevant to fixing the punishment is upheld by this Panel in terms of the extenuating circumstances found by the First-Instance Panel on the part of the accused Nihad Bojadžić: no criminal record, proper demeanor and respect for all the decisions of the Court, his family situation (divorced and father of two children) and the circumstances raised in the appeal in terms of the accused's professional duties and military achievements. In this Panel's view, those circumstances cannot result in a lesser sentence to be imposed on the accused.

245. The same also applies to the punishments imposed on the accused Nedžad Hodžić and Mensur Memić, and this Panel takes the view that their sentences have been properly meted out.

246. Consequently, in the view of the Appellate Panel, all the circumstances bearing on the magnitude of the punishment were properly evaluated by the First-Instance Panel and that Panel, in meting out punishments for the accused, properly exercised its discretion in assessing the circumstances when finding that circumstances that were taken under consideration in totality justify the imposed prison sentences.

247. In connection therewith, the Appellate Panel finds that the sentences imposed on the accused – from the aspect of social denunciation, the aspect of general and specific

deterrence and general fairness of punishing perpetrators of this type of serious crimes – are adequate and lawful.

248. Finally, although the counsel for the accused Memić alleged that he refuted the judgment on grounds of the decision on costs of the criminal proceedings and claims under property law, as the appeal reasoning does not contain any reasons in that regard, this Panel was not able to review the judgment relative to such allegations.

249. For all the reasons mentioned above, pursuant to Article 313 of the CPC of BiH, the Court has ruled as stated in the enacting clause above.

250. As the acquitting part of the first-instance judgment has not been appealed, that part of the judgment remains unaffected.

RECORD-TAKER **PRESIDING JUDGE**

JUDGE

Selena Beba **Mirko Božović**

LEGAL REMEDY: No appeal is allowed against this judgment.