

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Number: S1 1 K 008494 16 Krž 3

Date: 23 January 2017

Before the Appellate Panel composed of Judges:

Tihomir Lukes, Presiding

Redžib Begić

Mirko Božović

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Nihad Bojadžić

JUDGMENT

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

Mr. Sedin Idrizović

Counsel for the Accused:

Ms. Vasvija Vidović, Attorney

Ms. Edina Rešidović, Attorney

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Sarajevo, 23 January 2017

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Appellate Division Panel, composed of Judge Tihomir Lukes, as the Panel Presiding, and Judges Redžib Begić and Mirko Božović, as members of the Panel, with the participation of legal advisor Belma Čano-Sejfović, as the record-taker, in the criminal matter against the accused Nihad Bojadžić charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina and the criminal offense of War Crimes against Prisoners of War in violation of Article 175(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina, deciding upon the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and the defense attorneys for the accused Nihad Bojadžić, Ms. Vasvija Vidović and Ms. Edina Rešidović, from the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 008494 12 Kri of 14 April 2016, after a public session held in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mr. Sedin Idrizović, and the accused's defense attorneys, Ms. Vasvija Vidović and Ms. Aida Beganović-Handanagić, replacing attorney Edina Rešidović, in the absence of the duly summoned accused, on 23 January 2017 handed down the following

J U D G M E N T

I **Granting the appeal** filed by the defense attorneys for the accused Nihad Bojadžić, **revoking in its convicting part** the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 008494 12 Kri of 14 April 2017, and ordering a hearing to be held before a panel of the Appellate Division of the Court of Bosnia and Herzegovina.

II **Granting, in part, the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina, revoking** in its acquitting part the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 008494 12 Kri of 14 April 2017, **in relation to Sections 1, 2, 3, 4, 5, 6 and 11 of the enactment clause of the acquitting part of the Judgment**, and ordering a hearing in relation to the referenced Sections to be held before the Appellate Division Panel, while **dismissing as ill-founded** the appeal filed by the

Prosecutor's Office of Bosnia and Herzegovina **in relation to Sections 7, 8, 9, 10, 12 and 13 of the acquitting part of the Judgment enactment clause** and upholding the Trial Judgment in this part.

R e a s o n i n g

I. PROCEDURAL HISTORY

1. The Judgment of the Court of Bosnia and Herzegovina, found the accused Nihad Bojadžić guilty of committing, by the acts described in Sections 1, 2 and 3 of the convicting part of the enactment clause, the criminal offense of War Crimes against Prisoners of War under Article 144 of the Criminal Code of the Socialist Federative Republic of Yugoslavia, which was adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia¹. Thus, for the referenced criminal offense, the Trial Panel sentenced the accused to imprisonment for a term of one year by applying Articles 33, 38, 41, 42 and 43 of the referenced Code. Pursuant to Article 189(1) of the Criminal Procedure Code of Bosnia and Herzegovina², in connection with Article 185 of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of criminal proceedings, which shall be paid from within the budget appropriations. Pursuant to Article 198(3) of the CPC BiH, the injured parties were instructed to pursue their claims under property law in a civil action. In Chapter II of the Trial Judgment enactment clause, the accused was acquitted of the charges, pursuant to Article 284(a) and (c) of the CPC BiH that, by the acts described in Sections 1-13 of the Judgment enactment clause, he committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina (CC BiH) and the criminal offense of War Crimes against Prisoners of War in violation of Article 175(1)(a) and (b) of the CC BiH.

2. The referenced Judgment was timely appealed by the Prosecutor's Office of Bosnia and Herzegovina (Prosecution of BiH) and the accused's defense attorneys, Ms. Vasvija Vidović and Ms. Edina Rešidović.

3. In relation to the part of the Judgment acquitting the accused of the charges, the Prosecution of BiH filed an appeal on the grounds of violations of the criminal code, and

¹ Hereinafter: CC SFRY.

² Hereinafter: CPC BiH.

incorrectly and incompletely established state of facts, while in relation to the part of the enactment clause finding the accused guilty, the grounds of appeal was the sentencing decision. The appeal moved the Appellate Panel to grant the appeal, revoke the Trial Judgment in the part acquitting the accused of the charges and order a hearing, and in relation to the acquitting part of the Judgment revise the Trial Judgment in terms of the sentencing decision and impose on the accused a sentence pursuant to the CC SFRY.

4. The Defense filed an appeal on the grounds of essential violations of the criminal procedure provisions under Article 297(1)(d) and (k) of the CPC BiH, incorrectly and incompletely established state of facts, violations of the criminal code and the sentencing decision, with a motion that the Judgment be revised and the accused acquitted of charges, or that the Judgment be revoked in its convicting part and a hearing ordered before the Appellate Panel.

5. The defense attorneys for the accused submitted their response to the Prosecution's appeal, with a motion that the appeal be dismissed as ill-founded and the Trial Judgment upheld in its acquitting part.

6. The Prosecution of BiH submitted their response to the defense's appeal, with a motion that the defense attorneys' appeal be dismissed as ill-founded and the Judgment upheld in its convicting part.

7. Having acted pursuant to Article 304 of the CPC BiH, on 23 January 2017 the Appellate Division Panel held a public session in the presence of the Prosecutor of the Prosecution of BiH seised of the case, the accused's defense attorneys and in the absence of the dully summoned accused person. The appellants briefly presented the contents of their respective appeals, and fully stood by their reasons and motions presented therein.

II. GENERAL CONSIDERATIONS

8. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that

respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the judgment, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

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

III. APPEAL FILED BY THE DEFENSE FOR THE ACCUSED

A. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. Standards of Review

10. A Judgment may, pursuant to Article 296 of the CPC of BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297 of the CPC BiH.³

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

³ 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 verdict 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 verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction, h) if, in its verdict, the Court did not entirely resolve the contents of the charge; i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code, j) if the charge has been exceeded, k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict 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 principles of criminal procedure if the Court has

12. Absolutely essential violations of the CPC BiH are specified in Article 297(1)(a) through (k) of the CPC BiH. If the Panel finds any of the substantial violations of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC BiH, revoke the trial judgment, except in the cases provided for in Article 314(1) of the CPC BiH.⁴

13. Unlike absolutely essential violations, relatively essential violations are not specified in the law, but rather exist in situations where the court, during the main trial or in the rendering of the judgment, did not apply or improperly applied a provision of the criminal procedure code, but only if this affected or could have affected the rendering of a lawful and proper judgment.

14. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

2. Essential violation under Article 297(1)(k) of the CPC BiH

(a) Appellate grievances

15. The defense attorney submitted in the appeal that the enactment clause of the convicting part of the Judgment is incomprehensible, and that, as such, it cannot be examined in the part where the Trial Panel indicates that the accused is guilty of the commission of the criminal act under Sections 1-3 of the enactment clause of the convicting part of the Judgment “...*having acted in violation of Article 3(1)(a) and (c) of the*

not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.

⁴Article 314. Revision of the First Instance Verdict: (1) By honoring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the

Geneva Convention relative to the Treatment of Prisoners of War...”. Specifically, the appeal indicates that, in the referenced Sections, the Judgment neither indicated the injured parties’ capacity nor provided any description along this line, on the basis of which it could have been determined whether the person at issue was a prisoner of war. Obviously, the injured party’s status is not determined in the mere enactment clause of the contested Judgment, notwithstanding that it is a crucial essential element of the criminal offense of which the accused is found guilty, wherefore such an enacting clause of the judgment is incomprehensible.

(b) Conclusion of the Appellate Panel

16. Article 290 of the CPC BiH provides for the contents of the judgment, as a formal judicial document. Thus, Paragraph (3) of the referenced article provides that: “[I] *The pronouncement of the verdict shall contain the personal data of the accused and the decision declaring the accused guilty of the criminal offense for which he is charged or the decision acquitting him of the charge of the criminal offense in question or the decision rejecting the charge*”, while Paragraph (4) stipulates that if the accused is found guilty, “*the pronouncement of the verdict must include the necessary data referred to in Article 285 of this Code...*”. Article 285(1)(a) of the CPC BiH provides that, in a guilty verdict, the Court shall pronounce “*the criminal offense for which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offense, and those on which the application of a particular provision of the Criminal Code depends*”. At the same time, Article 227(1)(c) of the CPC BiH strictly provides that the indictment shall contain “*a description of the act pointing out the legal elements which make it a criminal offense, the time and place the criminal offense was committed, the object on which and the means with which the criminal offense was committed, and other circumstances necessary for the criminal offense to be defined as precisely as possible.*”

17. It is obvious from the foregoing that the CPC BiH establishes clear and strict criteria concerning the mandatory contents of a judgment, in particular its enacting clause. A clear and precise enactment clause (pronouncement) of the judgment is crucial for the judgment lawfulness, its proper nature and understanding. For this very reason, any vagueness in the enactment clause raises doubts into the proper nature of the decision itself. Such

facts established, a different verdict must be rendered when the law is properly applied, according to the

omissions by the Court resulted in violations of a number of the accused's rights, primarily the right to a defense and the right to an effective remedy. For all the foregoing reasons, an incomprehensible enactment clause of the judgment is recognized by the law as an absolute violation of the criminal procedure provisions, which results in a revocation of the first-instance judgment. In the process, the judgment will not be revoked because *"of unlawful or incorrect decision, but rather because, in terms of the appellate grievances, it cannot be determined what and how it was decided"*.⁵

18. In the concrete case, the appeal of the accused's defense attorneys justifiably indicated that Sections 1-3 of the convicting part of the Judgment enactment clause do not contain any indications of the crucial elements of the crime while stating that the factual description of the convicting part of the Judgment enactment clause does not contain any elements proving the status of the injured persons as prisoners of war, which is one of the essential elements of the criminal offense of War Crimes against Prisoners of War under Article 144 of the adopted CC SFRY, of which the accused was found guilty. The Appellate Panel concludes that the effect of the referenced omission is that the enactment clause of the contested Judgment is incomprehensible in its convicting part, and that thereby an essential violation of Article 297(1)(k) of the CPC BiH was made.

19. With regard to the foregoing, the appeal justifiably indicated that the issue of the injured parties' status, or whether they were civilians or prisoners of war, is an issue concerning the crucial elements of the crime charged against the accused, since the war crime categorization depends exactly on the status of the injured parties. War crimes cases are blanket offenses by character. Thus, in determining the existence of this crime, a reference should be made to the appropriate blanket regulation, and to all the facts and the circumstances pertaining to a specific case categorized therewith. It is exactly the protected object which makes a difference between the criminal offenses at issue, in such a manner that civilians are the protected object in the criminal offense of War Crimes against Civilians, while prisoners of war are the projected object in the criminal offense of War Crimes against Prisoners of War. Forms of commission of these criminal offenses, the scope of acts and their protection depend exactly on the proper determination of a victim's status. In addition, the appeal also justifiably indicates that the determination of the injured

state of the facts and in the case of violations as per Article 297, Paragraph 1, Item f) g) and j) of this Code.

⁵ Commentary of the Criminal Procedure Code of BiH, Council of Europe and European Commission, 2005. p. 774.

parties' status is also relevant from the aspect of determination of the accused's intent, since his intent must also include the awareness of a victim's status or capacity.

20. In the concrete case, the accused was found guilty of the commission of the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC SFRY, by the acts described in the referenced Sections of the Judgment enactment clause, while the Judgment enactment clause neither specified the injured parties' status, nor pointed to specific circumstances from which the grounds on which the injured parties enjoy protection would have been either obvious, or could have been concluded. Thus, Section 1 of the Judgment enactment clause indicated that the accused ordered that "*prisoner Karlo Marić be taken out into the corridor*"; in Section 2, that "*prisoner Franjo Ramljak be taken outside the detention room of the "Museum of the Battle on the Neretva River"*"; and, in Section 3, that the accused "*took prisoner Marinko Drežnjak out of a shed (...)*", which could involve both a civilian and a war prisoner. This deficiency in the enactment clause of the convicting part of the Trial Judgment becomes even more important considering that the description of facts in certain Counts of the Indictment, of which the accused was acquitted under the contested Judgment, shows that, at the same time, ... civilians, that is, women, children and the elderly, were also imprisoned at the same detention facility - "Museum of the Battle at the Neretva River", along with the referenced prisoners, as described in Section 8 of the acquitting part of the Judgment enactment clause.

21. Since the Judgment enactment clause does not contain a clear conclusion concerning the victims' status, the justifiability of the Trial Panel's finding regarding this decisive fact cannot be examined, despite the fact that the related reasons were provided in the Judgment reasoning. Therefore, the effect of the essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH is the revocation of the convicting part of the Trial Judgment pursuant to Article 315(1)(a) of the CPC BiH in the referenced part and the ordering of a hearing before the Appellate Panel.

22. For the referenced essential violations, whose effect is revocation of the Trial Judgment pursuant to the referenced provisions of the procedural law, the Appellate Panel could not deal with the justifiability of other appellate grievances advanced by the accused's defense attorneys, and the Prosecution's appellate complaint concerning the sentencing. In the explanation of such a decision, the Panel referred to Article 316 of the CPC BiH, and presented only brief reasons for the Judgment revocation in this part. At

the hearing held before the Appellate Panel, it will be decided, pursuant to Article 317 of the CPC BiH, whether certain evidence already tendered in the first-instance proceedings in relation to this part of the Judgment should be presented anew, and once the foregoing deficiencies have been remedied and the other appellate grievances of the accused's defense attorneys considered, a proper and lawful judgment will be rendered in the referenced part.

IV. THE APPEAL FILED BY THE PROSECUTOR'S OFFICE OF BIH

A. VIOLATION OF THE CRIMINAL CODE

1. Standards of Review

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

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

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

(a) Appellate grievances

26. The Prosecution of BiH argues that there is a violation of the criminal code under Article 298(a) of the CPC BiH in relation to Sections 11 and 13 of the enactment clause of the acquitting part of the Judgment because the Trial Panel found, pursuant to Article 284(a) of the CPC BiH, that the factual description of the acts described in Sections 11 and 13 of the Judgment does not contain a description of the effects of the criminal offense. The Prosecution appeal indicated that it is not necessary that the factual description of the criminal offense at issue must literally contain the words used in the

legal description of the criminal offense, particularly the words used in the definitions of certain elements pursuant to the judgments rendered by the International Criminal Tribunal for the Former Yugoslavia (ICTY). The Prosecution argues that it is just sufficient that the act is described in such a manner that the legal elements of the criminal offense ensue from this description, as required pursuant to Article 227(1)(c) of the CPC BiH.

(b) Conclusion of the Appellate Panel

27. The Appellate Panel first recalls that, when it comes to war crimes, as defined by the law, the existence of effects of an incriminating act must be proved in order to establish the existence of a crime, as well as that the finding of such effects is a factual issue, which is being proved on a case-by-case basis. Therefore, the factual description of the acts of commission of these criminal offenses must also contain the elements on the basis of which it was concluded that the prohibited effects indeed occurred. However, as properly indicated in the Prosecution's appeal, it is not necessary to indicate and use the legal wording in the enactment clause of the judgment finding the accused guilty of a war crime, but rather that the factual description of the offense and the acts of commission point to the inevitable occurrence of a concrete effect which is being proved during the proceedings.

28. Notwithstanding the Trial Panel's proper finding that common Article 3 of the Geneva Conventions does not sanction any conduct, or any unlawful act against one's life and physical integrity, but rather just an act by which the prohibited consequence was effectuated, the Trial Panel at the same time fails to examine and determine whether such a prohibited consequence indeed occurred in the concrete case due to the accused's commission of the criminal acts in the manner as described in the Indictment. In para. 256 of the Judgment, the Trial Panel even finds that it could be concluded from the described acts charged against the accused that certain consequences indeed occurred, while indicating, at the same time, that their gravity, in fact, cannot be determined.

29. The Appellate Panel concludes that the Trial Panel thus omitted to conclude, on the basis of both the acts described in the Indictment factual description and the evaluation of tendered evidence, that the prohibited consequence exists, and that the Trial Panel did not properly subsume the established state of facts under the appropriate provisions of the criminal code, while it insisted on an unnecessary formalization of the factual description. The Trial Panel erroneously understood that a finding of the occurrence of a consequence

within the judgment reasoning would lead to essential violations of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH, since the occurrence of effects is a result of the undertaken acts of commission. Therefore, in the Judgment reasoning, the Court must deal with the issue of proving the act of commission and the resulting injury.

30. Therefore, although the factual description contained in Section 11 of the acquitting part of the Judgment enactment clause does not contain legal formulations of the injuries resulting from the undertaken acts, the Appellate Panel concludes that a conclusion could have been drawn from such already described undertaken acts concerning their consequences/effects, namely that the description of the act, in and out of itself, also implies its effects.

31. In view of all the foregoing, the Appellate Panel considers as justified the Prosecution's grievance that the factual description of the criminal offense in Section 11 of the Judgment enactment clause, charging the accused that "*... he lined up the imprisoned persons ..., including Mirko Zelenika, Marinko Ljolje, Miroslav Sokol, and ordered them not to move during the shelling around, and ordered the guards to keep them at gun point, while telling them "if you move, we will kill you, and if you don't move, let them ... kill you"*", is sufficiently concretized that it provided the grounds for the conclusion that the prohibited consequence indeed occurred. The appeal justifiably indicated that the acts at issue are similar to the use of prisoners in a "human shield", when prisoners are exposed to hostile fire, under the threat of death if they opposed such an exposure.

32. In view of the foregoing, the Appellate Panel considers as justified the Prosecution's appellate argument that the Trial Panel erred in finding that all the elements of the criminal offense at issue are not obvious from the factual description of the criminal offense provided in Section 11 of the Judgment enactment clause. According to the Appellate Panel, such Trial Panel's finding resulted in a violation of the criminal code under Article 298() (a) of the CPC BiH.

33. The Appellate Panel emphasizes that, notwithstanding that the Prosecution's appeal indicates that the referenced violation concerns Sections 11 and 13 of the Judgment enactment clause, there was no explanation of the referenced complaint in relation to the incriminating acts in Section 13 of the Judgment enactment clause. Since the Appellate Panel will render its decision only in relation to the presented appellate grounds, arguments and contents, it concludes that the appeal is well-founded only in relation to

Section 11 of the Judgment enactment clause, while dismissing as ill-founded the unreasoned appellate complaints concerning Section 13 of the Judgment enactment clause, so it upheld the Trial Judgment in the referenced part.

B. INCORRECTLY AND INCOMPLETELY ESTABLISHED STATE OF FACTS

1. Standards of Review

34. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. In order for the Appellate Panel to find an error of fact, on the basis of appellate complaints, the Panel will examine if the indicated decisive fact matches the results of tendered evidence, or if it would be otherwise proved had the other evidence been tendered, or other facts indicated in the appeal proved.⁶

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

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

37. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.⁷ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very

⁶ Commentary on the Criminal Procedure Code of Bosnia and Herzegovina, Project of the Council of Europe, Sarajevo, 2005, p. 781.

rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

(a) Appellate grievances

38. In relation to Sections 3, 4, 5 and 6 of the Judgment enactment clause, the Prosecution of BiH's appeal indicates that the Trial Panel did not at all take into account the testimony of the prosecution's witnesses concerning the finding of fact as to whether the accused was present at the time and the place as indicated in the referenced Sections of the acquitting part of the Judgment enactment clause. The Prosecution also submits that, by its position presented in para. 284 of the contested Judgment, the Trial Panel introduced formal evidentiary rules, which is in direct violation of Article 15 of the CPC BiH. The Prosecution argued that all the witnesses examined about the circumstances pertaining to the referenced Sections of the Judgment enactment clause consistently confirmed the decisive facts as well as that their testimony cannot be brought into doubt by the defense's evidence, on whose basis the Trial Panel made an erroneous finding about the accused's alibi.

(b) Conclusions of the Appellate Panel

39. Article 290(7) of the CPC BiH provides that the Court "... *shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence...*". The Court must comprehensively evaluate all pieces of tendered evidence, individually and in combination, and particularly in relation to the opposing evidence. The state of facts can be established merely on the basis of a comprehensive and integral evaluation of evidence.

40. In the Appellate Panel's view, the Prosecution of BiH justifiably indicates, in the concrete case, that the Trial Panel applied an incorrect legally prescribed standard for evaluation of evidence, and derogated from free evaluation of evidence by accepting that any documentary evidence denies the probative strength of the tendered testimonials in its

⁷ M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

finding that *“no documentary evidence, originated in tempore criminis, as in this case, can be contested by any witness’s testimony.”*

41. Free evaluation of evidence is one of the basic principles of criminal procedure, and as such, provided for in Article 15 of the CPC BiH. Accordingly, free evaluation of evidence is carried out on the basis of expert knowledge, general logical rules and professional and life experience, rather than on the basis of the previously established evidentiary rules and the established strength of certain types of evidentiary materials. Therefore, the Trial Panel’s view, that certain documentary evidence cannot be contested by testimonials, is contrary to the essence of the procedural law and this basic principle of the criminal procedure, as justifiably indicated in the Prosecution’s appeal. The Appellate Panel concludes that such an incorrect and unlawful position, in and out of itself, resulted in the Prosecution’s justified contesting of the Trial Judgment, namely Sections 3, 4, 5 and 6 of the acquitting part of the Judgment enactment clause, on the grounds of incorrectly or incompletely established state of facts.

42. Specifically, due to the foregoing position and standard, the evidence tendered by the Prosecution, proving that the accused had indeed undertaken the incriminating acts, was not at all evaluated, which contradicts the defense’s claim that the accused had an alibi in relation to the time and the place of the crime commission. In para. 283 of its Judgment, the Trial Panel finds that the Prosecution did not present valid evidence to contest the accused’s alibi, namely that *“in the present case, on the one hand, the Panel had the Prosecution witnesses’ testimony with regard to the fact that, at the critical time, the accused was present on the Museum premises and participated in the commission of the acts described in Sections 3, 4, 5 and 6 of the acquitting part of the Judgment enactment clause, and, on the other hand, the related Defense’s documentary evidence and the Defense witnesses’ testimony.”* However, the Trial Panel completely failed to evaluate all pieces of the tendered evidence, and thus fully disregarded the testimony of witnesses C, J, I, A, Zenaid Burić, Miroslav Stipanović, Adem Halebić, Karlo Marić, Ivica Azinović, Mile Ravlić, Zvonimir Kukić, Mladen Perić, D and H, and to correlate them with the evidence tendered by the Defense.

43. The Trial Panel should have made a comprehensive assessment of all the evidence tendered by both the Prosecution and the Defense, it should have confronted it and accordingly should have provided clear and concrete reasons, as explicitly required under Article 290(7) of the CPC BiH, particularly because the evidence is contradictory.

According to the Appellate Panel, it ensues from the Trial Panel's omission to do so, solely because certain documentary evidence was tendered in the case record, that the state of facts concerning Sections 3, 4, 5 and 6 of the acquitting part of the Judgment enactment clause was incorrectly or incompletely established. Therefore, pursuant to Article 299(1)(a) of the CPC BiH, the Trial Judgment had to be revoked and a hearing ordered in relation to the referenced part.

44. In relation to Sections 1 and 2 of the Judgment enactment clause, the Appellate Panel concludes that the Prosecution appellate grounds, contesting the correctness of the Trial Panel's finding of the application of the principle of *in dubio pro reo*, are well-founded.

45. Specifically, in relation to the acts described in Section 1 of the acquitting part of the enactment clause, the Trial Panel notes in the contested Judgment that "*there is no dispute that the critical incident had indeed occurred, and that the injured party C sustained injuries. However, the Prosecutions' evidence was not of such a quality so as to enable the Panel to find, beyond a reasonable doubt, that the accused Nihad Bojadžić is indeed the person who committed the referenced criminal offense. Specifically, the Panel finds that, in relation to the decisive facts, the testimony of witness C is not consistent, clear, convincing and corroborated with the other witnesses' testimony*"⁸, as well as that it contradicts witness Branković's testimony, and that "*the Panel could not find beyond a reasonable doubt, solely on the basis of this witness's testimony, that the accused himself did it.*"

46. The Appellate Panel, however, concludes that the Prosecution's appeal justifiably questions the correctness of such a Trial Panel's finding. In addition, this Panel takes into account that, in the reasoning of the contested Judgment, the Trial Panel points to the alleged inconsistencies between the testimony of witness C and witness Sead Branković, as direct eye-witnesses to the critical acts, and notes that they are inconsistent with regard to the essential facts. The trial Panel also notes that, on the critical day, witness C was not interrogated by Sead Branković, namely that there is no related traces in writing, but rather that, on the referenced day, he was interrogated by Ismet Dedajić aka Dedo.

47. Considering, however, that the Trial Panel found that both witness C and witness Sead Branković confirmed that the injured party had been brought for interrogation and

⁸ Trial Judgment, para. 309.

that witness Sead Branković commenced the interrogation of witness C; that shortly thereafter the accused entered the room, along with other persons who escorted him; that thereupon the ill-treatment of witness C started and culminated in the infliction of injury on witness C's upper leg; that witness C clearly stated that the accused had done that; that witness Sead Branković stated that he had seen the accused taking a knife and, a minute later, holding a bloody knife, and ordering witness C to lick the knife; it remains unclear wherefrom the alleged inconsistency regarding the decisive facts is apparent.

48. The Trial Panel also notes that witness C is uncertain with regard to the site where this act took place, whether on the MUP or the Military Police premises, as well as that witness C and witness Sead Branković are inconsistent with regard to the identity of the other person present in the room along with the accused. The Appellate Panel, however, considers as justified the Prosecution's argument that witness C did not live in Jablanica, that he had no knowledge about the institutions and buildings around the town, and that the referenced incident indeed and undoubtedly took place in Jablanica, as found by the Trial Panel. In addition, the Prosecution justifiably indicates that the only substantial inconsistency between the testimony of witness C and that of witness Sead Branković, as interpreted in the contested Judgment, is the name of the Military Police Commander from whom the accused took the knife on the critical occasion, and that it ensues from the testimony of both these witnesses that the accused wounded the injured party.

49. The Appellate Panel observes that the Trial Panel's finding, that the testimony of witness C and witness Sead Branković are inconsistent, was made on the basis of a negative fact, or a non-existent interrogation record, on whose basis it almost fully denied the probative strength of the testimony of the two witnesses, who consistently confirmed exactly the facts that Sead Branković had commenced the interrogation of witness C, that the accused came after a while and immediately started beating and threatening witness C, which ultimately resulted in the infliction of injuries on the injured party. The Trial Panel, however, paid attention to the non-decisive facts, such as the identity of the person who had brought the injured party for interrogation, while disregarding that this happened soon after witness C's capture; that witness C does not know and has no reason to know the structure of the 44th Brigade and the identity of all persons active therein, particularly the time elapsed between these events, and that it is objective and realistic to expect that the witness's memory, concerning less important details, will fade.

50. In addition, there is no explanation of the reasons for which the Trial Panel does

not accept the accused's identification on the basis of witness C's testimony, except for the fact that witness C allegedly stated, upon his arrival in the hospital, that the "prison warden" had injured him. The Prosecution pointed to a number of circumstances on which the positive identification of the accused is based, which in this Panel's view bring into doubt the correctness of the Trial Panel's finding. As indicated in the appeal, witness C was several times in the presence of the accused, who had introduced himself by his full name; the witness provided the accused's description and identified him during the investigation pursuant to Article 85 of the CPC BiH; he remembered the accused's accent, particularly that the accused pronounced the witness's name with an ekavian accent. A particular account had to be taken of the Prosecution's allegation that witness C saw the accused at least on four occasions: first, when the witness was wounded in his upper leg; for the second time, during the exchange at the UNPROFOR base; for the third time at Mujo Honđo's farm; and for the fourth time during the exchange of prisoners ... and

51. The Trial Panel further indicated that witness Sead Branković allegedly protected Ismet Dedajić aka Dedo, while the appeal justifiably observed that there is no indication of any grounds on which the existence of such a friendship, which would motivate witness Sead Branković to attribute to the accused any charges with the intent to protect mentioned Ismet Dedajić, was established. The appeal also justifiably pointed to the contradictions among certain findings of the Trial Panel, including the finding in para. 307 of the contested Judgment, which indicated that the injured party-witness C "*was on the referenced day indeed interrogated by Ismet Dedajić Dedo*", considering the Trial Panel's previous note that the time when the critical incident took place cannot be precisely determined.

52. In view of all the foregoing, the Appellate Panel concludes that the contested Judgment provided several contradicting findings which bring into doubt the proper nature of the established state of facts, and the decision to apply the principle of *in dubio pro reo*, as justifiably indicated in the appeal.

53. In relation to the acts described in Section 2 of the acquitting part of the Judgment enactment clause, the Appellate Panel considers as well-founded the appellate arguments that the Trial Panel did not completely and properly establish the state of facts, but rather formalized the evidentiary materials by taking certain positions, thus derogating in a certain way from the principle of free evaluation of evidence.

54. The assertion in para. 314 of the contested Judgment that the testimony of the injured party-witness C could not be accepted as reliable, consistent and convincing, because it is a single piece of evidence for this Section, and it is not corroborated with any other evidence, leads to formalization of the evidentiary rules, as justifiably indicated in the appeal. Such a generalized evaluation of evidence, by which the findings about its admissibility and validity were made in advance, without addressing the essence of evidence, is contrary to the basic principles of the criminal proceedings, primarily the principle of free evaluation of evidence. Even though it may be just a single piece of evidence tendered in relation to certain acts by which the crime was allegedly committed, the Court is under obligation to thoroughly evaluate this evidence, and on the basis of such an evaluation render and explain its decision. Therefore, the appeal justifiably indicated that the Court's obligation was to present the evaluation of witness C's testimony, to find that it either accepts or not the referenced testimony, and to provide the relevant reasons.

55. Considering the Trial Panel's action in the above described manner, that is, non-compliance with its legal obligation to conscientiously evaluate each item of evidence individually, as set forth in Article 281(2) of the CPC BiH, the Prosecution's appellate complaint, that the state of facts in relation to this Section of the Judgment enactment clause was not properly and completely established, is well-founded. Thus, the Prosecution's appeal had to be granted on the ground of the foregoing legal provision, and the Trial Judgment revoked in relation to the referenced Section, and a hearing ordered.

56. In view of all the foregoing, the Appellate Panel concludes that the Prosecution's appeal concerning Sections 1, 2, 3, 4, 5 and 6 of the acquitting part of the Judgment enactment clause justifiably brings into question the correctness of the established state of facts, which resulted in the Trial Judgment's revocation in the referenced part, and the need to hold a new hearing, since, in the concrete case, it is the only option to remedy the established flaws and deficiencies of the contested Judgment. The referenced deficiencies will be remedied in the reopened proceedings, and, if necessary, the already tendered evidence will be tendered again, pursuant to Article 317 of the CPC BiH, while new evidence will be possibly also tendered after the other appellate arguments have been evaluated.

2. Dismissed appellate grievances

57. The Appellate Panel notes that the Prosecution's appeal did not at all provide any

reasons for its contesting of the Judgment reasons concerning Sections 7, 8, 9, 12 and 13 of the acquitting part of the Judgment enactment clause; although the appeal introduction shows that the acquitting part of the Trial Judgment is being contested in whole. As already indicated above, in paras. 8 and 9 of the present Judgment concerning the general considerations, the Appellate Panel cannot and will not review any arbitrary and unreasoned allegations, while pursuant to Article 306 of the CPC BiH an applicant shall provide clear and concrete reasons, which would be a ground for reviewing the judgment in the part which is being contested. In the absence of such reasons, and with no indication as to the part and the scope in which a decision is being contested, the Appellate Panel cannot review the contested judgment. Therefore, this Panel dismisses as ill-founded the Prosecution's appeal concerning Sections 7, 8, 9, 12 and 13 of the contested Judgment.

58. In relation to Section 10 of the Judgment enactment clause, the Appellate Panel concludes that the Prosecution did not bring into doubt the Trial Panel's findings, namely that it did not justifiably indicate that the Trial Panel's finding, pursuant to which it was not proved beyond a reasonable doubt that the accused indeed committed the incriminating acts described in the referenced Section, did not meet the standard of a reasonable trier of fact.

59. In this regard, the Appellate Panel concludes primarily that the Trial Panel lawfully and properly examined all the evidence concerning the Section at issue, conscientiously evaluated the testimony of the injured party Ilija Kaleb and correlated it with the testimony of the other witnesses who gave evidence about the incident at issue.

60. In this Panel's view, the Trial Panel properly found that witness Ilija Kaleb's testimony cannot constitute a reliable ground for the finding that the accused indeed committed the acts described in Section 10 of the acquitting part of the Judgment enactment clause. The contested Judgment provided clear and concrete reasons for which this witness's testimony was evaluated as inconsistent and contradictory. First, in his testimony, the referenced witness quite differently described when he saw the accused. Thus, he once stated that he had seen the accused for the first time during the days following a surgery on his leg, when two soldiers entered the room, one of whom he had known from the past, and who told him that the other soldier was Nihad Bojadžić. However, as the Trial Panel properly found, this statement significantly differs from the witness's statement that he saw the accused already upon his arrival at the

clinic, when he allegedly prohibited the medical doctor to provide him first aid. In addition, the Trial Panel took into account that, in his previous statements, witness Ilija Kaleb completely differently described the manner in which he had met the accused, but did not mention the critical incident at all.

61. In relation to the appellate grievances pursuant to which the Trial Panel referred to the statements previously given by witness Ilija Kaleb, which by their form do not constitute evidence on which a judgment can be based, the Appellate Panel recalls that, if there is a doubt into lawfulness of any evidence, the parties to the proceedings may point to and object to the lawfulness of each item of evidence individually. If the Prosecution believed that any item of evidence was unlawful, it should have used the referenced possibility in tendering its documentary evidence, and it should have objected to such evidence presentation during the witness's examination. Ultimately, the Prosecution's appeal could have also pointed to unlawfulness in the evidence presentation and the Prosecution could have filed an appeal on the ground of essential violations of the criminal procedure provisions.

62. The Appellate Panel holds that it is important to emphasize that, contrary to the appeal's implications, the contested Judgment was not based on the referenced evidence, or the statement given by witness Ilija Kaleb to the SIS Čapljina, on 7 March 1994. The Trial Panel properly evaluated this statement as indirect evidence, while the decision on this Count of the Indictment was based on a complete and proper evaluation of all the evidence tendered in relation to the charge at issue.

63. The Trial Panel also properly found that no witnesses other than witness Ilija Kaleb confirmed that the accused had threatened him and fired from his pistol, and that no other examined witnesses confirmed that anyone prohibited providing medical assistance to him. All medical personnel from the Jablanica Hospital, who gave evidence in relation to this Section of the Judgment enactment clause (physician Braco Hajdarević, Hospital Director Alija Šuko, nurse Merima Džino), denied that anyone had prohibited that Ilija Kaleb receive medical aid, or that there were any threats and banning that he receives medical treatment, or that anyone wanted to take him away to execute him. Quite contrary to witness Ilija Kaleb's statements, witness Braco Hajdarević clearly stated that he had immediately taken actions to provide him with medical support, and went together with witness Ilija Kaleb to the other room, where he received adequate medical treatment. The Appellate Panel particularly evaluated the inconsistencies between witness Ilija

Kaleb's and Braco Hajdarević's testimony. Thus, witness Ilija Kaleb stated that he was not taken to the other room, while witness Braco Hajdarević described in detail the injured party's health condition, the reasons for which he was transferred to the other room and what kind of medical treatment he received. Obviously, witness Ilija Kaleb was in a special condition at those moments, as a result of the sustained injury, fear and pains he had suffered. It can be expected that these circumstances would affect his perception of the event, and they indeed affected his perception in this case.

64. For the foregoing reasons, the Appellate Panel concludes that the Prosecution's appellate grievances, presenting the contents of the testimony of witness-injured party Ilija Kaleb, and the parts of the contents of the testimony of witnesses Braco Hajdarević, Alija Šuko, E, O, Ivan Jozić, Dr. Zaim Sarić, Zijada Babić and Merima Džino, and the insisting on credibility of the witness-injured party's evidence, did not justifiably bring into doubt the evaluation of evidence and the factual findings of the contested Judgment. Therefore, the appeal concerning Section 10 of the acquitting part of the Judgment enactment clause had to be dismissed as ill-founded and the Trial Judgment upheld in relation to this Section.

V. CONCLUSION OF THE APPELLATE PANEL

65. Having made the above referenced findings in relation to the convicting part of the Judgment enactment clause, the Trial Panel made essential violations of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH on all the grounds presented in paras. 16-23 of this Judgment. For the referenced essential violation, which pursuant to Article 315(1)(a) of the CPC BiH results in a revocation of the Trial Judgment, and the ordering of a retrial, the Appellate Panel did not evaluate the justifiability of other appellate grievances Article 296, Sub-paragraphs b), c) and d) of the CPC BiH, to which the defense pointed, since it would be in prejudice of the outcome of the reopened proceedings. Therefore, the Appellate Panel provided just brief reasons for its revocation pursuant to Article 316 of the CPC BiH. In addition, having granted the Prosecution's appeal in relation to the acts described in Sections 1, 2, 3, 4, 5, 6 and 11 of the acquitting part of the Judgment enactment clause, the Appellate Panel concluded that it is necessary to revoke the Trial Judgment also in this part, and order a hearing pursuant to Article 315(1)(b) of the CPC BiH.

66. The essential violations of the criminal procedure provisions will be remedied in a

hearing before the Appellate Panel which will, pursuant to Article 317 of the CPC BiH, evaluate the other appellate arguments and, if necessary, adduce new evidence, and thereupon render a new judgment based on the law.

67. In relation to the acquitting part of the Trial Judgment enactment clause, its Sections 7, 8, 9, 10, 12 and 13, in relation to which the Appellate Panel dismissed the Prosecution's appeal as ill-founded, the Trial Judgment was upheld pursuant to Article 313 of the CPC BiH.

68. In view of the foregoing, and pursuant to Article 310(1) and (2), as read with Articles 313 and 315 of the CPC BiH, it was decided as stated in the Judgment enactment clause.

Record-taker
Legal Advisor
Belma Čano-Sejfović

PANEL PRESIDING
JUDGE
Tihomir Lukes

LEGAL REMEDY NOTE: No appeal lies from this Judgment.