



COURT OF BOSNIA AND HERZEGOVINA

Case No: X-KRŽ-07/330
Date: Delivered 16 June 2011
Sent to the Parties 22 July 2011

Before: Judge Azra Miletić, Presiding
Judge Dragomir Vukoje
Judge Carol Peralta

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ZDRAVKO MIHALJEVIĆ

SECOND INSTANCE VERDICT

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

Slavica Terzić

Defense Counsel for the Accused:

Atty. Slavko Aščerić

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, Appellate Division Panel comprised of Judge Azra Miletić, as the Presiding Judge, and Judges Dragomir Vukoje and Carol Peralta, as the Panel members, with the legal advisor Melika Murtezić participating as the record taker, in the criminal case against the Accused Zdravko Mihaljević for the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c) and (e) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH) in conjunction with Article 29 of the CC of BiH, in relation to the amended indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-44/07 dated 14 March 2011, following the deliberation on the guilty plea and the sentencing hearing, held in the presence of the Prosecutor of the Prosecutor's Office of BiH, Slavica Terzić, Accused Zdravko Mihaljević and his Defence Counsel, attorney Slavko Aščerić, on 16 June 2011 pronounced the following:

VERDICT

Accused:

ZDRAVKO MIHALJEVIĆ aka Pijuk, son of Mate and Kata, maiden name Tuka, born on 27 June 1964 in Sarajevo, PIN 2706964172002, resided in Čizma at No. 17, Kiseljak, Croat, caterer by occupation, literate, high school qualifications, national of BiH and the Republic of Croatia, married, father of three children – two minor and one full-age, completed his military service in 1983 in Šabac, registered in the Kiseljak military records, convicted by the Basic Court in Kiseljak under the Verdict No. K-210/87 dated 20 April 1988 for the criminal offence Petty Theft, Embezzlement or Fraud in violation of Article 159(1) of the Criminal Code of SR BiH, **was placed in custody on the 3rd of August 2006 by a Decision of the Court of BiH No. X-KRN/05/68 dated the 4th of August 2006. An order of the Court of BiH No. X-KR/07/330 of 9 November 2007 released the Accused from custody and other prohibitive measures were imposed upon him and he is, currently, at liberty.**

IS GUILTY

Because:

During the war in Bosnia and Herzegovina and at the time of the armed conflict in Kiseljak between the Croat Defence Council on the one side and the Army of the Republic of Bosnia and Herzegovina on the other side, on 12 June 1993, in the territory of the Kiseljak municipality, in the village of Tulica, as a member of the Special Purpose Unit '*Maturice*' operating within the *Josip Ban Jelačić* Brigade falling within the Operations zone III of the Kiseljak Croat Defence Council, under the command of Ivica Rajić, acted in contravention of the rules of international humanitarian law, thus violating Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which prohibits violence to life, health, or physical or mental well-being of persons, in particular murder, as well as inhumane treatment, torture of any kind, so that he:

On 12 June 1993, following an artillery attack by HVO units on the place of Tulica, Kiseljak Municipality, together with other members of the

HVO and the Special Purpose Unit Maturice, armed with an automatic rifle, took part in an infantry attack on the place of Tulice, during which other members of the HVO killed Sifa Tulić, Safija Tulić and Fatima Bajraktarević, and then after they took control of Tulice, he, together with other soldiers, captured and rounded up most of the Bosniaks from Tulica in front of Mujo Bajraktarević's house, where he shot an old man by the name of Salko Bajraktarević with the weapon he carried, and then ordered the Bosniak men to separate from the women, after which he escorted a group of over 30 men, along with several other soldiers, to the local graveyard in Tulica, knowing that some of them would be killed, and when they reached the graveyard the men were ordered to line up, which they had to do, because he, as well as the other soldiers were in uniform and armed with automatic rifles, and the men were ordered to step out of the line, after which they were shot at point blank range from automatic rifles, in which way the following seven men were killed, namely: Aziz Huseinović, Zijad Huseinović, Refik Huseinović, Mufid Tulić, Kasim Huseinović, Safet Katkić and Ahmed Bajraktarević and, following the murder of those seven men, the rest of the men were ordered to get inside of the TAM vehicle by which all of them, except for Ibrahim Jahić, were taken to the Kiseljak barracks and imprisoned,

Whereby the Accused Zdravko Mihaljević committed the criminal offence of War Crimes against Civilians in violation of Article 142(1) of the Criminal Code of SFRY, which is, hereby, being applied, pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia in conjunction with Article 22 of the Criminal Code of SFRY.

Therefore, with the application of Articles 38 and 41 of the Criminal Code of SFRY, this Court

SENTENCES THE ACCUSED

TO A PRISON SENTENCE OF 6 (SIX) YEARS

In terms of Article 50 of the Criminal Code of SFRY, the time that the Accused has already spent in custody, beginning from the 3rd of August 2006 to the Decision of the Court of BiH No. X-KRN/05/68 dated the 4th of August 2006 and the time spent in custody following decision No. X-KRZ-07/330 of the 16th of June 2011 until the referral to serve the sentence shall be credited towards the term of six (6) years of imprisonment.

Pursuant to Article 188(4) of the Criminal Procedure Code of BiH, the Accused is relieved of the duty to reimburse the costs of the criminal proceedings.

Pursuant to Article 198(2) of the Criminal Procedure Code of BiH, the injured parties Zilha Huseinović, Džafer Huseinović, Beda Delić, witness A, witness C, Senad Bajraktarević, Asim Hasić, Halil Bešić and Avdija Bajraktarević, are instructed to take civil action to pursue their claims under property law.

I. REASONING

A. PROCEDURAL HISTORY

1. Under the Verdict of the Court of BiH No. X-KR-07/330 dated 16 April 2008, the Accused Zdravko Mihaljević was acquitted of the charges for the criminal offence of Crimes against Humanity in violation of Article 172(1)(h), in conjunction with Articles (a), (e), (f), (i) and (k) of the CC of BiH.

2. The Verdict was timely appealed by the Prosecutor's Office of BiH who requested the Appellate Panel to revoke the First-Instance judgment and schedule a trial. This appeal was upheld, the Verdict of the Court of BiH was revoked by a decision issued on 26 March 2009 of the Appellate Panel and a trial was scheduled before it.

3. On the 21st of March 2011, the Prosecutor's Office of BiH submitted the Amended Indictment, No. KT-RZ 44/07, dated 14 March 2011, under which the Accused Zdravko Mihaljević is charged with the criminal offence of War Crimes against Civilians in violation of Article 173(1) subparagraph (c) and (e) of the Criminal Code of BiH in conjunction with Article 29 of the same Criminal Code. A Plea Agreement, dated the 14th of March 2011, concluded between the Accused and the Prosecutor of the Prosecutor's Office of BiH in terms of Article 231 of the Criminal Procedure Code of BiH, was served with the Indictment.

B. PLEA AGREEMENT

1. Amended Indictment

4. The Accused Zdravko Mihaljević has pleaded guilty to the criminal offence of War Crimes against Civilians in violation of Article 173(1)(c) and (e) of the Criminal Code of BiH in conjunction with Article 29 of the same Code in the manner and under the circumstances described in the operative part of the Amended Indictment No. KT-RZ-44/07 dated 14 March 2011.

5. The Appellate Panel must, first, examine whether the Amended Indictment is, truly, an amended one in terms of Article 275 of the Criminal Procedure Code of BiH.

6. Article 275 of the CPC of BiH prescribes that:

“If the Prosecutor evaluates that the presented evidence indicates a change of the facts presented in the indictment, the Prosecutor may amend the indictment at the main trial. (...) In this case, the indictment shall not be confirmed.

In terms of this legal provision, the initial and the amended indictment must match one another in terms of the basic elements comprising the criminal offences concerned. The changes are to be limited to the subjective and objective identity as specified under Article 280 of the CPC BiH.¹

7. Subjective identity implies that the amended indictment can only refer to the person charged under the initial Indictment. Objective identity exists if the amended indictment refers to the same act or same incident from the past, including all of its important elements. The amended indictment must not exceed the limits of the description of the incident as given in the initial indictment.

8. The Defence has not raised any objections against the Amended Indictment.

9. Bearing in mind the above, the Appellate Panel, having compared the factual description of the initial indictment with that of the amended indictment, concludes that the Prosecutor has acted correctly and has adapted the amended indictment to the evidence at hand. In it, he has specified the participation/conduct of the accused to the incident that is contrary to the rules of international humanitarian law and his position as a member of the Special Purposes Unit *Maturice*. Furthermore, the Prosecutor has specified the facts pertaining to the general elements of the criminal offence at the time of the armed conflict. No additional criminal quantity, not existent in the initial indictment, has been placed on the accused.

10. As far as the changes to the factual description of the act of perpetration of the criminal offence is concerned, these changes have also been made with the aim of harmonizing this description with the evidence produced during the First-Instance proceedings and with the statements given by the Accused.

¹ *Commentary on the Criminal Procedure Code in Bosnia and Herzegovina, Prepared by:* prof.dr. Hajrija Sijerčić Čolić, Malik Hadžiomeragić, Marinko Jurčević, Damjan Kaurinović, prof. dr. Miodrag Simović, Project sponsored by the Council of Europe and the European Commission, Sarajevo 2005. p. 699; See **Correspondence between the verdict and charges** Article 280 of the CPC of BiH: *“(1) The verdict shall refer only to the accused person and only to*

11. On the 16th of June 2011, the Appellate Panel accepted the Indictment of the 14th of March 2011 as **an amended indictment**.

2. Deliberation of the Agreement

12. In the course of deliberations on the plea agreement, this Court must examine whether several cumulative requirements, in terms of Article 231(6) of the Criminal Procedure Code of BiH, have been met and concludes that they have. This was decided on the 16th of June 2011 at a purposely-held hearing. At this hearing, the Accused confirmed that he was physically and mentally able to participate and that he did not consume any tranquilizers or other psycho-active drugs.²

(a) Article 231(6)(a) of the Criminal Procedure Code of BiH states that the Court must ascertain whether:

“the plea agreement was entered voluntarily, consciously and with understanding, and whether the accused has been informed of the possible consequences, including satisfaction of the claims under property law, forfeiture of property gain obtained by commission of the criminal offense and reimbursement of the expenses of the criminal proceedings.”

13. After being explicitly questioned by the President of the Appellate Panel whether he had entered the Plea Agreement voluntarily, the accused answered in the positive and declared that no pressure had been exerted upon him, either by the Prosecutor or by his Defence Counsel, and that his decision to enter the plea agreement was not the result or consequence of any threat, extortion, ignorance, lack of understanding, permanent mental illness, temporary mental disorder or something similar and was, therefore, concluded when the Accused was healthy and fully understood the agreement he was entering into.

the criminal offense specified in the indictment that has been confirmed, or amended at the main trial or supplemented.
(2) *The Court is not bound to accept the proposals regarding the legal evaluation of the act..“*

² Audio-video recording of the hearing held on 16 June 2011 in the Zdravko Mihaljević Case (Case No. X-KRŽ-07/330)

14. The Prosecutor has, fully, corroborated this declaration of the Accused and further informed this Court that it was the Accused personally who had contacted the Prosecutor's Office of BiH and expressed a willingness to co-operate. Only after the Accused had expressed his willingness to co-operate with the Prosecutor was his newly-appointed defence counsel brought in to negotiate the plea bargaining. The Accused confirms that the Prosecutor, at an early stage of the bargaining, clearly informed him of the consequences of the agreement and that he may be ordered to pay restitution for the damages caused by his actions as well as reimburse the costs of the criminal proceedings.

15. The Appellate Panel is also assured that Articles 4 and 5 of the attached Plea Agreement contain the legal requirements stipulated in Article 231(6)(a) of the Criminal Procedure Code of BiH.

16. Bearing in mind all the above, the Appellate Panel finds that, without doubt, the requirements set forth in Article 231(6)(a) of the Criminal Procedure Code of BiH have been fully met.

(b) Article 231(6) (b) of the CPC BiH stipulates that this Court must determine:

“whether there is sufficient evidence proving the guilt of the accused|”

17. The Accused has pleaded guilty to the crime with which he has been charged, at the time and in the manner and capacity as a member of the Special Purposes Unit *Maturice as described in the Indictment*. Notwithstanding the voluntary confession of the Accused to the charge, the Court is obliged to assess whether there exists sufficient evidence which can secure the conviction of the Accused of the charges contained in the indictment.

18. The Appellate Panel has concluded that the evidence provided during the First-Instance proceedings, coupled with that provided in the plea hearing, is sufficient to secure the conviction of the Accused for the criminal offences with which he is charged.³

³ The list of evidence adduced during the first-instance proceedings (witnesses and documentary evidence) is given in Annex I of this Verdict and makes an integral part of its reasoning.

19. The general elements of the criminal offence under review result from the testimony of the witnesses produced. It is agreed among the parties that this particular criminal offence was committed during the war in Bosnia and Herzegovina, at the time of the armed conflict in Kiseljak, between the Croat Defense Counsel and the Army of BiH.

20. The Accused admits that he was a member of the *Maturice* unit and this admission is substantiated by the existing documentary evidence. This is, further, corroborated by the testimony of witness KV 5 and that of Haris Adrović and Dominik Ilijašević.

21. The identification of the Accused through a tattoo on his arm presented a difficulty during the First Instance proceedings. The witnesses had testified that the perpetrator of the criminal offence under review had a snake tattooed on his arm. When the First-Instance verdict was pronounced, he wore a tattooed cross on the same arm. The photograph taken of the Accused during his attendance of a custody hearing before the Court of BiH and extracted from the audio-visual recordings of the proceedings clearly shows that the Accused did have a snake tattooed on his right arm. The accused admits this during the plea agreement hearing and, in so doing, corroborates the testimony given by the witnesses.

22. Witnesses A and C corroborate the confession of the Accused concerning his presence at the scene and his participation in the incident under review. Although witness C changes his testimony in part at the main trial hearing, the same witness' statements from the investigation incriminate the Accused without question.

The relevant evidence is not disputed by the parties throughout the proceedings thus inducing the Appellate Panel to conclude that the Prosecutor has succeeded in offering sufficient evidence to convict the accused of the charges brought against him.

(c) Article 231(6)(c) of the Criminal Procedure Code of BiH provides that the Court must ascertain:

“whether does the Accused understand that by agreement on the admission of guilt he waives his right to a trial and that he may not file an appeal against the pronounced criminal sanction”

23. During the hearing the Accused confirms that, by concluding the plea agreement, he is waiving his right to a trial. The Accused explicitly waives this right as well as his right to file an appeal from the decision on the criminal sanction in Article 6 of the attached plea agreement. Article 10 of the same agreement contains a detailed list of all the specific rights and legal amenities that the Accused is waiving his right to, which include: the right to invoke the presumption of innocence, the right to present evidence and call witnesses, the right to present his defence.

24. In virtue of the above, the Appellate Panel must conclude that the legal requirements stipulated under Article 261(6) (c) of the CPC of BiH have been satisfied.

(d) Article 231 (6) (d) of the Criminal Procedure Code of BiH stipulates that the Court must ascertain:

“whether the agreed sanction is in accordance with paragraph (3) of this Article.”

25. Article 231(3) of the Criminal Procedure Code of BiH prescribes that:

“when negotiating with the suspect, that is, the Accused and the Defense Counsel on the admission of guilt (...) prosecutor may propose an imprisonment sentence below the legally prescribed minimum or a more lenient criminal sanction for the suspect or the accused, pursuant to the Criminal Code.

26. The Prosecutor did not mention this provision when proposing the duration of imprisonment of between 5 (five) and 6 (six) years, and only refers to the Criminal Code of Bosnia and Herzegovina as being the applicable law. In Article 3 of the Plea Agreement, the Accused has agreed to this proposed sentencing range.

27. In terms of Article 4 of the Criminal Code of BiH, this Court must decide on the application of the substantive law. It had decided to apply the Criminal Code of SFRY which was incorporated into the “Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia”, as the law which was applicable at the time of the perpetration of the criminal offence under review,

and concludes that the Criminal Code of BiH, as the subsequently adopted law, is not more lenient to the perpetrator.

28. The minimum sentence of imprisonment envisaged under the Criminal Code of SFRY for the criminal offence of War Crimes against Civilians is imprisonment for a period of 5 years. Therefore, this Court is not in a position to evaluate the proposal of a six (6) year prison sentence in terms of Article 231(6)(d) of the CPC of BiH, as read with paragraph (3) of the same Article. The Appellate Panel gives a detailed reasoning of this point of view in Section D of this Verdict under the title of “*Application of Substantive Law.*”

(e) Article 231(6)(e) of the CPC BiH provides that the Court must, also, determine:

“ whether the injured party has been given an opportunity before the Prosecutor to give a statement regarding his claim under property law.”

29. It is to be remembered that the plea agreement hearing was held when the trial before the Appellate Panel had, already, been scheduled. The injured parties, therefore, were in a position to give their respective statements concerning their claim under the property law both before the Prosecutor and before the First-Instance panel.

30. In this context, the Appellate Panel makes reference to the First Instance proceedings where, in terms of Article 198(2) of the Criminal Procedure Code of BiH, the injured parties Zilha Huseinović, Džafer Huseinović, Beda Delić, witness A, witness C, Senad Bajraktarević, Asim Hasić, Halil Bešić and Avdija Bajraktarević are advised by the same Court to take civil action to pursue their claims under property law.

C. APPLICABLE LAW

31. The Amended Indictment and the Plea Agreement propose that the Criminal Code of BiH should be applied. The Court must, however, satisfy the provisions contained in Article 4(1) of the Criminal Code of BiH and apply the law which was in existence and effective at the time of the commission of the crime and this for the following reasons.

32. Article 3 of the Criminal Code of BiH, which prescribes the principle of legality as one of the fundamental principles of criminal law, reads as follows:

“(1) Criminal offences and criminal sanctions shall be prescribed only by law.

(2) No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which punishment has not been prescribed by law.

33. Article 4 of the CC of BiH, which sets down the principle of time constraints regarding the applicability of the Criminal Code, reads as follows:

“(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.

(2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

34. Article 4(a) of the Criminal Code of BiH provides for an exception to the application of Article 3 and 4, prescribing that:

*“Articles 3 and 4 of this Code shall not prejudice the **trial and punishment** of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.”*

35. It follows, therefore, that as a rule, the law that was in effect at the time when the criminal offence was perpetrated is the law which is to be applied in relation to the perpetrator of a crime (*tempus regit actum*).

36. This principle may be departed from only in the interest of the Accused and only in the event that the new law or the law which has been amended after the criminal offence has been perpetrated is, manifestly, more lenient to the perpetrator. Whether a new law is more lenient or not to a perpetrator is resolved *in concreto* or by comparing the old and the new law(s) in each specific case.

37. Such a comparison can provide a definite answer only if the new law has decriminalized the offences which existed because, in such a case, the new law is clearly more

lenient to the perpetrator. In all other instances, if the matter under review is a criminal offence under both laws, it is necessary to take into consideration all the relevant circumstances of the case in deciding which is the more lenient law to apply.

38. Which law is more lenient depends on the relevant circumstances. These, primarily, concern circumstances relating to sentencing or to the commuting of sentence, admonishment, accessory punishment, new measures to be applied in lieu of more serious punishment (e.g. out-of-prison community service), security measures, legal consequences of the conviction, whether the new law foresees grounds to eliminate illegality, criminal liability or punishment, etc.

39. As we have seen, this principle of applying a more lenient law may only be departed from in cases prescribed under Article 4(a) where the application of a more lenient law would **prejudice the trial or the punishment** for the acts criminalized under the general principles of international law.

40. **Trial or punishment** for any specified act cannot be conducted if such specified act **was never prescribed as an act of commission of a criminal offence** because, according to Article 3(1) of the Criminal Code of BiH, criminal offences and criminal sanctions are only prescribed by law. As an example, Article 4(a) of the Criminal Code of BiH is applicable to the criminal offences of Crimes against Humanity committed during the time in which this Code was not in effect, considering that these offences were not recognized under the Criminal Code of SFRY. Article 4(2) of the Criminal Code of BiH allows the interpretation that the Criminal Code of SFRY would be a more lenient law to the perpetrator because it does not criminalize the act committed by the Accused. Accordingly, the perpetrator **can be neither tried nor sanctioned for this criminal offence**.

41. In this and similar cases, Article 4(a) of the Criminal Code of BiH must apply or, in other words, the direct application of Article 7(2) of the European Convention on Human Rights and Fundamental Freedoms (ECHR). This is directly pertinent to BiH law through the application of Article 2/II of the Constitution of BiH, in which Article 7(2) provides for the direct application of the Convention to BiH, taking precedence over all other laws and precluding **impunity** of perpetrators for acts that amount to criminal offences according to the general principles of international law.

42. Accordingly, Article 4(a) of the Criminal Code of BiH allows for an exceptional departure from the principles as stipulated under Article 3 and 4 of the same Code. This is done

in order to ensure that a trial is held and punishment is meted out for those acts which have been established as criminal offences under international law and which represent a violation of norms and rules commonly accepted by all nations, which are of common importance, or which represent or are believed to represent the universal attainment of civilization under modern-day criminal law. This Article allows for all those situations where such acts were not criminalized under national criminal legislation at the time of their commission.

43. In the case under review, both the law at the time of the commission of the act and the currently effective law criminalize the acts for which the Accused has been convicted.

44. For these reasons, it is clear that all legal requirements are in place to put the Accused on trial for Crimes against Humanity and to punish him after taking into consideration that his actions amount to a criminal offence under both the old and the new law.

45. A further evaluation of which is the more lenient law for the perpetrator must be carried out by comparing the sentences prescribed by both the old and the new law.

46. The criminal offence of War Crimes against Civilians, under Article 173 of the Criminal Code of BiH is punishable by a term of imprisonment of not less than ten years or a long-term imprisonment. The same crime is punishable by imprisonment of not less than five (5) years to the death penalty under Article 142(1) of the Criminal Code of SFRY. The evaluation of a more lenient law is always carried out "*in concreto*," in other words, by weighing all the circumstances of a specific case.

47. The Prosecution has suggested a prison sentence ranging from 5 to 6 years imprisonment. In considering which law is applicable, the Court must compare the minimum prison sentence prescribed by both laws for the same criminal offence and determine which one is more lenient towards the perpetrator. Bearing this in mind and after comparing the Criminal Code of SFRY and the Criminal Code of BiH it is easy to determine that the Criminal Code of BiH is not the more lenient law because the minimum it provides for in Crimes against Humanity is a ten (10) year long imprisonment. Because of these reasons and pursuant to Article 4 of the Criminal Code of BiH, the Appellate Panel must conclude that the Criminal Code of SFRY, which is the law at the time of the commission of the criminal offence, is the most applicable.

48. The Panel refers to paragraph 84 of the judgment of the Constitutional Court of BiH AP 1785/06, which reads:

“Nevertheless, a variance in application of laws in similar cases is allowed provided that it is supported by reasonable and justified reasons”⁴.

49. The “raison d’etre” of this decision is that one law may appear more beneficial or more damning of the perpetrator according to the particular situation. It must, therefore, be determined which one of the laws that might be applicable in a given case has a greater possibility of a more favourable outcome for the perpetrator.

50. The Panel, therefore, concludes that the Plea Agreement has been concluded by the Accused voluntarily, knowingly and with full understanding. It is satisfied that the Prosecutor has provided sufficient evidence for the Accused to be convicted of the offence for which he is charged. It has also taken into consideration that the Accused has admitted to the charges proffered against him by the Prosecution and it is satisfied that all requirements under Article 231(6) of the Criminal Procedure Code of BiH have been met. The Appeal Panel has accepted the Plea Agreement concluded between the Accused and the Prosecution, having no doubts as to the full mental competencies of the Accused at the time of the commission of the criminal offence. Zdravko Mihaljević has been found guilty of the criminal offence of War Crimes Against Civilians in violation of Article 142(1) of the Criminal Code of the SFRY, adopted pursuant to the Law on the Application of the Criminal Code of Bosnia and Herzegovina and the Criminal Code of the Socialist Federative Republic of Yugoslavia, as read with Article 22 of the same Law.

D. SENTENCING

51. The Plea Agreement, in Article 3, proposes a sentence range of 5 to 6 years imprisonment. In its deliberations, the Appellate Panel has been mindful of a number of facts and circumstances, and, because of these, concludes that an adequate sentence to be imposed on the Accused, Zdravko Mihaljević, should be one of 6 (six) years imprisonment. The reasons that have guided this Panel to this decision are the following:

⁴ Constitutional Court of Bosnia and Herzegovina, Abduladhim Maktouf, Decision AP 1785/06 of 30 March 2007, para.84.

52. The Appellate Panel has taken into consideration the fact that the Accused has co-operated with the Prosecution. Notwithstanding that he had been acquitted by the First Instance Court, the Accused admitted his participation in the commission of the crime, thus co-operating with the Prosecution. It appears that the voluntary statement given by the Accused is of a relevant and decisive nature for the positive outcome of ongoing investigations into the same incident, which may lead to the institution of criminal proceedings against four other perpetrators and open up the possibility of two further investigations.

53. Furthermore, the statement given by the Accused has already been used in the criminal proceedings instituted against Miroslav Anić who has been convicted by the Court of BiH. Knowing that Zdravko Mihaljević had made a statement implicating him, Anić decided to cooperate with the Prosecution and concluded a Plea Agreement with them. He was sentenced to 14 years imprisonment. The Prosecution believes that the statement of Mihaljević has instigated further investigation into the incident. The Appellate Panel accepts this argument.

54. This Court believes that the Accused's willingness to co-operate and his sincere regret for what has happened is, further, evidenced by his decision to remain in Bosnia-Herzegovina notwithstanding the fact that he holds dual citizenship, that of Bosnia and that of Croatia. Just as numerous other suspects and accused, the Accused must have had a very realistic possibility of leaving the territory of BiH and taking up residence in the Republic of Croatia to avoid criminal prosecution. The Appellate Panel is appreciative of the fact that, by his voluntary appearance before the competent judiciary authority in Bosnia-Herzegovina, the Accused has set an important and positive example to other suspects or accused who possess dual citizenship.

55. The Appellate Panel has also taken into consideration the criminal and legal sanctions which have been imposed by this and other Courts in similar and related cases. In the Miroslav Anić and Ivica Rajić cases, the criminal sanction imposed followed the conclusion of plea bargain agreements and were accepted by the Court. Miroslav Anić was sentenced to 14 years imprisonment by the Court of BiH, and Ivica Rajić was sentenced to 12 years imprisonment by the ICTY. Ivica Rajić was a military superior to Mihaljević, and was, consequently, charged with the commission of other criminal offences to which he admitted. The charges against Miroslav Anić are far more complex and encompass multiple incidents and various victims.

56. It is impossible for this Court to disregard the value of the admission of guilt by the Accused in relation to the victims of this criminal offence. From a victim's point of view, a legally imposed prison sentence does not bring adequate satisfaction in itself, especially in cases where human lives have been lost and, therefore, the loss is irrecoverable. The Appellate Panel is of the considered opinion that it is of significant importance for the victims that the perpetrator has admitted to his crimes and that the incident did, indeed, happen and that he feels remorse. Such an admission also contributes, not in a small way, towards reconciliation and a future, peaceful co-existence between the different ethnic groups that make up society in Bosnia and Herzegovina.

57. Bearing in mind all the foregoing facts and circumstances, the Appellate Panel has concluded that the sentence of 6 years imprisonment is an adequate punishment for the Accused Zdravko Mihaljević, commensurate with the degree of criminal liability and the gravity of the criminal offences charged. The sentence is also adequate to serve the purpose of sanctioning and of justice.

Record-keeper:
Melika Murtezić

PRESIDING JUDGE
JUDGE
Azra Miletić
(hand and stamp)

LEGAL REMEDY: Pursuant to Article 317a (1) (b) of the CPC of BiH, this Verdict may be appealed with the Third Instance Panel of the Court of BiH within 15 days as of the receipt of the written copy thereof. No Appeal on sanction is allowed.

II. ANNEX – EVIDENCE

A) WITNESSES FOR THE PROSECUTION:

Witnesses for the Prosecution who were heard at the main trial:

1. Elvir Huseinović
2. Avdija (Meho) Bajraktarević
3. Hamdija Tulić
4. Zilha Huseinović
5. Džafer Huseinović
6. Bejda Delić
7. Senad Bajraktarević
8. Asim Hasić
9. Fedhija Bajraktarević
10. Witness “A”,
11. Witness “B”,
12. Witness “C”,

Expert witnesses for the Prosecution: Dr. Hamza Žujo - medical expert, and Dr. Sead Lačević, specialist in plastic and reconstructive surgery.

B. DEFENSE WITNESSES

The following were heard as Defence witnesses for Zdravko Mihaljević:

1. Elvir Huseinović
2. Asim Hasić
3. Avdija (Hamid) Bajraktarević
4. Dragan Šimić
5. Mijo Šimić
6. Selver Bajraktarević
7. Anto Cvijanović
8. Tibor Prajo
9. Predrag Pravdić
10. Halil Bešić
11. Witness “A”,
12. Witness “C”,
13. Witness “D”
14. Witness “B”
15. Accused Zdravko Mihaljević

C. DOCUMENTARY EVIDENCE FOR THE PROSECUTION

The Appellate Panel inspected the following Prosecution documentary evidence:

1. Record on examination of witness Elvir Huseinović on the premises of the Prosecutor's Office of BiH, dated 16 June 2006;
2. Record on examination of witness Zilha Huseinović on the premises of the Prosecutor's Office of BiH, dated 30 January 2007;
3. Record on examination of witness Džafer Huseinović on the premises of the Prosecutor's Office of BiH, dated 31 January 2007;
4. Record on examination of witness Bejda Delić on the premises of the Prosecutor's Office of BiH, dated 30 January 2007;
5. Record on examination of witness Senad Bajraktarević on the premises of the Prosecutor's Office of BiH, dated 31 January 2007;
6. Record on examination of witness Asim Hasić on the premises of the Prosecutor's Office of BiH, dated 31 January 2007;
7. Record on examination of witness Fedhija Bajraktarević on the premises of the Prosecutor's Office of BiH, dated 31 January 2007;
8. Record on examination of witness "B", dated 26 January 2007;
9. Sketch of the Tulice village;
10. Legend to the Sketch of the Tulice village
11. Record on examination of witness "C" on the premises of the Prosecutor's Office of BiH, dated 29 January 2007;
12. Decision of the Court of BiH on the takeover of the criminal case No. X-KRN-05/68 of 5 October 2005,
13. BiH Ministry of Defence – Officer Zdravko Mihaljević's Personal File No. 504/64
14. Register File for Conscript Zdravko Mihaljević No. 1048050464
15. Order of the HVO Brigade "Ban Josip Jelačić" Kiseljak Conf. No. 02-1207-1/93,
16. Excerpt from Criminal Records for Zdravko Mihaljević No. 02/6-3-04-2-5734/06 of 30 August 2006
17. Decision on exhumation, autopsy and identification of bodies in the area of the village of Tulica, No. Kri-148/96 of 17 October 1997
18. Decision on exhumation, autopsy and identification of bodies in the area of the village of Tulica, No. Kri-148/96 of 26 January 1998;
19. Record on examination of expert witness Ilijas Dobrača and Hamza Žujo, No. Kri-148/96 dated 23 February 1998;
20. Sarajevo MoI - Sketch of the site, exhumation, autopsy and identification, No. 359/98;
21. Report on Crime Scene Investigation and Forensic Examination, No. 359/98 of 8 February 1998
22. Record on Site Inspection made on 9 February 1998 by the Cantonal Court in Sarajevo, No. Kri-148/96;
23. Record on Identification of Body for Salko Bajraktarević of 11 February 1998
24. Record on Identification of Body for Aziz Huseinović of 11 February 1998
25. Record on Identification of Body for Zijad Huseinović of 11 February 1998
26. Record on Identification of Body for Refik Huseinović of 11 February 1998
27. Record on Identification of Body for Mufid Tulić of 11 February 1998,
28. Record on Identification of Body for Kasim Huseinović of 11 February 1998,
29. Record on Identification of Body for Safet Katkić of 11 February 1998
30. Record on Identification of Body for Ahmed Bajraktarević of 11 February 1998
31. Record on Identification of Body for Sifa Tulić of 11 February 1998
32. Record on Identification of Body for Safija Tulić of 11 February 1998
33. Death Certificate for Salko Bajraktarević,
34. Death Certificate for Aziz Huseinović,
35. Death Certificate for Zijad Huseinović
36. Death Certificate for Refik Huseinović
37. Death Certificate for Mufid Tulić
38. Death Certificate for Kasim Huseinović
39. Death Certificate for Safet Katkić

40. Death Certificate for Ahmed Bajraktarević
41. Death Certificate for Ibrahim Jahić
42. Death Certificate for Fatima Bajraktarević
43. Death Certificate for Sifa Tulić
44. Death Certificate for Safija Tulić
45. Report on the Work of the Kiseljak Military Police Municipal Staff of 12 June 1993,
46. Report on the Work of the Kiseljak Military Police Municipal Staff of 13 June 1993
47. Report for 12/13 June 1993 of the Command of the 3rd Company of the Military Police Kiseljak No. 02-4/3-07/3-104/93 of 14 June 1993
48. Decision of the Presidency of the Republic of Bosnia and Herzegovina to declare the state of war (“Official Gazette of the R BiH”, issue 7/92)
49. Consolidated version of the Decision on establishment of the Croat Community of Herceg-Bosna (“Official Gazette of the Croat Community of Herceg-Bosna”, issue 1/92),
50. Constitution of the Federation of Bosnia and Herzegovina – the so-called Washington Agreement (“Official Gazette of the FBiH”, issue 1/94)
51. Decision of the Presidency of the Republic of Bosnia and Herzegovina to terminate the state of war (“Official Gazette of R BiH”, issue 50/95)
52. Judgment of the Cantonal Court in Travnik No. K.4/01-RZ dated 23 May 2002 in the Tibor Prajo Case;
53. Judgment by the Supreme Court of F BiH No. Kž-382/02 dated 27 November 2002 in the Tibor Prajo Case;
54. Record on examination of the protected witness “103” given before the Supreme Court of F BiH in the case No. KZS-18/01 of 21 December 2001;
55. Letter of the standard marking of the ICTY Office of the Prosecutor for Zdravko Mihaljević a.k.a. “Pijuk” No. 003808/GB/MAL/RR46a of 15 February 2000
56. Order OG-2 OZ SB dated 27 May 1993;
57. List of members of the Intervention Unit “Ban Josip Jelačić” Kiseljak of 4 May 1993
58. Photo-documentation made by AID – village of Tulice – dated 7 May 1998
59. Escort sheet of the Busovača HVO Military Police (ICTY document, No. Y0029604);
60. Record of the Higher Court in Travnik No. KRI 2/98 (ICTY document: 04632734).

D. DOCUMENTARY EVIDENCE FOR THE DEFENSE

The Appellate Panel has inspected the following documentary evidence of the Defence for the Accused:

1. Statement given by witness Avdija Bajraktarević dated 23 and 14 May 1996 (ICTY document, No. 00697666);
2. Statement given by the witness “A” dated 13 April 1996 to AID, No. 329/96;
3. AID Report: “Attack on undefended villages Grahovci and Han Ploča” (ICTY document, No. 03595993);
4. Certificate of Non-Conviction for Zdravko Mihaljević No. 02/OK-1-1-04-81/2087 dated 20 February 2008;
5. Statement by witness “B” dated 9 February 1994 given to the Koševo Public Security Station.

E. PROSECUTION DOCUMENTARY EVIDENCE TENDERED BEFORE THE APPELLATE PANEL

In addition to the afore-mentioned, the Panel has inspected the following Prosecution evidence that was tendered during the second-instance proceedings:

1. Record of Examination for the Witness kv-5;
2. Record of Examination of witness Haris Adrović before the Cantonal Court in Sarajevo in the Tibor Prajo Case (Case No. ki 6/01) dated 6 February 2001;
3. Witness examination record for Dominik Ilijašević No. KT-RZ 114/06 dated 29 May 2009 and 1 April 2010;
4. Three photographs extracted from the video footage of the custody hearing for the suspect Zdravko Mihaljević held on 4 August 2006;

5. List of the detainees brought from the village of Tulica (recovered from the ICTY data base, bearing the ICTY No. 01554179);

Record-taker:

PRESIDENT OF THE PANEL

Melika Murtezić
(signed)

JUDGE
Azra Miletić (*hand and stamp*)