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Case No.: S1 1 K 003302 13 Krž 5

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Panel composed of: Judge Hilmo Vučinić, Presiding  
Judge Senadin Begtašević, member  
Judge Dr. Miloš Babić, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Zurahid Mujčinović

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**SECOND INSTANCE VERDICT**

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**Prosecutor of the BiH Prosecutor's Office:**

**Adnan Gulamović**

**Counsel for the Accused:**

**Attorney Midhat Skenderović**

**Attorney Rifat Konjić**

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**Number: S1 2 K 003302 13 Krž 5**

**Sarajevo, 28 March 2013**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Appellate Division Panel comprised of judges Hilmo Vučinić, as the Panel President, and Senadin Begtašević and Dr. Miloš Babić, as members of the Panel, with the participation of the legal adviser Medina Džerahović, as the minutes-taker, in the criminal case against the Accused Zurahid Mujčinović, for the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH) and Article 29 of the CC of BiH, deciding upon the appeals by the Counsel for the Accused Zurahid Mujčinović, Attorney Midhat Skenderović, dated 26 December 2012, and Attorney Rifat Konjić dated 24 December 2012, filed from the Verdict of the Court of Bosnia and Herzegovina, No.: S1 1 K 003302 10 Krl dated 2 October 2012, following a public session of the Panel held in the presence of the Prosecutor of the BiH Prosecutor's Office, Sanja Jukić, the Accused and his Defense Counsel Midhat Skenderović and Rifat Konjić, on 28 March 2013 issued the following:

**V E R D I C T**

**Refusing, as ill-founded**, the appeals of the Counsel for the Accused Zurahid Mujčinović, and **upholding** the Verdict of the Court of Bosnia and Herzegovina No.: S1 1 K 003302 10 Krl dated 2 October 2012.

## REASONING

### I. HISTORY OF THE PROCEEDINGS

#### FIRST INSTANCE VERDICT

1. The Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No.: S1 1 K 003302 10 Krl of 2 October 2012 (written copy sent out on 6 December 2012), found the Accused Zurahid Mujčinović guilty of committing, as described in sections 1 and 2 of the operative part of the Verdict, the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the CC of BiH, as read with Article 180(1) and Article 29 of the CC of BiH, and acquitted the Accused Husnija Hrustić of the charges for the same criminal offense.
2. For the referenced criminal offense, the Accused Zurahid Mujčinović received a sentence of imprisonment for a term of eight years.
3. Pursuant to Article 188(4) of the CPC of BiH, the Accused is relieved of the duty to reimburse the costs of the criminal proceedings, which will be paid from within the budget appropriations of the Court. Pursuant to Article 198(2) of the CPC of BiH, the injured parties Pero Đukić and Drago Đukić are instructed to pursue their claims under property law in a civil action.

### II. APPEALS

4. The Counsel for the Accused, Attorneys Midhat Skenderović and Rifat Konjić, appealed the Verdict and enclosed therewith a criminal report of the Truth, Justice and Reconciliation Foundation from Tuzla of November 2012, and the statements of witnesses Ismet Imširović and Elvedin Ćudić. Attorney Rifat Konjić contested the Verdict on the grounds of essential violations of the criminal procedure, incorrectly and incompletely established state of facts and the decision on the criminal sanction, and moved the Appellate Division Panel to grant the appeal, revoke the First Instance Verdict, order a retrial and acquit the Accused of charges. Attorney Midhat Skenderović contested the same Verdict on the grounds of the essential violations of the criminal procedure, incorrectly and incompletely established state of facts, and also for the criminal code violations, with a proposal that the appeal be granted, the impugned Verdict revised, and

the Accused be acquitted of charges, or that the impugned Verdict be revoked and a hearing ordered.

5. Having reviewed the admissibility and timeliness of the filed appeals, the Appellate Panel concluded that the appeals were both admissible and filed in due time.

6. Having examined the contested Verdict within the grounds and arguments of the appeal, pursuant to Article 306 of the CPC of BiH, the Appellate Panel rendered the decision as stated in the operative part of the Verdict for the reasons that follow:

### III. GENERAL CONSIDERATIONS

7. Prior to reasoning every appellate ground individually, the Appellate Panel has noted that, pursuant to Article 295(1)(b) and (c) of the Court of BiH, the appellant shall state in his appeal both the legal grounds to contest the Verdict and the reasoning behind the appeal.

8. Considering that, pursuant to Article 306 of the CPC of BiH, the Appellate Panel considers the Verdict only insofar as contested by the appeal, the appellant shall produce an appeal so that it may serve as a ground for consideration of the Verdict. To this effect, the appellant must specify the appellate grounds for contesting the Verdict, state which part of the Verdict, evidence or Court procedure is contested, and provide the reasoning which must be clear and supported with arguments to corroborate the objection raised.

9. Mere arbitrary stating the grounds for appeal, as well as pointing to the alleged irregularities during the first instance proceedings but with no reference to a specific ground for appeal, does not constitute a valid ground for reviewing the First Instance Verdict. The Appellate Panel will therefore, with no further consideration, dismiss the unreasoned and unclear grievances of the appeal as ungrounded, pursuant to the Appellate Panels' developed case law<sup>1</sup>.

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<sup>1</sup> See ICTY: Appellate Judgment in *Krajišnik*, para. 17, Appellate Judgment in *Martić*, para.15, Appellate Judgment in *Strugar*, para. 17. A number of Appellate Panels of the Court of BiH has, in their decisions, have

## IV. GROUNDS FOR APPEAL UNDER ARTICLE 297 OF THE CPC OF BIH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

### STANDARDS OF DECIDING ON THE APPEAL

10. Pursuant to Article 296 of the CPC of BiH, a verdict may be contested on the grounds of essential violations of the provisions of criminal procedure. Essential violations of the provisions of criminal procedure are defined in Article 297 of the CPC of BiH.<sup>2</sup>

11. Considering the gravity and importance of the committed violations of the procedure, the CPC of BiH differentiates between the violations which, if found to exist, constitute an irrefutable assumption that they negatively affected the validity of the pronounced verdict (absolutely essential violations), and the violations in relation to which, in any specific case, it is up to the Court to evaluate if the established violation of the procedure had or could have had a negative impact on the verdict's validity (relatively essential violations).

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

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acted in compliance with this case law. To this effect, see *Trbić*, Second Instance Verdict No.: X-KRŽ-07/386 of 21 October 2010.

<sup>2</sup> Article 297 of the CPC of BiH: **Essential Violations of the Criminal Procedure Provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the 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 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.

13. If the Appellate Panel finds that there exists an essential violation of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC of BiH, revoke the first instance verdict, except in cases referred to in Article 314(1) of the CPC of BiH.<sup>3</sup>

14. Unlike those absolute violations, relatively essential violations are not enumerated in the Code and they only exist if, during the main trial or in rendering a verdict, the Court failed to apply or improperly applied any provision of the Criminal Procedure Code, but solely provided that this affected or could have affected a lawfully and properly rendered verdict.

15. With regard to the arguments that the violation of the principles of criminal procedure could have negatively affected a legal and proper verdict rendering, it is not sufficient for the appellant to simply claim that the procedural violation could have *hypothetically* adversely affected rendering a lawful and proper verdict. Instead, the Appellate Panel will conclude that the principles of criminal procedure have been violated only if the appellant proved that the violation is of substantive nature, and that it cannot be concluded that the referenced violation did not adversely affected rendering a lawful and proper verdict. Namely, when the Appellate Panel holds that a lawful and proper verdict has been rendered regardless of the violation of procedure of such a nature, it will conclude that Article 297(2) of the CPC of BiH was not violated.

**(a) The impugned Verdict is contradictory to the Verdict reasons (Article 297(1)(k) of the CPC of BiH)**

16. Within this appellate ground, the appeals of both Defense Attorneys for the Accused pointed to the lack of reasons on the decisive facts in the contested Verdict, namely that the drawn conclusions on the existence of decisive facts were incomprehensible and, as such, contradictory to the indisputable facts, that the evidence adduced on certain important facts were not evaluated at all, and that certain conclusions are partial, and some are fully illogical. More specifically, explaining this appellate ground, both Defense

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<sup>3</sup>Article 314 of the CPC of BiH, **Revision of the First Instance Verdict:** (1) By honouring 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 facts established, a different verdict must be rendered when the law is properly

Attorneys for the Accused have referred, to a certain extent, to the evidence adduced during the proceedings, analyzed it and finally presented their own conclusions with regard to their client's innocence, which are, in their opinion, logical and contrary to the contested Verdict's conclusions.

17. This Panel has held that the operative part of the Verdict is neither incomprehensive nor contradictory, internally or to the reasoning thereof, as stated by the appeals of the Accused's Defense Attorneys. The Verdict would be incomprehensible if there were doubts as to the conclusions of the Court, that is, if the Court's conclusions were incomprehensible, which obviously is not the case here. More specifically, the operative part of the contested Verdict is very clear, concise and precise, and the reasons regarding the decisive facts do not contradict it, which renders these appellate grounds of the Accused's Defense ill-founded. In addition, this Panel has concluded that the Verdict contains a description of the concrete criminal acts of the Accused, which includes all essential elements of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, as read with Articles 180(1) and 29 of the CC of BiH. The Appellate Panel has held that the proper and valid conclusions of the Trial Panel on the essential elements of the referenced offense, and the Accused's responsibility undoubtedly ensued from a comprehensive evaluation of the adduced evidence, both individually and in combination. In this regard, the contested Verdict provided fully clear and concrete reasons, including the reasons as to why certain witnesses' statements, unlike some others, as well as a certain number of the documentary pieces of evidence on which the factual findings of the Trial Verdict were based, were accepted as true and reliable, and which this Panel has also fully accepted.

18. Considering its character, this objection also addresses the scope of the appellate ground of incorrectly and incompletely established state of facts. This was also indicated by the appeal of the Accused's Defense Attorney Rifat Konjić, stating that the provided explanation practically also refers to the referenced grievance. This Panel will, therefore, further analyze, in the reasoning of this Verdict, the advanced appellate grounds which, as a rule, pertain to the determination of the decisive facts which were, according to the Defense, incorrectly established, namely the issues of: a possibility that other persons, in general, could enter the Youth Center building-prison, whether the Accused indeed visited

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applied, according to the state of the facts and in the case of violations as per Article 297(1)(f), (g) and (j) of



the referenced facility, a proper identification of the Accused and finally, the issue of his criminal liability for the acts of whose commission he was found guilty under the Trial Verdict.

**(b) The Court has improperly applied the CPC provision, and this affected or could have affected a lawful and proper Verdict (Article 297(2) of the CPC of BiH)**

19. The appeals filed by the Counsel for the Accused Zurahid Mujčinović stated within this appellate ground that the contested Verdict is based on unlawful evidence on which a verdict cannot be based, which results in violations of Article 297(1)(i) of the CPC of BiH. More specifically, the Defense argues that the identification procedure for the then suspect Mujčinović during the investigation (Identification Record No. 10-02/7-31/08 of 22 December 2008), when the suspect was identified by way of photos, was not carried out pursuant to Article 85(3) and (4) of the CPC of BiH, considering that the suspect was available to the investigative authorities. Therefore, first a direct identification of the suspect from among a number of persons should have been carried out in this regard.

20. The Trial Panel concluded in the contested Verdict that the referenced evidence was lawful, reliable and true.

21. With regard to the circumstances surrounding the concrete case, and bearing in mind Article 85(3) and (4) of the CPC of BiH, the Appellate Panel has determined that the adduced evidence, Identification Record of 22 December 2008, was indeed deficient since the identification procedure was not fully complied with, given the fact that the suspect's direct identification from among several persons was not carried out before his identification from the photos.

22. In addition to this fact, and the fact that such an omission by the Trial Panel was characterized as evidence on which, pursuant to the CPC of BiH, a verdict cannot be based, the Appellate Panel has not considered this omission along this line. It has rather qualified it as an essential violation under Article 297(2) of the CPC of BiH. More specifically, taking into account the overall evidentiary materials on the basis of which the Accused was found responsible for the referenced crimes, the Appellate Panel has

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this Code.

brought this fact in relation to the gravity of the obvious omission, and concluded that the nature and intensity of the violation could in no way result in the trial verdict revocation.

23. The Appellate Panel has examined, in this regard, if the omission had any effect on the lawful and proper decision of the Trial Panel. Along this line, it has also examined the importance and scope of this evidence use in ruling on the Accused's identity. The Appellate Panel concluded that the conclusion on the identity of the Accused Mujčinović, in its decisive part, was based on the other evidence, primarily on the statements of Pero Đukić and Drago Đukić, who had undoubtedly indicated the Accused Mujčinović as the perpetrator of the referenced crime. In addition, the other circumstances surrounding the case at hand, particularly those pertaining to the Accused as a musician (drummer) and his nickname, have fully clarified the dilemma concerning the Accused's identity. This will certainly be addressed in more detail within the appellate ground of incorrectly and incompletely established state of facts.

24. To this end, the disputed investigation record has served as an additional, corroborating piece of evidence to determine the Accused's identity, and its deficiency in this part has neither brought under suspicion the proper and lawful finding of the contested Verdict, nor given to it the character of unlawful evidence in terms of Article 10 of the CPC of BiH, which would otherwise result in the Trial Verdict revocation.

25. It is important to note, in this part, that the act of person's identification is not an obligatory evidentiary act, but rather that it is being carried out when there is a suspicion regarding the identity of the person who committed the offense. The injured party in this case, Drago Đukić, had certain knowledge about the person who had tortured them on the critical occasion, thus this person's personal details obviously were not at issue, nor was the Accused's nickname. Therefore, the act of identification during the investigation was only carried out with a view to fully clarify this issue, and the evidence obtained in such a way was evaluated as controlling and corroborating evidence, rather than a decisive one on the basis of which the Court's decision on the Accused's identity would be exclusively based.

## V. ERRONEOUSLY AND INCOMPLETELY ESTABLISHED STATE OF FACTS

26. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. The Appellate Division Panel, when considering alleged errors of fact, will substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict.

27. 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.

28. Therefore, only when the Appellate Panel concludes first, that a reasonable trier of fact could not have reached the original Verdict, and second, that an error has caused a miscarriage of justice, this Panel will accept the appeal filed pursuant to Article 299(1) of the CPC of BiH, which argues that the state of facts was erroneously and/or incompletely established.

29. Article 299 of the CPC of BiH stipulates when exactly a verdict may be contested for erroneously or incompletely established state of facts. Decisive facts will directly be determined through evidence, or indirectly through other facts (indicia or control facts). Only the facts established under the verdict can be considered as existing ones, and regardless of the decisive facts existence, conclusions on their existence must always be drawn. Otherwise, there will be no established state of facts (incompletely established state of facts). If a decisive fact has not been established in the way it existed in the reality of an event, then there is an incompletely established state of facts.

30. The Appellate Division Panel will evaluate if the state of facts was incompletely established in relation to the facts and findings contested by the Defense appeal. For such an evaluation, the subjective test should be applied by way of evaluating whether a decisive fact is consistent with the adduced evidence results.

31. Contesting the Verdict in relation to this appellate ground, the Defense argued that the state of facts regarding the decisive facts in the contested Verdict and its convicting

part was erroneously and incompletely established both in relation to the findings under Section I and the findings under Section II of the contested Verdict.

32. The Appellate Panel, however, concludes that the Trial Panel has properly and completely established the state of facts in the Trial Verdict, and that therefore the appellate grievances contesting the Trial Verdict on this ground are ill-founded for the reasons that follow.

**(a) The possibility to enter the Rapatnica prison**

33. Both appeals by the Counsel for the Accused have almost identically pointed to the same lack of logic in the contested Verdict, that is, to its deficiencies regarding the erroneously established state of facts, or the decisive facts that, as a rule, pertain to: possibilities to enter the Rapatnica prison, the fact of whether the Accused Mujčinović generally visited this prison, and whether the Accused himself was the person who had beaten, burnt and abused the witnesses-injured parties Pero Đukić and Drago Đukić. Given the foregoing, the Appellate Panel will provide a uniform reasoning concerning the objections advanced by the Defense Counsel.

34. To this effect, the Counsel for the Accused argued that the Trial Panel has based the decisive fact – possibility that the Accused Mujčinović entered the prison, exclusively on the fact that the detained Serbs were beaten and abused in this facility. In addition to the referenced fact, which was according to the Defense erroneously established in the contested Verdict, the Defense has also argued that the evidence adduced exactly showed the contrary, namely the fact that only members of the military and civilian security were authorized to enter the prison to interrogate the prisoners. According to the Defense, there were certain rules in force in this prison, pertaining to both the persons authorized to enter the prison, and to the rules of conduct in the prison, with which everyone had to adhere. The Defense therefore argues that all this finally points to a logical conclusion that only members of the military and civilian security and the guards were the persons who had access to the detainees, and that a more realistic possibility was that it was exactly they who committed the referenced criminal acts, rather than the Accused, as the contested Verdict unreasonably concluded.

35. The Appellate Panel has evaluated the referenced arguments advanced by the Defense for the Accused, and concluded that they are ill-founded, and that the Trial

Panel's explanation of the decisive facts in question was fully reasonable. The Appellate Panel has also upheld this explanation, and concluded that the evidence adduced suggests the conclusion that, nevertheless, at the critical time, there were no strict control rules on entrance into the Rapatnica prison, and that it is therefore logical to conclude that the Accused, although not being a member of any security organ, had access to the prison. This is all the more so because the critical period at issue pertains almost to the very outset of the war conflict in BiH, when there still was no strict discipline and the established hierarchy of the military and civil authorities, which could undertake adequate measures against any abuse of the state of war, or against the arbitrariness of both individuals and members of military and paramilitary units or the parts thereof.

36. It should be first noted that it ensues from the evidence adduced, as also properly found in the Trial Verdict, that two groups of persons entered the prison with the aim to inhumanly treat the detainees. The first group of four-five people is correlated with the questioning of the detainees-injured parties, with almost daily beatings and extortion of statements, which suggests that they were probably members of the military security whose duties included the detainees' interrogation. The latter group comprised masked men who used a soldering iron and syringes to torture the injured parties, of which only one person had no mask, and who was identified by witnesses Pero Đukić and Drago Đukić as „Zoka the drummer“, and whom they learned to be the Accused Zurahid Mujčinović after they left the prison.

37. Witness Pero Đukić testified that he was brought to the stage located within the Rapatnica prison. There was a group of men wearing masks, except for one person whom the others addressed as „Zoka the drummer“. These men tortured the witness with a soldering iron, with the continued punching, kicking and beating him with batons. Among these persons, it was exactly „Zoka the drummer“ who took the most active part in the witness's torture, who took bandages off his wounds, poured salt over them and said „... the Chetnik will survive...“

38. The statement of witness Pero Đukić is fully consistent with the testimony of witness Drago Đukić, who almost identically describes the torture he himself was subjected to in a similar way, that is, the burning with the soldering iron, beating, and the salt pouring over his wounds. This witness was also forced to eat salt exactly by the person whom the others called Zoka. Witness Drago Đukić testified that this Zoka had personally told him: „We must beat you now“, and added „I used to play drums here.“ The witness was

determined in saying that, prior to being taken out of there, he had heard one of the group members saying: "*Mujčinović, you will beat your own ones*"!

39. When all the foregoing is correlated with the other witnesses' statements, primarily the statements of witness Blažan Todić and Stokan Marković, who had been abused in the Rapatnica prison, and with a very indicative fact presented by witness Ismet Imširović, the then prison guard, that all arrivals or visits were recorded, except the arrivals of those who had come to the prison with members of the civilian and military security, this all undoubtedly points to the obvious fact that other persons had also entered the prison, either within the security organs or on their own initiative, as concluded by the Trial Panel. The Appellate Panel has also upheld this conclusion in its entirety, which renders the Defense objections, advanced along this line, ill-founded.

40. Indeed, none of the other heard Prosecution witnesses, also tortured in the Rapatnica prison, as implied by the Defense appeals, could testify that they had indeed seen the Accused in the prison, or that he participated in their abuse. This fact, however, cannot bring into question the Trial Panel's proper finding that it was nevertheless possible to enter the prison, and that the Accused was indeed present in the Rapatnica prison, given the fact that the detainees were individually taken out of there and abused. All the foregoing suggests a logical conclusion that possibly these same other heard Prosecution witnesses were not at all abused by the Accused, but rather by some other persons. This is quite realistic given the obvious fact that a number of persons were in question, that is, several (two) groups which entered the prison with a view to physically and mentally abuse the Serb detainees.

41. Therefore, due to such a finding of facts, it can be undoubtedly concluded that, in addition to members of the military and civilian security, other individuals or groups also had a possibility to enter the Rapatnica prison. In addition, it should be noted that, obviously, not only that other persons could enter the prison, but all the more so, the Accused Mujčinović, according to the consistent statements of witnesses Pero Đukić and Drago Đukić, indeed entered the prison. Due to the foregoing facts, the Appellate Panel has fully upheld the Trial Panel's conclusion in this part, and concludes that the Defense objections advanced along this line are ill-founded.

**(b) The Accused's identity and his participation in the abuse of the injured parties  
Pero Đukić and Drago Đukić**

42. The appeals further implied that the Trial Panel has uncritically accepted the statements of witnesses Pero Đukić and Drago Đukić regarding the fact that it was exactly the Accused Zurahid Mujčinović who had abused them, and who had burnt them with the soldering iron, sprinkled salt over their wounds, beat and insulted them, and called them the Chetniks. Therefore, both Defense Counsel's appeals implied that the concrete case pertains to quite other persons who had done this. The Defense has pointed to the evidence (the witnesses' statements) which demonstrates that other persons' too had the nickname of „Zoka“, that they too were former musicians, and that their client was in no way this person. Finally, the appeals pointed both to certain contradictions in the witnesses-injured parties' statements, which were accepted as reliable, and to the Trial Panel's illogical or improper conclusions.

43. Having reviewed the trial transcripts, the Appellate Panel concludes that the appellate grievances of the Counsel for the Accused are ill-founded, and that the Trial Panel has justifiably given full credence to the statements of witnesses-injured parties Pero Đukić and Drago Đukić. This is so because they are consistent in the decisive facts, and they fully confirmed the Prosecution arguments, and categorically and consistently indicated that the Accused Zurahid Mujčinović was „Zoka the drummer“, that is, the person who had abused them in the prison by burning them with the soldering iron, beating, sprinkling salt over their wounds and forcing them to eat salt, in addition to continued insults.

44. The Appellate Panel has indeed noticed certain inconsistencies in the mentioned witnesses' testimony, as implied by the Counsel appeals too. The Appellate Panel, however, has held that these inconsistencies could, in no way, bring into question the Trial Panel's proper conclusion about the Accused's responsibility for the charges pressed against him. This is all the more so because it is quite non-realistic to expect a full consistence between the witnesses' statements, given that the hard moments they had experienced in the prison, the time period elapsed since the moment of the crime commission and a larger number of statements they gave both during the investigation and at the main trial, indeed finally resulted in certain discrepancies, which, on the other hand, were not of such a nature or extent so as to violate the credibility of their testimony.

45. More specifically, witness-injured party Pero Đukić described, in his testimony, how he had been brought to the Rapatnica prison and the conditions therein. This witness made an emphasis on the daily beatings by a number of persons, particularly pointing to a group of persons that had a strikingly specific way of torturing the detainees, namely with the soldering iron, sticking needles in the nails, accompanied with constant punching, kicking, etc. Witness Pero Đukić testified: „As to the masks, a group which worked with the tools, such as the soldering irons as they called them, they were all masked but one“, and added „*This one wearing no mask was Zoka the drummer*“.

46. Explaining how he had learned that the person with no mask was one „Zoka the drummer“, the witness stated that all the other present persons had so addressed him. The witness particularly remembered the fact that this „Zoka the drummer had *unclear speech*“, namely that he spoke „*inarticulately*“, as also confirmed by witness Nihad Ibrišimović. Witness Ibrišimović testified that the Accused's speech before the war was regular, except in situations when he got irritated, and when his speech defect revealed.

47. When it comes to the Accused's (inarticulate) way of speaking at the critical time, one of the Accused's attorneys asked, in his appellate reasons, now that the Court has accepted this as a fact, how it could be possible that his client was a professional musician given his speech defect.

48. With regard to the foregoing, the Appellate Panel has noted the generally recognized fact that, as a rule, an existing speech defect constitutes no obstacle for a person to be a professional musician. This fact has been confirmed by a large number of musicians who, despite certain speech disturbances, played music with no obstacles given that such type of disturbance is, as a rule, more expressed in a daily speech rather than during music performance.

49. Furthermore, witness Pero Đukić testified that, at the time, he even did not know the real identity of “Zoka the drummer”. This witness testified that it was not until his transfer from the Rapatnica prison to the Central Prison in Tuzla that he learned that one Zurahid was at issue, and that once he was released from the Tuzla prison he learned the Accused's full name, namely that it was none other than the Accused Zurahid Mujčinović.

50. The Appellate Panel has also held that a particularly important fact that undoubtedly it was exactly the Accused Mujčinović who had taken the referenced criminal acts ensues from a key detail in this witness's testimony. This witness testified that, in the course of his



transfer to the Tuzla Central Prison, guard Suad approached the witness and told him that he could not help him, and that „*Zurahid should not have done what he did*“. Witness Drago Đukić confirmed the foregoing by testifying that guard Suad had told him exactly the same.

51. The Trial Panel has properly concluded the foregoing from witness Drago Đukić's testimony, namely that the Accused Mujčinović was the person who had, in addition to the injured party Pero Đukić, also abused Drago Đukić in an identical way. More specifically, witness Drago Đukić himself almost identically described at the main trial the way in which he was abused by a soldering iron, sticking needles under his nails and by being forced to eat salt. This witness confirmed that, among others, the Accused Mujčinović, whom he had recognized both during the investigation and the main trial, had done this. This witness also confirmed that Zoka the drummer was exactly the Accused Zurahid Mujčinović.

52. Finally, excluding the possibility that the concrete case concerned some other person, whose nickname was also „Zoka“ or who was perhaps a musician, rather than the Accused Zurahid Mujčinović, ensues from the testimony of witness Drago Đukić. This witness was determined in stating, as mentioned above, that before they were taken out of there, he had personally heard one member of the group saying: „*Mujčinović, beat your own ones!*“, which points to the logical conclusion that it was the Accused who had undertaken the criminal acts against the injured parties.

53. The Defense has pointed to the inconsistency between the witness Drago Đukić's concrete statement and his testimony at the main trial. The Defense argued that initially, responding to the Prosecutor's question, this witness stated that he had heard someone from the group saying “Mujčinović, beat your own ones!“, while further in his testimony, during cross-examination, the witness stated that he had heard the sentence “*Zoka, you will now torture and beat your own ones!*“.

54. Having reviewed the trial transcripts, the Appellate Panel has indeed established that, at one point, the referenced witness used the Accused's last name, and following a repeated question, he used the nickname Zoka. However, the Appellate Panel has held that the witness's expressing in this way was just a clumsy formulation resulting from his being repeatedly examined regarding the same circumstances. According to the Panel, such a failure cannot bring into question the reliability of his testimony, particularly regarding the fact that the referenced witness, consistently with witness Pero Đukić, personally learned from guard Suad the above addressed decisive fact, namely that this

guard told them that there was nothing that he could do to help them, and that “*Zurahid should not have done what he did.*” This undoubtedly pointed to the Accused's identity.

55. The Defense has pointed to the lack of logic in the foregoing statements of the witnesses-injured parties, namely to the fact that, at the confrontation between witness Drago Đukić and Suad Imširović, witness Đukić could not recognize Suad.

56. In brief, the Defense argued that witness Drago Đukić indeed was not able to recognize witness Suad as a person who had told him that “*Zurahid should not have done what he did*”, and also that he would not have recognized the Accused Mujčinović either had he not been told, during the identification procedure in the CJB Bijeljina, that none other than Zurahid Mujčinović was the person who had abused him. Along this line, the Defense referred to the testimony of Blažen Todić. This witness stated at the main trial that, after his failure to identify in the photos the person who had abused him, the police officers pointed at the Accused telling the witness that he was that person. However, despite this fact, the witness could not remember the requested person.

57. The Appellate Panel considers that the advanced appellate reasons are ill-founded. More specifically, the confrontation between witnesses Drago Đukić and Suad Imširović made no significant contribution to the clarification of the decisive factual circumstances concerning witness Drago Đukić's statement that it was exactly Suad who had told him that “*Zurahid should not have done what he did*”.

58. There is no doubt, as it ensues from the main trial record of 13 June 2012, that witness Drago Đukić could not recognize witness Suad Imširović as a person who had told him the referenced sentence. It is, however, very important to note that witness Suad Imširović himself could not remember with certainty either that Drago Đukić was exactly the person who had been detained in the Rapatnica prison. Given the elapsed period of time, all the foregoing has, in a way, justified witness Đukić's poor memory of guard Suad's physical appearance.

59. Therefore, the view of the Appellate Panel is that the very fact that witness Drago Đukić could not confirm with certainty that this person was exactly guard Suad does not bring into question his testimony's reliability as a whole. More specifically, considering all the suffering to which witness Drago Đukić and his brother Pero were subjected in the Rapatnica prison, it is obvious that the injured parties remember far more details concerning the persons who had mistreated them, namely that their primary motive was to

remember, find out and finally identify the persons who had abused them. The foregoing also ensues from these witnesses' statements revealing the ways in which they have gathered the information with a view to finally learn the identity of the persons in question.

60. More specifically, this Panel has concluded that the fact that witness Drago Đukić did not recognize witness Suad Imširović has no decisive importance for the establishment of the Accused's guilt in a situation where there is clear, consistent, and above presented evidence on the Accused's concrete acts undertaken in the referenced crime commission.

61. Furthermore, contesting this part of the impugned Verdict, that is, the fact that the Accused Mujčinović was a perpetrator of the crime, the appeals also referred to witness Dževad Imširović's statements. This witness testified that he knew that one Huso Hodžić, who had visited the prison, also called himself by the nickname „Zoka“, as also confirmed by witness Suad Imširović. The appeals also referred to the testimony of witness Ismet Imširović, who stated that he knew that one Samir Nurkanović, a military police member, had also been a drummer before. This somehow suggests the conclusion that these persons too could be the perpetrators of the referenced criminal offense charged against the Accused Mujčinović.

62. The Appellate Panel, however, noted that the Defense has partially, in a way acceptable for them, evaluated the referenced witnesses' statements.

63. It undoubtedly ensues from these very statements that none of the witnesses indicated none of the mentioned persons as Zoka the drummer, but rather only as “Zoka” (Huso Hodžić), or “the drummer” (Samir Nurkanović), while on the other hand, the witnesses-injured parties, Pero Đukić and Drago Đukić, indicate the person who had abused them as “Zoka the drummer“, which is obviously also the Accused Mujčinović's nickname. Obviously, this fact was not at all disputable in these criminal proceedings given the fact that the appeal by the Counsel for the Accused itself stated that his client has been known as “Zoka the drummer“.

64. Given such a finding of facts, the Appellate Panel considers irrelevant the appeals' arguments that the Trial Verdict delivery was followed by a number of reactions pointing to the real perpetrators of the referenced criminal offense, which reactions ended in bringing criminal charges against a number of persons. More specifically, the Appellate Panel has held that, as such, these appellate reasons could not bring into question the Trial Panel's proper conclusion.

65. The Appellate Panel could not accept the statements of witnesses Ismet Imširović and Elvedin Ćudić (heard at the main trial), enclosed with the appeal filed by one of the Accused's attorneys, given that the character of new evidence, as provided for in Article 327(1)(c) of the CPC of BiH, could not be given to them. This is so because these statements, individually or in combination with the evidence adduced, are not suitable to bring into effect the Accused's acquittal. Regardless of the foregoing, it should be noted that the Appellate Panel does not exclude a possibility that the persons indicated in the referenced criminal report indeed participated, in addition to the Accused Zurahid Mujčinović, in the commission of the criminal offense at issue. However, it should be noted that it was not their criminal responsibility that had to be determined in these criminal proceedings, but rather the responsibility of the Accused Mujčinović, which undoubtedly ensues from the foregoing evidence.

66. Finally, the theory of the Accused's Defense, that the Prosecution witness Drago Đukić was not convincing, was also based on the fact that the co-accused in this case, Sulejman Hrustić, was acquitted of the charges for almost identical acts, regardless of the fact that witness Drago Đukić unequivocally indicated or identified the co-accused Hrustić as a person who had, in concert with the Accused Mujčinović, participated in his abuse.

67. However, contrary to such an evaluation of witness Drago Đukić's testimony, the Appellate Panel has held that the Trial Verdict itself has not characterized the referenced witness's testimony as unreliable, but rather as insufficient so as to base solely on it, as a single piece of evidence, the decision on the guilt of the co-accused Sulejman Hrustić.

68. More specifically, the Appellate Panel has noted a decisive difference regarding the responsibility of the co-accused Mujčinović and Hrustić, as properly found in the Trial Verdict. It pertains to the fact that the decision on the Accused Mujčinović's guilt was based on the consistent testimony of the injured parties-witnesses, Pero Đukić and Drago Đukić. However, in relation to the co-accused Hrustić, there was no key corroborating evidence to confirm Drago Đukić's statements, which would ultimately quite certainly lead to making a different conclusion on the participation of the Accused Hrustić in the incriminating acts, and his responsibility for these acts.

69. Since the Defense has, in no way, brought into doubt the Trial Panel's conclusion in this part, the Appellate Division Panel decided to refuse as ill-founded the appeal arguments advanced along this line.

## **VI. VIOLATIONS OF THE CRIMINAL LAW**

70. Having relied on the foregoing standards, described in the Verdict section titled „General Considerations“, the Appellate Panel *prima facie* dismissed as ill-founded the appellate argument advanced by the Counsel for the Accused, Attorney Midhat Skenderović, indicated as the appellate ground under Article 296(b) of the CPC of BiH (the criminal code violation).

71. Pursuant to Article 306 of the CPC of BiH, the Appellate Panel shall review the verdict only insofar as it is contested by the appeal, and the appellant shall draft his appeal so that it serves as a basis for reviewing the verdict. To this effect, the appellant must concretize the appellate arguments for which the Verdict is contested, and specify the part of the Verdict, evidence or the judicial procedure which is being contested, and provide clear and corroborated reasoning in support of his appellate grievances.

72. Since the appeal by the Accused's Counsel has only arbitrarily advanced this appellate reason, with no clear reasoning and arguments in support thereof, it could not constitute a valid ground for reviewing the Trial Verdict. Pursuant to the developed Appellate Panels' case law, the Appellate Panel has therefore, with no further consideration, dismissed this unreasoned appellate argument.

## **VII. DECISION ON CRIMINAL SANCTION**

73. The Appellate Panel has also considered as ill-founded the Defense appellate reasons regarding the imposed criminal sanction, that is, the sentence of imprisonment for a term of 8 (eight) years for the referenced criminal offense.

74. The Appellate Panel has noted, upon examining the referenced Defense appeals, that they presented no new decisive facts or circumstances, except those evaluated by the Trial Panel in ruling on the type and duration of sentence for the commission of this criminal offense. On the contrary, the Appellate Panel noted that the appeals have only reiterated and tried to reevaluate the circumstances already established.

75. The Appellate Panel has concluded that, in fashioning the sentence of imprisonment to be imposed on the Accused, the Trial Panel relied on all the established relevant facts and the circumstances on the part of the Accused, that all these facts, including the ones

the appeals reiterated, were properly evaluated, and that a proper decision on sentence was made. The Appellate Panel therefore dismissed as ill-founded the Defense's appellate reasons.

76. The Appellate Panel has noted that in evaluating the circumstances surrounding the Accused's family situation, and his obviously poor health condition, the Trial Panel applied the proper standards in meting out his punishment, and that the reduced eight-year punishment is quite proportionate with the gravity of the committed crime and the degree of the Accused's criminal liability.

77. In view of the foregoing, pursuant to Article 310, as read with Article 313 of the CPC of BiH, the Appellate Panel decided as stated in the operative part of the Verdict.

**Minutes-taker:**

**PANEL PRESIDENT**

**Legal Adviser**

**J U D G E**

**Medina Džerahović**

**Hilmo Vučinić**

**NOTE ON LEGAL REMEDY:** No appeal lies from this Verdict.