

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине
Court of Bosnia and Herzegovina

Case No. S1 1 K 016464 17 Kžž

Delivered on: 9 March 2017

Before the Third Instance Panel composed of Judges:

Mirza Jusufović, Panel Presiding
Dr. Miloš Babić, Reporting Judge
Mirko Božović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the accused Jasmin Čoloman

THIRD INSTANCE JUDGMENT

Prosecutor's Office of Bosnia and Herzegovina:

Mr. Ivan Matešić

Counsel for the accused

Mr. Senad Dupovac, Attorney

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Sarajevo, 9 March 2017

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, the Third-Instance Panel of the Appellate Division composed of Judge Mirza Jusufović, as the Panel Presiding, and judges Dr. Miloš Babić and Mirko Božović, as members of the Panel, with the participation of the legal officer Ena Granić Čizmo, as the record-taker, in the criminal matter against the accused Jasmin Čoloman, charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the Criminal Code of BiH, as read with Article 29 and Article 180(1) of the same Code, deciding upon the appeal filed by counsel for the accused Jasmin Čoloman, attorney Senad Dupovac, from the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 016464 16 Kžk of 23 September 2016, after the Panel session held in the presence of the Prosecutor of the Prosecutor's Office of BiH, Mr. Ivan Matešić, the accused Jasmin Čoloman, and his defense attorney, Mr. Senad Dupovac, pursuant to Article 310(1), in connection with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina, handed down the following

J U D G M E N T

dismissing as ill-founded the appeal filed by counsel for the accused Jasmin Čoloman, and **upholding** the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 016464 16 Kžk of 23 September 2016.

REASONING

I. PROCEDURAL HISTORY

A. SECOND-INSTANCE JUDGMENT

1. The Second-Instance Judgment of the Court of Bosnia and Herzegovina (the Court of BiH), No. S1 1 K 016464 16 Kžk of 23 September 2016, found the accused

Jasmin Čoloman guilty of committing, by the acts described in the contested Judgment enactment close, the criminal offense of War Crimes against the Civilian Population under Article 142(1) 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 SFRY^[1] - killings and violation of bodily integrity, as read with Article 22 (Complicity) of the same Code, and imposed on him a sentence of imprisonment for a term of 3 (three) years pursuant to Articles 33, 38, 41 and 42(2) of the CC SFRY.

2. Pursuant to Article 50(1) of the CC SFRY, the Second-Instance Panel credited towards the imposed sentence the time the accused spent in pre-trial custody, running from 25 June 2014 through 31 October 2014.

3. Pursuant to Article 188(4) of the CPC BiH, the same Judgment relieved the accused of the obligation to reimburse the costs of the criminal proceedings, which will be paid from within the budget appropriations of the Court of BiH.

B. APPEALS AND RESPONSES

4. The referenced Judgment was appealed by Mr. Senad Dupovac, defense attorney for the accused Jasmin Čoloman, on the grounds of incorrectly and incompletely established facts, with a motion that the Third-Instance Panel of the Court of BiH grant the defense's appeal, revoke the judgment of the Second-Instance Panel and uphold the First-Instance Judgment.

5. The Prosecutor's Office of BiH submitted their response to the appeal filed by the accused's counsel and proposed that the appeal be dismissed as ill-founded, and the contested Judgment upheld in whole.

6. On 9 March 2017, the Third-Instance Panel held a session pursuant to Article 304 of the CPC BiH. During the session, the accused's counsel briefly presented the grounds

^[1] The Decree with the force of law concerning the application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia which was adopted as the republic law effective at the time of imminent danger of war, or the state of war (Official Gazette of the RBiH, No. 6/92) and the Law on Confirmation of Decrees with the Force of Law (Official Gazette of the RBiH, No. 13/94).

of the appeal and completely stood by his appeal filed in writing. On the other hand, the Prosecutor briefly referred to counsel's arguments, and also completely stood by his written response to the appeal.

7. Having reviewed the contested Judgment within the appellate arguments and complaints, pursuant to Article 306 of the CPC BiH, the Third Instance Panel rendered the decision as stated in the enactment clause for the reasons that follow:

II. GENERAL CONSIDERATIONS

8. Before elaborating on each appeals grievance, the Third-Instance Panel notes the appellant's obligation, under Article 295(1)b) and c) of the CPC BiH, to state in each appeal both the legal grounds to challenge the verdict and the reasoning to support the well-foundedness of the appeals grievance.

9. Since the Third-Instance Panel, pursuant to Article 306 of the CPC BiH, reviews the verdict only within the bounds of the appeal, it is the appellant's obligation to draft the appeal in a clear and specific manner, so it can serve as a basis for reviewing the verdict.

10. In that regard, the appellant must specify the grounds of appeal based on which to challenge the verdict, specify which part of the verdict, evidence or court procedure the appeal challenges, and state a clear and a well-argued reasoning with which to support the appeals grievance.

11. Raising grounds of appeal in a general across-the-board manner only, as well as pointing to alleged irregularities during the second-instance proceedings without specifying which grounds of appeal the appellant invokes, does not constitute a sufficient basis for reviewing the second-instance verdict. It is for these legally defined reasons that the Third-Instance Panel refused as ill-founded the unreasoned and unclear appeals grievances.

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

A. STANDARDS OF REVIEW

12. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel, and by extension also the Third-Instance Panel, is one of reasonableness.

13. The Appellate Panel, and the Third-Instance Panel as well, 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.

14. In determining whether or not the Appellate Panel's conclusion was reasonable, the Third-Instance Panel shall start from the principle that findings of fact by the Appellate Panel should not be lightly disturbed. The Third-Instance 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 Appellate Panel. Thus, the Third-Instance Panel must give a margin of deference to a finding of fact reached by the Appellate Panel.

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

16. Article 299 of the CPC BiH defines when a verdict may be challenged due to erroneously or incompletely established facts. Decisive facts are established directly by way of evidence, or indirectly from other facts (indicia or control facts). Only those facts that are included in the verdict may be considered existent, and regardless of the fact that decisive facts exist the verdict must always contain reasons concerning their existence, or otherwise there can be no established state of facts (incompletely established state of facts). If a decisive fact has not been established as it indeed existed in the reality of an

event, then we can speak of an erroneously established state of facts.

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

18. The Third-Instance Panel shall give an evaluation of whether the facts were erroneously established in relation to the facts and findings the defense pointed to in the appeal. As previously stated, such an evaluation requires the implementation of a criterion under which all appeals grievances will be considered and a decision made as to whether the particular decisive fact follows from the evidence adduced.

1. The appeal filed by the accused Jasmin Čoloman

19. The appeal primarily indicated that the witnesses/eye-witnesses presented different views on the essential facts in the case, and that no witness fully confirmed the witness Refik Mujezinović's statement, wherefore the defense concluded that both the Indictment itself and the Appellate Panel's judgment were based exclusively on this witness's evidence.

20. In that context, the defense's appeal indicates that they have repeatedly pointed to the substantial inconsistencies in the statements of certain witnesses, and that the Appellate Panel erroneously evaluated the accused Čoloman's identification. Counsel specifically submitted that his client's identification and his view of the moment and the site of the crime commission are the most important issues in the entire proceedings. Along this line, Counsel concluded that the Trial Panel clearly and precisely explained its

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

evaluation regarding the witnesses “A”, Nedžad Sivro, Refik Mujezinović and the witnesses-injured parties, on the basis of which a judgment of acquittal was rendered.

21. Thus, the appeal stated that the Trial Panel properly pointed to the deficiencies in the accused’s identification by Nedžad Sivro and Refik Mujezinović, and presented the two witnesses’ different views of the persons who had taken part in the incriminating act, in addition to the differences in the mere description of the development of the criminal act and the number of persons who had arrived and their descriptions, which were provided by witness Mujezinović, the witness A (who was granted protective measures), and the injured parties themselves, Štefica, Sofija and Ana Brković, and Ante Papić. The appeal ultimately developed a theory that, indisputably, at the end of the evidentiary proceedings related to the tragic event, the Court did not find the number of attackers, the means by which they had arrived, the clothing they were wearing, persons who were present, who fired and where they went afterwards, wherefore the only possible decision was to render a judgment of acquittal.

22. Counsel further referred to the evidence of the witnesses who had confirmed the accused Čoloman’s alibi. According to the appeal, witness Zihret Avdić resolutely stated that he and the accused were members of the same unit, and therefore concluded that no one from his unit took any part in the event at issue charged under the Indictment. Counsel also referred to the evidence given by witnesses Narcis Drotić and Šemso Spahić. Counsel indicated that witness Spahić confirmed he had heard that a person nicknamed “Roky” was correlated with the criminal event, but ruled out that any member of the 7th Muslim Brigade, which the accused also belonged to, had anything to with it.

23. Ultimately, by indicating that B.F. testified directly before the Appellate Panel, from whose responses it was clear that the investigation concerning the event at issue was carried out just in relation to the Refik Mujezinović’s questioning, by whose statement nothing was changed considering that the deficiencies still existed in the accused’s identification by Nedžad Sivro, as well as the inconsistencies between the witness Mujezinović’s statement and those of the other witnesses, the defense concluded that it remains unclear how any judgment other than that rendered in the trial proceedings could be rendered, namely the judgment which certainly should not have been rendered on the basis of the imprecise and suspicious statements.

(a) Findings of the Third-Instance Panel

24. Having considered the defense's appellate grievances indicating that the facts in the contested judgment were incorrectly and incompletely established, after a comprehensive analysis of the contested judgment contents and the case record review, the Third Instance Panel found that the defense's grievances are ill-founded, and that the contested Judgment contains valid and acceptable reasons for all decisive facts on whose basis the judgment of conviction was rendered.

25. It should be noted here that the Third Instance Panel will address the appellate grievances of substantial significance. This Panel will present its disagreement or agreement with the conclusions of the Second-Instance Panel, in the manner that it will incorporate or point in its decision to the reasons and the explanations of the Second-Instance Panel, which is in compliance with the ECHR case law and positions.²

26. This Panel primarily observes that the accused Čoloman's counsel also advanced the identical appellate grievances during the proceedings before the Second-Instance Panel, in relation to which the contested Judgment provided sufficiently clear and precise conclusions, and supported them with arguments, which are also upheld by the Third-Instance Panel for the reasons that follow.

27. Truly, the accused Čoloman's identification in terms of the place and the time of the crime commission is the most important issue in these proceedings, as emphasized in the Counsel's appeal. However, contrary to his grievances, the Third-Instance Panel found that the foregoing was proved beyond a doubt by both the evidence of Refik Mujezinović, who was best positioned to confirm the accused's identity, and the other witnesses' evidence, primarily those of Nedžad Sivro and the witness "A", as well as the evidence given by the injured party themselves, whose evidence, in whole, constitutes a unique basis for the conclusion that, in the concrete case, Jasmin Čoloman was indeed a participant in the criminal event.

28. In order to make his theory a success, the defense attorney tried, in different ways, to discredit the foregoing witnesses' evidence, primarily by continually pointing to

² See, ECHR, *Garcia Ruiz v. Spain*, 1999-I, 31 EHRR589 GC; ECHR, *Helle v. Finland*, 1997-VIII, 26 EHRR 159; ECHR, *Lindner and Hammermayer v. Romania*, HUDOC (2002).

the alleged inconsistencies in their evidence concerning the accused's description, the mere number of persons who took part in the event, the position of weapons at the moment of the conversation with Refik Mujezinović and other details, and ultimately by the attempt to present the accused's identification by Nedžad Sivro as unlawful. However, counsel disregarded the crucial fact that all the referenced witnesses supported each other's evidence, regardless of their inconsistencies which are both acceptable for this Panel and normal for the present moment, whereby they create a closed circle of evidence, as a result of which a decision beyond a reasonable doubt was rendered.

29. Along this line, the Third-Instance Panel primarily observes that the Second-Instance Panel provided a comprehensive analysis of the witness Refik Mujezinović's credibility. In evaluating the admissibility of the referenced witness's evidence, the Second-Instance Panel quite correctly reviewed the relevant factors concerning the accused's identification by this witness. Thus, the Second-Instance Panel took into account the situation in which the witness saw the accused, and examined if there were any specific obstacles for which the witness was not able to obtain a good view of him, and whether the witness gave different identification-related statements during the investigation and at the main trial. The Second-Instance Panel ultimately draw the following conclusion, which is also upheld by this Panel:

“Having applied the referenced factors to the concrete evidence, the Panel concluded that, on the critical day, witness Refik Mujezinović was the only person who had spent a longer period of time with the perpetrators of the criminal acts at issue; that he transported them by his own vehicle (and left) in front of the Dom building; that, having heard a burst of fire, he went back to the village of Vrhovine; and that, therefore, there is a great likelihood that he was in a situation to identify the perpetrators, that is, to have a good view of the accused, considering that, on the referenced occasion, there were no obstacles which would prevent him from doing so. The witness identified the accused during both the investigation and the main trial, while the fact that the witness stated in the courtroom that *he thinks it is him* cannot be considered as a decisive uncertainty for a conclusion that he did not identify him. These statements were primarily evaluated from the aspects of evaluation of all the circumstances pertaining to the concrete event and the witness's realistic ability to identify the accused, as well as in correlation with the other corroborative evidence.” (para. 57 of the contested Judgment)

30. In his foregoing appellate grievances, counsel paid due attention to the attempt to discredit the witness by pointing to certain different parts of the evidence given by

witnesses “A” and Nedžad Sivro. This was not successful, according to this Panel, considering that the analysis of the contested Judgment showed beyond a doubt that the defense’s approach to these witnesses’ evidence was partial, and that the defense exclusively indicated the parts of their evidence which could corroborate its theory, but disregarding their decisive parts which indeed confirmed Refik Mujezinović’s evidence. Therefore, this Panel considers as particularly indicative the facts that both Refik Mujezinović and witness “A” confirmed that, on the critical occasion, two soldiers had been undoubtedly present, and that the fact emphasized by the appeal, that Nedžad Sivro saw just one (soldier), does not support the inconsistencies in the witnesses’ evidence, considering that witness Sivro personally, as properly noted by the Second-Instance Panel, confirmed his presence during only one part of the conversation ongoing between Mujezinović and the soldier at issue. The foregoing points to the conclusion that the other soldier had already sat in Refik’s car, which contests the defense’s allegation concerning an unidentified number of persons. In addition, the Third Instance Panel finds that the fact more important than the foregoing is the fact that, in his statement, witness Sivro identified a person age 18-20, which clearly points to a young adult. This further confirms that it was exactly the accused Čoloman, considering that there is no doubt that, at the critical time, he was age 17. In addition, the defense’s grievances concerning the inconsistencies between the witness Mujezinović’s and the witness “A”’s evidence, concerning the issue of whether witness “A” went *up or down*, and whether the witness “A” should pass by Mujezinović’s car after the event commission, are not decisive inconsistencies, in both this Panel’s and the Second-Instance Panel’s view, considering the circumstances under which the critical event took place, the dynamics of the event development, the fact that no witness could have had a complete overview of all the events at any moment, and the mere nature of the event, while all persons were in a certain state of fear and uncertainty, namely witness Mujezinović, who had driven the accused Čoloman and other unidentified soldier under threats, and witness “A”, who was ordered by the referenced persons under fire arms to get the key of the Dom building.

31. In relation to the procedure of the accused Čoloman’s identification by witness Nedžad Sivro, which is also a defense’s attempt to ultimately bring into question the established facts, it is important to emphasize that, at this point, giving any related and more comprehensive explanation is irrelevant considering that the contested Judgment has sufficiently addressed this issue in its paras. 61-65. The statement concerning the (accused’s) facial appearance remembered by the referenced witness is particularly

significant for this Panel, and it cannot be devaluated just by the appellate grievance pointing to possible deficiency of the repeated identification. Obviously, it is not of such intensity that it can render the procedural activity carried out as completely unlawful. In finding the foregoing, the Third-Instance Panel referred to the facts that the witness had identified the accused already during the investigation after being presented with a number of photos, and that he signed certain photos at the time. Therefore, the fact that the same photos were presented, and that even some of them were already signed, cannot discredit this identification procedure, or the confirmation of the accused's identification, particularly taking into account the above referenced fact concerning the witness's memory (see paras. 63 and 64 of the contested Judgment).

32. Also irrelevant are the grievances of the accused's counsel by which he attempts to contest the accused's undoubtful identification by alleging the inconsistencies in the accused's description by the witnesses-injured parties, while in para. 77 of the contested Judgment, the Second-Instance Panel itself indicated the following:

“It is quite likely that, while being in a state of shock and enormous fear after the door had opened, the injured parties-survivors saw quite different persons at the door, and that the Panel's conclusion concerning the perpetrators' physical appearance was based on the statements of witnesses Mujezinović, Sivro and “A”.

It is obvious from the foregoing that the Second-Instance Panel was also mindful of the injured parties' condition, that at those moments of being in fear for their own lives they certainly were not able to memorize the tiniest details of the faces they saw, and that, at the critical time, all injured parties had already been at their older age.

33. Ultimately, no conclusion other than that reached by the Second-Instance Panel can be drawn from the appellate grievances pointing to the evidence given by witnesses Šemso Spahić and Zihret Avdić. As also indicated by the Second-Instance Panel, this is so considering that, at the critical time, witness Šemso Spahić was not present at Počulica, while witness Zihret Avdić was not able to give any reliable statement about the referenced witness because he only subsequently obtained the information related to the referenced event. Contrary to the foregoing, however, this Panel holds that witness B.F. nevertheless provided certain information which led to the final decision, namely that, at the critical time, units of the 7th Muslim Brigade were present in the Vrhovina and Prnjavor areas, that their members interned the Croat civilians at the Dom facility, and the accused Čoloman was

undoubtedly a member of such units. Thus, in view of all the evidence and the facts, a conclusion can be drawn beyond a doubt concerning the accused's role as a perpetrator of the criminal act at issue.

34. Based on all the foregoing, the Third-Instance Panel concludes that the facts established by the Second-Instance Panel were not brought into question by any grievance, wherefore they are also completely upheld by this Panel.

IV. SENTENCING

A. STANDARDS OF REVIEW UNDER ARTICLE 300 OF THE CPC BiH

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

36. The decision on sentence may first be appealed on the grounds that the Appellate Panel failed to apply the relevant legal provisions when fashioning the punishment. However, the Third-Instance Panel will not revise the decision on sentence simply because the Appellate Panel failed to apply all relevant legal provisions. Rather, the Third-Instance Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Third-Instance Panel is satisfied that such a miscarriage of justice resulted, it will determine the correct sentence on the basis of Appellate Panels factual findings and the law correctly applied.

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

38. In particular, the appellant must demonstrate that the Appellate Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to

relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Appellate Panel's decision was so unreasonable or plainly unjust that the Third-Instance Panel is able to infer that the Appellate Panel must have failed to exercise its discretion properly. The Third-Instance Panel recalls that the Appellate Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Third-Instance Panel is satisfied that the Appellate Panel has considered such circumstances, the Third-Instance Panel will not conclude that the Appellate Panel abused its discretion in determining the appropriate sentence.

1. The appeal filed by counsel for the accused Jasmin Čoloman – extended effect of the appeal

39. The appeal filed by the accused Čoloman's counsel does not contain any legal grounds or reasoning contesting the criminal sanction imposed on him under the Second-Instance Judgment. However, since Article 308 of the CPC BiH explicitly provides for the extended effect of the appeal, namely that an appeal on the ground of incorrectly or incompletely established facts filed in favor of the accused shall thereby also contain an appeal on the ground of a criminal sanction, the Third Instance Panel has addressed this appellate ground also in favor of the accused.

(a) Findings of the Third-Instance Panel

40. Having reviewed the decision on sentence, the Third Instance Panel found that the Second-Instance Panel considered as extenuating and mitigating certain circumstances pertaining to the concrete case, which had to be evaluated in terms of Article 41 of the CC SFRY as the circumstances relevant to fixing the punishment for the accused.

41. Along this line, the Second-Instance Panel evaluated the manner of the act commission, namely the fact that the accused participated in the commission of the criminal act as a co-perpetrator with direct intent, as well as the "gravity of the protected value", namely that helpless and previously imprisoned civilians were deprived of their lives on the critical occasion, while the survived civilians suffered from violations of bodily integrity as a result of the injuries inflicted upon them. All the referenced circumstances constitute the underlying elements of the criminal offense of War Crimes against the Civilian Population, and, in the concrete case, they were not established as the

aggravating circumstances. According to this Panel, such a position of the Second-Instance Panel in the evaluation and validation of the referenced circumstances is ill-founded, because the circumstances constituting the elements of a crime can also be exceptionally validated as aggravating if they appear in an extent larger than that required for the existence of a particular criminal offense, such as in the concrete case. Specifically, the Second-Instance Panel itself indicated that the victims were “helpless, previously imprisoned civilians”, mostly the elderly; that three civilians were deprived of their lives; that severe bodily injuries were inflicted upon nine civilians, which is a high degree of violation of the protected value which exceeds the extent required for the existence of this criminal offense, because it also exists when, e.g., only one person sustains bodily injuries if this was committed in violation of the rules of international law at the time of war, armed conflict or occupation, all of which exists in the present case. In addition to the foregoing facts, the commission of this crime is also characterized by both a special motive which includes retaliation and the special manner of its commission, which includes both the random shooting at the imprisoned and helpless civilians and in complicity. They are not the legal elements of this criminal act, but certainly they are aggravating by their character, which the Second-Instance Panel did not take into account. Therefore, the Second-Instance Panel overlooks or neglects the fact that, pursuant to its legal description (in both the CC SFRY and the CC BiH), this criminal offense has several alternative forms, of which the gravest one is exactly the one that involves killings of civilians (which is why it is put first in the definition: “murder, torture, inhuman treatment.....”, etc.). Therefore, the Court should fix the punishment towards the upper limit of the prescribed punishment, which is quite logical and which is being regularly done in the case law (a minimum prescribed punishment is intended for less severe forms of the offense, such as are, e.g., forcing into service in the hostile administration or its spy service, willful destruction or appropriation of the property, etc., rather than for this form of the offense).

42. On the other hand, considering the nature of the criminal offense at issue and the evaluated circumstances character (extenuating), it is quite unreasonable to evaluate in the concrete case the accused’s past life and personal circumstances as particularly extenuating circumstances, and reduce the accused’s punishment below the statutory minimum. The circumstances indicated by the Second-Instance Panel in the contested Judgment reasoning as particularly extenuating circumstances are the fact that the accused had a difficult childhood; that he grew up without parents; that his mother left him while he was still a baby; that as a very young man of age 17 he became a member of

military formations and took part in the war activities; that he has no prior convictions. On the basis of the referenced circumstances, the Second-Instance Panel reduced the accused's punishment, although they have no particular functional relevance to the nature and commission of the concrete crime, particularly considering the accused's motivation, the circumstances under which the crime was committed, and the manner in which the acts of killing and injuring of the imprisoned civilians were carried out.

43. In addition, this Panel finds that the evaluation and validation of all the foregoing circumstances in the case at issue (both the aggravating and the extenuating ones), significantly departs from the Court of BiH's practice in the evaluation of such and similar circumstances, and in the selection of type and length of punishment for the criminal offenses against international humanitarian law prosecuted before this Court.

44. However, since the prosecution in the concrete case filed no appeal, the foregoing is just an observation by this Panel, wherefore the punishment imposed on the accused remains unaltered. This also means that the defense's appellate grievances contesting the imposed punishment (extended effect of the appeal) are dismissed as ill-founded. In addition, This Panel observes that the maximum prescribed punishment pursuant to the CC SFRY (which was applied to the present case) for this criminal offense (Article 142 of the CC SFRY) is not 20 years, as indicated in the contested Judgment reasoning, but 15 years, because no sentence of imprisonment for a total term of 5-20 years could have been imposed for the referenced criminal offense (the CC SFRY did not provide for a punishment of 16,17,18 and 19 years in prison), but rather only a prison sentence up to 15 years or a death penalty.

44. Ultimately, this Panel also observes that, considering that the Second-Instance Panel prosecuted an adult for an offense which he had committed as a minor (young adult), in imposing the criminal sanction it failed to apply Article 81(4) of the CC SFRY, which reads as follows: *"As an exception to the provision set forth in paragraph 3 of this article, in lieu of juvenile custody the court may sentence of imprisonment or impose a suspended sentence on an adult who was aged 21 or more at the time of the trial. Regarding rehabilitation, deleting the sentence and legal consequences of the sentence, the sentence of imprisonment in this case has the same legal effect as a juvenile custody sentence."*

41. In view of the foregoing, and pursuant to Article 310(1), as read with Article 313 of

the CPC BiH, it was decided as stated in the enactment clause of the Judgment.

RECORD-TAKER
Ena Granić Čizmo

PANEL PRESIDING
JUDGE
Mirza Jusufović

LEGAL REMEDY NOTE: No appeal lies from this Judgment.