

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case No.: S1 1 K 002594 13 Krž3

Date: 13 June 2013

Before the Panel of Judges comprised of: Dragomir Vukoje, LLM, Presiding Judge
Redžib Begić, Reporting Judge
Mirza Jusufović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ACCUSED ESO MACIĆ

SECOND INSTANCE VERDICT

Prosecutor's Office of Bosnia and Herzegovina:

Prosecutor Sanja Jukić

Counsel for the Accused Eso Macić:

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Sarajevo, 13 June 2013

The Court of Bosnia and Herzegovina, sitting in the Appellate Division Panel of the Section I for War Crimes, comprised of Judge Dragomir Vukoje, LL.M., as the President of the Panel, and Judges Redžib Begić and Mirza Jusufović, as members of the Panel, with the participation of the Legal Advisor-Assistant Nevena Aličehajić as the Record-taker, in the criminal case against the Accused Eso Macić, for the criminal offenses War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina and War Crimes against Prisoners of War under Article 175(a) of the same Code, taken in conjunction with Articles 29 and 180(1) of the same Code, deciding on the appeal of Attorney Kadrija Kolić, Counsel for the Accused Eso Macić, filed from the Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 002594 10 Krl of 15 November 2012, following a public session of the Appellate Panel held in the presence of Ms. Sanja Jukić, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the Accused Eso Macić and his Attorney Kadrija Kolić, on 13 June 2013 issued the following:

VERDICT

Granting, in part, the appeal filed by the Counsel for the Accused Eso Macić, **revising** the Verdict of the Court of Bosnia and Herzegovina number S1 1 K 002594 10 Krl of 15 November 2012 in its decision on sentence, and sentencing the Accused Eso Macić, for the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina, as read with Article 29 and 180(1) of the same Code, of which the Verdict found him guilty, pursuant to both the referenced provision and Articles 39, 40, 42(1) and (2) and 48(1) of the Criminal Code of Bosnia and Herzegovina, to the imprisonment for a term of 13 (thirteen) years, towards which sentence, pursuant to Article 56 of the Criminal Code of Bosnia and Herzegovina, the time the Accused spent in custody, running from 15 November 2012 onwards, shall be credited.

As to the remaining part thereof, the Verdict remains unaltered.

REASONS

1. The Verdict of the Court of Bosnia and Herzegovina No. S1 1 K 002594 10 Krl of 15 November 2012 found the Accused Eso Macić guilty because, by the acts described under sections 1 through 4 of the convicting part of the Verdict, he committed the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), as read with Article 29 and Article 180(1) of the CC of BiH, for which criminal offense he was, pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH), and applying Articles 39, 40, 42(1) and (2) and Article 48 of the CC of BiH, sentenced to imprisonment for a term of 15 (fifteen) years. Pursuant to Article 188(4) of the CPC of BiH, the Accused is relieved of the duty to reimburse the costs of the proceedings, which will be paid from within the budget appropriations, while pursuant to Article 198(2) of the CPC of BiH, it was decided to instruct all the injured parties to pursue their possible claims under property law in a civil action. Pursuant to Article 284(1)(c) of the CPC of BiH, the same Verdict acquitted the Accused Eso Macić of the charges that, by the acts described under Counts 5 and 6 of the Indictment, he committed the criminal offenses of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH and War Crimes against Prisoners of War under Article 175(a) of the CC of BiH, as read with Article 29 and Article 180(1) of the same Code. Pursuant to Article 189(1) of the CPC of BiH, it was decided that, in this part too, the Accused will be relieved of the duty to reimburse the costs of the criminal proceedings, which will be paid from within the budget appropriations. Pursuant to Article 198(3) of the same Code, in this part too it was decided to instruct all the injured parties to pursue their possible claims under property law in a civil action.

2. Attorney Kadrija Kolić, the Accused Eso Macić's Counsel has timely filed an appeal from the referenced Verdict, more specifically, in relation to the sentencing part thereof. The appeal contested the Verdict for essential violations of the criminal procedure provisions, violations of the criminal code, erroneously or incompletely established state of facts and for the decision on criminal sanction. The Accused's Defense moved the Appellate Panel of the Court of BiH to grant the appeal, alter the appealed Verdict pursuant to Article 314, as read with Article 284(1)(c) of the CPC of BiH, by acquitting the Accused Eso Macić of the charges of which he was found guilty under the Trial Verdict,

and to dismiss the charges for the acts that were omitted by the Prosecution in the amended Indictment. Also, the Counsel moved the Appellate Panel to terminate, as of the appeal's date, the Accused Eso Macić's custody into which he was ordered under the Decision dated 15 November 2012.

3. The Prosecution has timely filed their response to the appeal filed by the Accused's Counsel, arguing that all the appellate reasons were void of grounds. Thus, the Prosecution proposed that the appeal be refused as ill-founded, and the Trial Verdict upheld.

4. On 13 June 2013, the Appellate Panel held its session pursuant to Article 304 of the CPC of BiH. The session was attended by Ms. Sanja Jukić, Prosecutor of the BiH Prosecutor's Office, the Accused Eso Macić and Attorney Kadrija Kolić, the Accused's Defense Counsel.

5. The Accused Eso Macić's Counsel has presented the appeal's contents, and fully stood by all the reasons and proposals contained therein. The Accused has also supported his arguments in their entirety.

6. The Prosecutor maintained all her arguments and the proposals presented in the Prosecution's response to the appeal.

I. GENERAL CONSIDERATIONS

7. 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, which is why the Appellate Panel's decision shall only be limited to the issues highlighted and reasoned by the parties' appeals. Furthermore, as to the appeal's contents, which may form a valid basis to review the impugned verdict, the Panel finds it necessary to note that, pursuant to Article 295(1)(b) and (c) of the CPC of BiH, the applicant's appeal should include the grounds for contesting the verdict, and the reasoning behind his complaints too.

8. In view of the foregoing, the applicant shall state the grounds for contesting the verdict¹, specify the contested part of the verdict, piece of evidence or court's procedure, and support his arguments with clear reasoning.

9. Mere arbitrary presenting the appellate reasons, and highlighting the alleged irregularities of the contested verdict, without specifying the appellate ground under which such irregularities may be subsumed, cannot constitute a valid basis to contest the verdict, which is why the Appellate Panel considers such complaints as *p r i m a f a c i e* ill-founded.

II. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. Essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC of BiH – violation of the right to a defense

10. The Defense Counsel's appeal stated that, during the cross-examination of witness Mladen Vukalo, who refused to answer certain questions, the Trial Panel violated the Accused's right to a defense, which is among other things, provided for under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), by failing to take actions to ensure answers to such questions, whereby the Accused's defense was prevented from posing additional questions in the course of cross-examination.

11. According to the Appellate Panel, this complaint is ill-founded.

12. A violation of the right to a defense exists where the rules of the procedure were not applied at all, or these rules were applied to the prejudice of the accused. Any violation of the procedural norms to the detriment of the accused means that the accused's right to a defense, enshrined in the international acts, has been violated. If such a violation was

¹ Article 296 of the CPC of BiH, that includes appellate grounds, stipulates that a verdict may be contested on the grounds of: a) an essential violation of the provisions of criminal procedure; b) a violation of the criminal code, c) the state of the facts being erroneously or incompletely established, d) the decision as to

made, and an authorized procedural subject's appeal has so indicated, this violation will be characterized as an absolutely essential violation of the criminal procedure, the result of which is always a revocation of the verdict.

13. Having reviewed the transcript of witness Mladen Vukalo's testimony before the Trial Panel on 8 February 2011 and 22 February 2011, the Appellate Panel concluded that the Accused's Defense was provided with a possibility to cross-examine the witness pursuant to Article 262(1) and (2) of the CPC of BiH. However, despite being cautioned for several times by the Trial Panel's President, the Counsel continued the questioning in a way non-compliant with the rules on witness cross-examination, and posing the questions regarding the circumstances irrelevant to the state of facts' clarification, the Panel issued, and the Panel President announced the decision prohibiting any further examination of the witness in the way as previously done by the Counsel. The Counsel was instructed that, in the further course of examination, he should act in compliance with the cross-examination rules or, more precisely, if he considers that the statement given for the record during the investigation differs from the trial testimony, he may clarify this issue, first by putting a question to the witness, and only thereupon by presenting the witness with the record's contents. Following such a decision of the Panel, the Counsel sought disqualification of the Trial Panel's President on the grounds set forth in Article 29(f) of the CPC of BiH (the circumstances raising a reasonable suspicion as to judge's impartiality). The Decision of the Special 24(7) Panel No. S1 1 002594 10 Kv of 9 February 2011 refused this petition as inadmissible. The main trial resumed on 22 February 2013, and the Counsel was provided with an opportunity to finalize the witness cross-examination. Considering that certain questions put by the Counsel to the witness went beyond the scope of direct examination, the Panel President banned such questions, and instructed the Counsel that he may summon witness Vukalo as a witness for the Defense to examine him regarding those circumstances. The Accused's Defense did not exercise this right. In view of all the foregoing, in particular the facts that, pursuant to the legal provisions, the Counsel was enabled to cross-examine this witness, that the Panel provided him with a possibility to summon this Prosecution witness and hear him as a Defense witness, and thereby directly examine him with regard to the circumstances that were not a subject of the Prosecutor's examination, that the bans and restrictions imposed during the hearing were strictly aimed

the sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law and announcement of the verdict through media.

to ensure that the examination is carried out in compliance with the law, with the principles of judicial economy and efficiency, and only regarding the circumstances relevant to a proper and comprehensive establishment of the state of facts, this Panel has concluded that the Accused's right to a defense in this situation was not violated.

14. The Counsel further submits that the Accused Eso Macić's right to a defense was also violated by the fact that no possibility was provided to him to present his case in relation to Šćepo Gotovac's murder, with which the Panel charged him after the main trial completion. Since this Counsel's complaint is related to the complaint concerning the extension of charges, this Panel will address this complaint too in the part in which the essential violations of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH will be reviewed, all with a view to avoiding unnecessary repetition.

2. Essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC of BiH

15. According to the Counsel, the Trial Panel made an essential violation of the criminal procedure provisions under Article 297(1)(h) CPC BiH since the subject of charges has not been entirely resolved due to its failure to render a verdict dismissing the charges for the acts and consequences allegedly undertaken by the Accused against the injured parties, as indicated under Counts 3 and 4 of the Indictment of 30 September 2010, which is a part of the factual description withdrawn by the Prosecutor from the amended Indictment submitted at the hearing on 17 February 2012.

16. According to this Panel, the referenced complaint is ill-founded.

17. In relation to the referenced appellate argument, one should be first mindful of Article 280(1) of the CPC of BiH, according to which a verdict shall refer only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial. In addition, it should be noted that under Article 275 of the CPC of BiH, the Prosecutor may amend the indictment at the main trial if he/she believes that the evidence presented indicates changes of the facts presented in the indictment. However, the amendments to the indictment imply such changes in the factual description of the offence that should not result in changing the legal qualification of the criminal offense to the prejudice of the Accused's procedural position. According to this Panel, the Prosecution has acted exactly in accordance with the referenced legal provision by altering the

factual description of Counts 3 and 4 of the amended Indictment of 16 February 2012, as a result of the evidence presented at the main trial, and of the state of facts transpiring therefrom. Contrary to the Counsel's objection, the Prosecution withdrew no action charged against the Accused Eso Macić as a result of which it would be necessary to render a verdict dismissing the charges. The amendments in the factual description rather pertain to the omission of a certain number of the injured parties who were, according to the original indictment, the victims of beating, or to the specification of the actions undertaken by the Accused against the injured parties individually, but which are still, under the amended Indictment, characterized as „*intentional infliction of severe bodily and mental pain and suffering*“, as an act of commission of the criminal offense of War Crimes against Civilians. The Prosecution's amendments to the factual description of the Indictment were not made in terms of changes that would result in an altered legal qualification of the offense. The acts charged against the Accused under the amended indictment have also satisfied the essential elements of the same criminal offense but against a reduced number of the injured parties. This Panel has therefore concluded that the Prosecutor did not withdraw the charges described in the original indictment which would require rendering a verdict dismissing the charges. One should also note here that the referenced interventions in the factual description of the Indictment were made in favor of the Accused. Bearing in mind that the Prosecutor amended the factual description of the Indictment pursuant to his discretion right provided for under Article 275 of the CPC of BiH, and that the subject of the Verdict is the criminal offense contained in the amended Indictment, the appellate complaint that the contested Verdict did not fully resolve the subject of charges whereby an essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC of BiH was made, is ill-founded.

3. Essential violations of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH

18. Defense Counsel's appeal stated, among other things, that the contested Verdict is based on the evidence on which it could not be based, namely on the records on identification performed by witnesses Branko Šiniković, Mladen Vukalo, Velibor Mrkajić, Velimir Kuljanin and Momir Mrkajić, and that this identification was carried out in violation of Articles 10 and 85 of the CPC of BiH.

19. Article 10 of the CPC of BiH governs the issue of legality of evidence. Paragraph 2

of this Article provides that:

“The Court shall not base its decision on evidence obtained through violation of human rights and freedoms prescribed by the Constitution and international treaties ratified by Bosnia and Herzegovina, or on evidence obtained through essential violation of this Code.”

20. The Counsel obviously believes that, in terms of Article 10(2) of the CPC of BiH, the records on identification of suspects performed by the referenced witnesses are unlawful, as they were drafted, that is, the act of identification was carried out, in violation of Article 85(3) and (4) of the CPC of BiH, namely by making essential violations of the Criminal Procedure Code provisions.

21. It should be noted here that the very fact that a certain piece of evidence is obtained in violation of the CPC of BiH's provisions, does not *a priori* mean that it is the evidence on which a court's decision cannot be based. Such unlawful evidence is the evidence obtained in violation of the criminal procedure provisions, and for which the law prescribes that no court's decision can be based on the evidence obtained in such a way.²

22. The very notion of unlawful evidence is, however, far wider than the referenced one. More specifically, the evidence for which it is not strictly prescribed that it cannot form a court's decision may also be unlawful evidence. Nevertheless, taking such a piece of evidence as a ground for the verdict does not amount to an essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH, which always results in a revocation of the verdict. In a situation where an appeal suggests the existence of such an unlawful piece of evidence, the Appellate Division Panel will rather examine, on a case-to-case basis, if indeed there is an essential violation of the criminal procedure provisions, that is, whether the referral to such evidence has affected rendering a lawful and proper verdict (Article 297(2) of the CPC of BiH).

23. Considering that the Counsel's appeal states that the records on identification made by witnesses Branko Šiniković, Mladen Vukalo, Velibor Mrkajić, Velimir Kuljanin and Momir Mrkajić constitute unlawful evidence as it was obtained in violation of Article 85(3) and (4) of the CPC of BiH, and that the law does not strictly provide that the evidence obtained in violation of the said provisions is the evidence on which a court's decision cannot be

²For example, Article 78(6) of the CPC of BiH, Article 83(4) of the CPC of BiH, Article 98(1) of the CPC of BiH, Article 121 of the CPC of BiH, etc.

based, this Panel will examine whether Article 85 of the CPC of BiH was violated during the procedure of making these identification records, and if so, whether such a violation could have affected rendering a proper and lawful verdict.

24. Therefore, contrary to the referenced appellate complaint, this Panel has held that the Trial Verdict contains no violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH, and that the objection, suggesting that the referenced evidence is unlawful, will be examined within the evaluation of the appellate complaints concerning the essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH.

4. Essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC of BiH

25. According to the Counsel, the Trial Panel has also made an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH. More specifically, the Counsel argued that, by interfering, after the main trial's completion, with the „objective identity of the underlying act of the criminal offense“, as described in section 1 of the operative part of the Verdict, and by introducing the elements of the criminal offense of Murder, the Trial Panel extended the charges, and thereby deprived the Accused to present his case along this line, which is why his right to a defense has been violated. The Counsel argued that, in pronouncing the trial verdict, the Trial Panel strictly noted that it did not accept, as the act of commission of the criminal offense, that the accused Eso Macić participated in Šćepo Gotovac's murder. However, it transpires from the reasons of the written copy of the contested Verdict that the accused Macić was found guilty of this murder too. That is why, according to the Counsel, not only that the charges were extended, and the Accused's right to a defense violated, but the verdict is incomprehensible and contrary to its reasons too.

26. The Appellate Panel has first concluded that the Accused's right to a defense was not violated in the way as stated under the appeal. The Accused was found guilty of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, which, pursuant to the legal description, also includes murder as an act of commission of

this crime, which he committed by the acts described in section 1 of the operative part of the Verdict, and whose factual description was harmonized with the Indictment's factual description for this count (with an intervention in the factual description made in favor of the Accused, by which the objective identity of neither the Verdict nor the Indictment was brought into question). Thus, the Panel cannot accept the appellate submission that the Accused's right to a defense was violated because the Accused has been made aware of the charges brought against him since the moment when the confirmed Indictment was forwarded, and because he could, and indeed did exercise the right to present his case with a view to contesting the Prosecution's allegations.

27. It should be further noted here that the Counsel has erroneously interpreted the reasoning provided by the Panel President during the Verdict announcement, in relation to the changed factual description of the Indictment. This reasoning ultimately formed part of a written copy of the Verdict. More specifically, it ensues both from the oral explanation provided at the public announcement of the Verdict, and from the written copy thereof, that the intervention in the factual description of section 1 of the operative part was made because the Trial Panel, despite finding proved that the accused Eso Macić indeed participated in Šćepo Gotovac's beating, did not find that the Accused participated in this beating until the injured party showed no more signs of life, that is, until he received the final, lethal blow. Thus, a part of the sentence from the factual description of the Indictment was omitted in the above related part. However, as it transpires from the contested Verdict's reasons, despite making such a factual intervention, the Trial Panel finds in the accused Macić's acts, described under section 1 of the contested Verdict, the underlying elements of complicity in the murder of this injured party (para. 166 of the Trial Verdict). This Panel will further evaluate if such a legal conclusion was properly drawn in the contested Verdict, and accordingly provide a detailed reasoning.

28. This Panel finds it necessary here to note that the charges would be exceeded even if the Court extended the offense description provided in the Indictment, that is, if the Court took into account the decisive facts that were as such established at the main trial but were not included in the Indictment. In the concrete case, however, as also confirmed in this part in the non-amended Indictment, the Accused was charged with the killing of the injured party Šćepo Gotovac in the way factually described in Count 1 of the Indictment because, in concert with other guards, he:

„...cruelly and sadistically beat up the injured party Šćepo Gotovac ... by kicking and punching him, and beating him₁₂with rifle butt all over his body, and,

despite being aware that the injured party could die as a result of such blows and his age, he consented to such a consequence because he continued beating the injured party until he showed no sign of life.”

29. The Trial Panel has intervened in the factual description of the Indictment by omitting, from the factual description provided under section 1 of the operative part of the Verdict, the part of the sentence „*because he continued beating the injured party until he showed no sign of life*”. By this intervention, the Trial Panel has not exceeded, but on the contrary, rather diminished the criminal weight of the activities as compared with the Indictment. This is certainly an intervention in favor rather than to the prejudice of the Accused. Explaining the reasoning behind this, the Trial Panel stated that it did not find proved that the Accused was the last person to deliver the final, fatal blow to the injured party Šćepo Gotovac. However, notwithstanding such an intervention, as transpires from the overall reasoning provided in relation to Section 1 of the operative part of the Verdict, contrary to the Counsel’s objection and interpretation of the reasons presented at the Verdict’s announcement, the Trial Panel has found the Accused guilty of murder, as an underlying act in relation to the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, which the Accused committed as a co-perpetrator in concert with Esad Landžo and other unidentified guards.

30. In view of the foregoing fact that the Accused was found guilty of the offense also charged against him under the confirmed Indictment, and that the Trial Panel added nothing new in the factual description of the operative part of the Verdict, but on the contrary, it omitted a part of the factual description in favor of the Accused, this Panel has concluded that the Counsel’s objection, that the Trial Panel exceeded the charges and thereby made an essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH, is ill-founded.

31. This Panel has, however, concluded that the Counsel righteously pointed to certain deficiencies of the contested Verdict suggesting certain contradictions between the Verdict’s operative part and its reasons in relation to the acts described under Section 1 of the Verdict, but which the Counsel himself correlated with the objection of an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH. Therefore, the referenced objections will be analyzed in more detail in the reasons for this Verdict presented below.

5. Essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH

32. According to the Counsel, the impugned Verdict is incomprehensible, contradictory to its reasons, and contains no reasons for the decisive facts. The Counsel sees this violation primarily in relation to Section 1 of the operative part of the contested Verdict because, in announcing the Verdict on 15 November 2012, the Trial Panel presented the reasons for not accepting that the Accused participated in Šćepo Gotovac's murder and because, as it transpires from Section 1 of the operative part of the impugned Verdict, it was not determined that the Accused indeed delivered the final and fatal blow to the injured party. Nevertheless, according to the reasons presented in the written copy of the Verdict, the Accused was, under this Count of the Indictment, found guilty of co-perpetration in Šćepo Gotovac's murder. The Accused's Counsel *implicite* finds in the foregoing both the contradiction between the operative part of the Verdict and its reasons, and the lack of reasons for the referenced departure from the reasons presented at the Verdict's announcement.

33. As already reasoned in addressing the objection of the alleged violation of the right to a defense made by the Trial Panel, the Counsel has erroneously interpreted the Panel President's reasoning provided during the Verdict's announcement. It only ensues from this explanation that the Trial Panel did not find proved that the Accused delivered the fatal blow to the injured party Šćepo Gotovac, but regardless of this, it found the Accused guilty as a co-perpetrator in his murder. Therefore, this Panel concludes that, in the referenced part, there is no essential violation of the criminal procedure provisions, as suggested in the Counsel's appeal.

34. Notwithstanding that the charges were not extended, in terms of essential violations of the criminal procedure provisions under Article 297(1)(j) of the CPC of BiH, as reasoned above, the Counsel's objection points to certain deficiencies of the contested Verdict mirrored in the reasons provided in relation to the Trial Panel's legal conclusion about the Accused's acts described in Section 1 of the operative part of the Verdict.

35. This Panel has concluded that, on the basis of the evidence adduced at the main trial and its evaluation, the Trial Panel properly found proved that the accused Eso Macić undertook the actions described in Section 1 of the operative part of the Verdict, and that

these actions qualify as the essential element of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, as read with Article 29 and Article 180(1) of the same Code. Notwithstanding the foregoing, this Panel has established that the Trial Panel erroneously found that the murder of the injured party Šćepo Gotovac committed in complicity is indeed the offense underlying the referenced crime of which the Accused was found guilty.

36. With such a conclusion, this Panel was first mindful of the legal description of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH, which includes a number of modalities of the act of commission, that is, a number of alternatively set out forms, namely: „*killings, intentional infliction of severe physical or mental pain or suffering upon a person (torture), inhuman treatment...immense suffering or violation of bodily integrity or health*“³.

37. This Panel has further taken into account that the criminal offense of War Crimes against Civilians, as well as all other war crimes offenses, can be committed solely with intent, that is, a perpetrator's direct intent. Such a direct intent must be described in the operative part of the Verdict, which is a binding part of the Verdict. In the concrete case, the operative part of the Verdict stated that the Accused „consented“ to the prohibited consequence of the killing, namely he acted with *dolus eventualis* in relation to the killing of Šćepo Gotovac, which is insufficient for the standard required for the killing as a war crime. The Trial Panel has also intervened in the Indictment's factual description by omitting from the operative provisions of the Verdict the following part of the sentence „...*he continued beating [Šćepo Gotovac] until he showed no signs of life...*“. Even though the factual description of Section 1 of the operative part of the Verdict describes that, despite being aware that the injured party could die as a result of the received blows and his age, the Accused consented to such a consequence, the Verdict's reasons stated that the Accused wanted the commission of the referenced criminal offense. Undoubtedly, there is a contradiction between the operative part and the reasons provided in the Verdict. According to this Panel, however, this contradiction is not of such an importance so as to bring into question the proper and lawful nature of the very Verdict, more specifically, of its operative part, which is indeed a binding part thereof.

³ Article 173(1)(c) of the CC of BiH.

38. This Panel has examined the factual description of the acts under Section 1 of the operative part of the Verdict, of which the accused Eso Macić was found guilty, and concluded that these acts have satisfied the essential elements of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CPC of BiH, but not of killing, as an underlying element of the referenced criminal offense, but rather as the other, alternatively laid down form of the commission of the offense at issue, that is, *intentional infliction of severe physical or mental pain or suffering upon a person (torture)*. According to this Panel, there is direct intent on the part of the Accused in relation to the foregoing, which results from the fact that the injured party Šćepo Gotovac was cruelly and sadistically beaten, kicked, punched, and hit with rifle butts all over his body by the Accused and other guards. As also found by the Trial Panel, the Accused was in all this undoubtedly aware that, due to the injured party's age and the nature of the beating, these acts could have lethal consequences for the injured party, and he consented to such a consequence. This fact itself gives weight to the act of torture, but it does not, in any way, render the Accused responsible as a co-perpetrator in the killing due to a non-existent subjective element –direct intent to kill, as an underlying element of the criminal offense of War Crimes against Civilians.

39. Therefore, this Panel concludes that the Counsel's submissions, that the Trial Court extended the charges, and that his right to a defense was violated since he was prevented from presenting his case in relation to the murder charges, cannot be accepted because both the Accused and his Counsel were aware of these charges from the beginning. Notwithstanding this, as also suggested by the Counsel's appeal, the Verdict indeed provided erroneous reasons regarding the fact that the Accused committed the criminal offense of Šćepo Gotovac's murder. According to this Panel, the Trial Panel has properly found that the accused Macić indeed undertook the act of Šćepo Gotovac's beating up, in the way as described in the operative part of the Verdict, in concert with Esad Landžo and other guards, and that these acts of the Accused satisfy the essential elements of the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the CC of BiH. However, contrary to the Trial Panel's conclusion, the offense underlying the referenced crime, whose essential elements were satisfied by the Accused's acts, is *intentional infliction of severe physical or mental pain or suffering upon a person (torture)*, rather than the offense of killing.

40. This Panel has also concluded that the acts factually described in Section 1 of the

operative part of the Verdict are proved, and that also proved is that the accused Eso Macić committed these acts with direct intent. Even though it has not accepted the Trial Panel's reasoning that these acts satisfy the underlying elements of murder, but rather of torture, as a separate incrimination set forth in Article 173(1)(c) of the CC of BiH, such a conclusion of this Panel would result in no changes in both the factual description and the legal qualification of the referenced acts. Therefore, notwithstanding that, despite the properly determined facts pertaining to the acts concretely taken by the Accused, the Trial Panel erroneously concluded that the charges described in Section 1 of the operative part of the Verdict have satisfied the underlying elements of killing as a war crime, given that the same provision of Article 173 of the CC of BiH also prescribes torture as an underlying act of the crime, this Panel's conclusion can result in no changes in the operative part of the Verdict. Ultimately, considering that the factual description of the acts and the legal provision of which the Accused was found guilty are still unchanged, this Panel concludes that such erroneous reasons provided by the Trial Panel have neither rendered the Verdict incomprehensible, nor brought into question the proper and lawful verdict. However, such an impropriety in the contested Verdict's reasons may be of importance for the decision on sentence.

6. Essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH

41. The Counsel's appeal sees an essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH in the fact that the Trial Panel acted contrary to Article 281(2) of the CPC of BiH, which prescribes the way in which the court is bound to evaluate the evidence. According to the Counsel, the sentencing part of the trial Verdict is only grounded on the witnesses' testimony given at the main trial, which were correlated neither with the previous testimony of these very witnesses nor with the other witnesses' testimony which they contradict, which has affected the proper and lawful verdict. Along this line, the Counsel argued that the Verdict contains no reasons on decisive facts, particularly when it comes to the charges under Section 1 of the operative part of the Verdict.

42. When it comes to evidence on the basis of which the conclusion on the acts described in Section 1 of the convicting part of the Verdict is based, the Counsel argues that the Trial Panel's decision on the accused Eso Macić's guilt is only based on the

testimony of witnesses Branko Šiniković and Mladen Vukalo, namely on the statements they gave as witnesses at the main trial, which were not correlated with the other evidence adduced, which is contradictory to these two witnesses' statements.

43. The Appellate Panel has concluded that, contrary to such Counsel's objection, the Trial Panel evaluated the evidence adduced in the first instance proceedings exactly in the way as required under Article 281(2) of the CPC of BiH, namely by evaluating, individually and mutually, all adduced items of evidence, and by making such an evaluation a basis of its decision. Furthermore, in the contested Verdict, the Trial Panel has, consistently with Article 290(7) of the CPC of BiH and contrary to the objection of the Accused's Counsel, correlated and evaluated the witnesses' statements incriminating the Accused with the evidence in his favor.

44. Truly, the decision on Eso Macić's guilt for the acts described in Section 1 of the operative part of the Verdict is primarily based on the testimony of witnesses Branko Šiniković and Mladen Vukalo. The Counsel has, however, unreasonably suggested that the Trial Panel failed to evaluate the other pieces of evidence that contradicts the referenced witnesses' statements.

45. Contrary to such appeal's position, the Appellate Panel concludes that, in relation to the acts described in Section 1 of the operative part, the contested Verdict also analyzed the statements of witnesses Janko Glogovac, Dragan Đorđić, Hazim Delić and Zoran Đorđić. These witnesses did not indicate the Accused as the person who had beaten Šćepo Gotovac, so their testimony was in favor of the Accused. The Verdict has interpreted the contents of these witnesses' statements and, contrary to the advanced appellate complaint, correlated them with witnesses Branko Šiniković's and Mladen Vukalo's statements. The Verdict has also provided the reasons for which credence was not given to the foregoing witnesses' statements. Contrary to the above, the statements of witness Šiniković and witness Vukalo were evaluated as sincere, objective and convincing, wherefore they form a basis for the Trial Verdict. In such a way, contrary to the Counsel's objection, the Verdict has indeed provided reasons for the referenced decisive fact.

46. Furthermore, the Appellate Panel has concluded that, contrary to the Counsel's objection, the Trial Panel indeed analyzed in detail witness Momir Mrkajić's statements, given in relation to the acts described in Section 3 of the operative part of the Verdict during various stages of the proceedings (at the main trial and during the investigation), as

well as the witness's reasons for which he did not mention the Accused, during the investigation phase, as one of the persons who had beaten him. Despite stating that the Trial Panel did not evaluate the contradictory evidence, the Counsel's appeal further argued that the Trial Panel has erroneously evaluated witness Mrkajić's statement given during the investigation stage. According to the Counsel, this is so because the Court "justified" certain parts of the witness's statement, which means that the Counsel himself accepted that the Court indeed evaluated this witness's previous statements too. Also, contrary to the Counsel's objection, the Trial Panel has indeed correlated witnesses Velibor Mrkajić's and Velimir Kuljanin's statements, which the Counsel considers as contradictory, and concluded that their statements mutually supported each other.

47. According to the Counsel, the Trial Panel has made a violation of Article 15 and Article 281(2) of the CPC of BiH in relation to the evidence which forms the basis for the conclusion that the Accused is guilty of the acts described in Section 4 of the operative part of the Verdict. The Counsel explains that this is so because the Trial Panel failed to evaluate the statements of witnesses who testified in favor of the Accused's defense (Hazim Delić, Senadin Turković, Safet Alikadić and Ali Uka), and who confirmed that Eso Macić had left Čelebići in late June 1992, or the evidence of Marko Draganić, who is certain that he did not see the Accused in the Čelebići camp on 12 August 1992, when the incriminating act took place. However, based on paras. 251 and 253 of the Verdict, this Panel concludes that, contrary to the appeal's arguments, the Trial Panel indeed evaluated the Defense witnesses' statements given in relation to the charges under Section 4 of the operative part of the Verdict, which generally include the presence of the Accused in the Čelebići camp in the second half of June 1992 and thereafter. Thus, contrary to the consistent and convincing Prosecution witnesses' statements, the Appellate Panel has concluded that the Defense witnesses' statements were aimed to help the Accused and that they are not convincing. This is why these statements as such were given no credence.

48. It ensues from the foregoing not only that, contrary to the objection of the Accused's Counsel, the Trial Panel indeed evaluated the evidence in compliance with Article 281(2) of the CPC of BiH, but that it has also provided reasons on decisive facts. More specifically, there would be an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC of BiH if the reasons on decisive facts and the evaluation of contradictory evidence were fully absent. However, the very fact that, as the

appeal indicated, the Trial Panel indeed referred to certain witnesses' statements, and found them unconvincing and unreliable, excludes the existence of any essential violation of the criminal procedure provisions. Yet, such an evaluation of the referenced appellate reasons provided by the Accused's Counsel does not prejudice the examination of proper evaluation of the evidence adduced in relation to the established state of facts. The foregoing will be done in analyzing the appellate reasons on the grounds of the erroneously or incompletely established state of facts. On the other hand, the referenced appellate reasons pertaining to essential violations of the criminal procedure provisions are considered as ill-founded.

49. As stated above, in paras. 18-24 of this Verdict, the Counsel's objection, that the Records on Identification carried out by certain witnesses⁴ are characterized as evidence on which a court's decision cannot be based, and that this would constitute an essential violation under Article 297(1)(i) of the CPC of BiH, is considered as ill-founded. This Panel's view, however, is that it should be determined whether the referenced evidence was obtained in violation of Article 85 of the CPC of BiH, as indicated by the Counsel's appeal, which affected or could affect rendering a proper and lawful verdict.

50. Article 85 of the CPC of BiH provides as follows:

“... (3) If necessary to ascertain whether the witness knows the person or object, first the witness shall be required to describe him/her/it or to indicate distinctive signs, and then a line-up of persons shall follow, or the object shall be shown to the witness, if possible among the objects of the same type.

(4) If the procedure specified in Paragraph (3) of this Article is not possible, the witness may alternatively be asked to identify a photograph of the person among a set of photographs of persons unknown to the witness, or identify the object among a set of objects of the same kind.”

51. The Counsel argues that the Identification Record is unlawful due to the very fact that the identification procedure was carried out by way of photos presentation, rather than in the way as prescribed under Article 85(3) of the CPC of BiH, that is, by showing the Accused to the witness together with other persons unknown to him, even though the Accused was available. In addition, the Counsel argues that such a deficient identification also exists because the witnesses have identified the Accused from among the photographs including other persons whose physical appearance does not even closely

⁴ Mladen Vukalo, Branko Šiniković, Momir Mrkajić, Velibor Mrkajić and Velimir Kuljanin.

resemble that of the accused Eso Macić, and that the identification was carried out on the recent-photo basis, rather than on the basis of war-time photos.

52. Contrary to this objection, the Appellate Panel has concluded that the above quoted Article 85(4) of the CPC of BiH provides for a possibility of identifying the person from among a set of photographs, as it was done in this specific case. Therefore, contrary to the Counsel's appeal, the very act of identification carried out in the referenced way, cannot be considered as unlawful.

53. As also properly concluded by the Trial Panel, the witnesses were first required to describe the Accused. Thereupon, they were presented with a set of photos of the persons unknown to them, from among which they have all identified the Accused, and confirmed so with their signatures below his photos. The law does not provide that the identification must be carried out on the basis of photos of the persons with same or similar physical characteristics, nor that the photos from which the identification is carried out should or must pertain to a certain period of the person's life (the war-time when the offenses were committed), as implied by the Counsel's appeal. In addition, had the Accused been personally showed to the witnesses instead of his photo-identification, the witnesses would have also seen his physical appearance at the time when the identification procedure was carried out.

54. In view of the foregoing, the Appellate Panel has concluded that the identification procedure was carried out pursuant to Article 85(4) of the CPC of BiH, and that therefore the Counsel's objection that by their nature the Identification Records are unlawful evidence, is ill-founded.

55. Ultimately, contrary to the Counsel's complaints, the Appellate Panel considers proper, and accepts them as such, the Trial Panel's arguments concerning the identification procedure, or more precisely, the witnesses' identification of the Accused carried out in the courtroom. Specifically, even though the Counsel also disputes such an identification of the Accused by the witnesses, arguing that it is contrary to Article 85 of the CPC of BiH, this Panel holds, like the Trial Panel, that the identification carried out in the courtroom is not inherently a procedural action set forth in Article 85 of the CPC of BiH, but that, on the contrary, such an identification is and must be treated as a part of the witnesses' testimony at the main trial. Therefore, such identification, or more precisely, the Accused's showing in the courtroom, should be considered as a part of the witnesses'

testimony, rather than a separate piece of evidence in the evidentiary materials.

56. In view of the foregoing reasons, the Counsel's objections as to the allegedly unlawful evidence, and alleged essential violation of the criminal procedure provisions under Article 297(2) of the CPC of BiH, are ill-founded.

III. ERRONEOUSLY AND INCOMPLETELY ESTABLISHED STATE OF FACTS

A. STATUS OF THE INJURED PERSONS IN THE CASE

57. The Counsel's appeal stated that, in the contested Verdict, the Trial Panel has erroneously found that the allegedly injured persons in this case have the civilian status, rather than that of the prisoners of war. More specifically, the appeal stated that, in relation to the injured parties in the concrete case, three elements have been satisfied (an armed conflict existence, possession of weapons, and the combat-related capture), due to which they must be considered as prisoners of war. The Counsel has added, along this line, that, according to the criminal-law theory's interpretations and the provisions of the Geneva Conventions and their Protocols, even members of voluntary units established within resistance movements are considered prisoners of war. The Counsel has further argued that the injured parties themselves confirmed that they had obtained weapons from the SDS, and that the documentary evidence shows that the RS Assembly had proclaimed their territory, and called all able bodied Serb citizens to join the RS Territorial Defense. In addition, the Counsel has stated that Serb military formations were active in the Bradina area, that combats around Bradina lasted for 3 days, and that an attempted capture of Bradina took place on 15 May 1992, all of which suggests that the injured parties in this case had the status of prisoners of war.

58. The Trial Panel has examined in detail the issue of the injured parties' status in this case, and reserved for this decisive fact a whole chapter in its Verdict. Contrary to the objections advanced by the Accused's Counsel, this Panel finds proper the Trial Panel's conclusion that the injured parties, included in the convicting part of the contested Verdict, were civilians rather than prisoners of war.

59. More specifically, as properly evaluated by the Trial Panel, the starting point in

determining the injured parties' category is Common Article 3 of the Geneva Conventions. Common Article 3 prescribes that protected categories shall be „persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat...“. Furthermore, in order to define the injured parties' status, the Trial Panel has also taken into account both Article 4 of the Fourth Geneva Convention, which defines persons who should be considered prisoners of war, and Article 50 of the Additional Protocol to the Geneva Conventions, which provides that „A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian“. In determining the injured parties' status, the Trial Panel has also properly evaluated the view of the International Criminal Tribunal, according to which an active or direct participation in the hostilities "does not solely imply direct participation in the hostilities, or combat, but also includes an active participation in the combat-related activities"⁵, and that even though "a membership in the armed forces may seriously suggest that the victim takes active part in the hostilities, it itself is not an indicator sufficient for such a conclusion."⁶

60. Notwithstanding that both the fact that there was an armed conflict, and the fact that certain injured parties possessed weapons are indisputable, this Panel also did not find proved, contrary to the Counsel's objection, that these persons were captured in combat. Beside the two referenced circumstances which may suggest that a person has the status of war prisoner, this Panel has correlated the referenced circumstances with a series of other circumstances pertaining to the injured parties individually, as also evaluated by the Trial Panel. Contrary to the Counsel's submission, this Panel concluded that, in the concrete case, the persons in question were not prisoners of war.

61. Taking as a starting point the referenced definitions and the standards established under the international case law, the Trial Panel examined, for each injured party in the concrete case, his individual characteristics, and the circumstances which could affect the conclusion that they were prisoners of war, rather than civilians.

⁵ *Lubanga Dyilo*, Decision confirming the charges, para. 261; *Germain Katanga et al.*, case No. ICC-01/04- 01/07-717, Pre-trial Panel dated 30 September 2008, footnote 375 in para. 276; *Bahar Idriss Abu Garda*, case No. ICC-02/05-02/09-243-Red, Pre-trial Panel, Decision on confirmation of charges of 8 February 2010, para. 83; *Abdallah Banda Abakaer Nourain et al.*, case No. ICC-02/05-03/09-121-Corr-Red, Decision on confirmation of charges of 8 March 2011, para. 6.)

⁶ *Halilović*, Trial Panel Verdict of 16 November 2005, paras. 33 – 34. It should be noted that the lawfulness of the attack by members of the armed forces does not depend on this person's direct participation in the hostilities. The notion of

62. Thus, with regard to the two injured parties deprived of their lives, Šćepo Gotovac and Milorad Kuljanin, this Panel has fully upheld the Trial Panel's conclusion that they had the status of civilians. More specifically, at the time when he was captured, as an older person (age 70), with a frail body constitution, Šćepo Gotovac quite certainly neither fell within the able bodied men category, nor was there any piece of evidence to prove his military engagement. Also, there is no evidence about Milorad Kuljanin's military engagement at the time of his capture. Therefore, this Panel has upheld the Trial Panel's conclusion that, bearing in mind Article 50 of the Additional Protocol to the Geneva Conventions and the ICTY's⁷ view, Milorad Kuljanin too has the civilian status.

63. Furthermore, the other injured parties-victims of the incriminating acts described in Sections 3 and 4 of the Verdict: Mile Kuljanin, Momir Mrkajić, Velibor Mrkajić, Velimir Kuljanin, Branko Šiniković, Ranko Žuža, Boško Gligorević and Zdravko Đorđić, also had the status of civilians, as properly concluded by the Trial Panel. As it transpires from their testimony, even if all injured parties indeed had weapons, it was either seized from them at the moment when they were captured, or they themselves handed them over (Momir Mrkajić, Ranko Žuža). Some of them threw their weapons even before the capture (Velibor Mrkajić, Branko Šiniković, Zdravko Đorđić, Velimir Kuljanin), in which way they were placed *hors de combat*, while some of them (Boško Gligorević), contrary to the Counsel's submission, did not possess any weapons at all. That these persons were civilians, rather than members of armed formations and prisoners of war, is also visible from the fact that certain witnesses testified that they wore civilian clothes at the moment when they were captured (Mile Kuljanin), that they were taken away from their homes (Branko Šiniković), or that they were not able-bodied persons (Novo Mojević). In addition, even with regard to the persons who, for example, stood guard in their village (Velimir Kuljanin), this Panel did not accept the Defense's assertion that even these persons fall within the category of war prisoners, because village guards organized in the Bradina village, as Rajko Đorđić testified, did not represent organized armed forces under the command responsible for the organization of activities during an armed conflict.

64. The Trial Panel has correlated the referenced witnesses' statements with the documentary evidence tendered in the case record. It ensues from this evidence that both

"direct participation" in the hostilities refers to civilians, rather than to combatants or soldiers, wherefore the categories of civilians and combatants/soldiers exclude each other.

⁷ *Prosecutor v. Stanislav Galić*.

prisoners of war and civilians were indeed held in the Čelebići camp. Exhibit T-42 shows that certain injured parties in this case were categorized as prisoners of war (Zdravko Đorđić, Velimir Kuljanin, Momir Mrkajić, Boško Gligorević and Janko Glogovac). In addition, the Panel has evaluated the testimony of Defense witness, Muhamed Rizvić, and the evidence showing that, during the critical period, there was a commission tasked with categorizing the persons held in the Čelebići prison/camp, and determining the extent of their criminal responsibility. However, as also found by the Trial Panel, it can be strictly concluded from all this evidence that the possession of weapons was the sole requirement applied for the deprivation of liberty, which is certainly insufficient to categorize the detained persons as either civilians or prisoners of war. Bearing in mind all the circumstances examined by the Trial Panel, as also stated in para. 63 of this Verdict, and considering that the fact that neither witness Rizvić's testimony nor the documentary evidence brought into question the conclusion that the injured parties had the status of civilians, this Panel has, without questioning the fact that a certain number of war prisoners could have been, or probably were held in the Čelebići camp, accepted as proper the Trial Panel's conclusion that the injured parties, referred to in the convicting part of the contested Verdict, had the status of civilians. Therefore, the Counsel's appellate complaints, regarding the erroneously established state of facts in relation to this decisive fact, are rendered as ill-founded.

65. This is so particularly if the ICTY's view in *Blaškić et al.* is taken into account, namely that „*the presence of those who were members of a resistance movement or former combatants who were no longer bearing arms among the population does not alter the civilian nature of that population.*“

B. THE STATE OF FACTS IN RELATION TO SECTION 1 OF THE CONVICTING PART OF THE VERDICT

66. According to the Counsel, the Trial Panel's findings in the contested Verdict, in relation to the decisive facts pertaining to the acts described in Section 1 of the operative part thereof, or, more precisely, to the Accused's participation in the severe beating of the injured party Šćepo Gotovac which resulted in his death, are erroneous. The Counsel submitted that the Trial Panel's conclusion, that the Accused directly participated in the referenced acts commission, was partial. According to the Counsel, such a conclusion was based solely on the evidence given by witnesses Branko Šiniković and Mladen Vukalo at the main hearing, but with no correlation made between the referenced evidence and

these witnesses' statements given in the earlier stages of the proceedings, or the other evidence adduced. The Counsel argued that such an evaluation would result in a different conclusion on the decisive facts and, applying the principle of *in dubio pro reo*, in the Accused's acquittal of the referenced charges.

67. The Counsel argued that the Trial Panel has erroneously concluded that the accused Eso Macić participated in the beating of the injured party Šćepo Gotovac. This is so because this decisive fact was not confirmed beyond a doubt by witness Branko Šiniković, in his statements given during the investigation phase, which were tendered in the case record by the Defense, and which also contradict the statements of the Defense witness, Marko Draganić. According to the Counsel, witness Draganić is the most credible witness, because he is younger, he has a university degree, and he has known the Accused well since before the war. Witness Draganić testified with certainty that on the relevant day the accused Macić did not visit the Čelebići camp. The statements of witnesses A, B and Hazim Delić also contradict the Trial Panel's conclusion, considering that they do not point to the Accused as a person who took part in the beating of the injured party Gotovac. Ultimately, the Counsel argued that witness Mladen Vukalo's testimony did not support witness Šiniković' testimony either, since witness Vukalo presented no personal feature whatsoever so as to indicate that he could undoubtedly identify the accused Eso Macić. This witness was generally uncertain and vague with regard to the circumstances surrounding Šćepo Gotovac's beating and the place where it took place. According to the Counsel, all these circumstances suggest that, in relation to this section, the Trial Verdict has erroneously established the state of facts.

68. The Counsel ultimately stated that the established state of facts is contrary to the facts established by the ICTY and its case law, pursuant to which Esad Landžo was found guilty as a perpetrator of the referenced murder⁸.

69. The Appellate Panel concludes that the advanced complaints are ill-founded.

70. Contrary to the Counsel's objection, as already addressed in the part of the Verdict providing the reasons for the complaint concerning essential violations of the criminal

⁸Considering the Counsel's arguments, that it is exactly because of the referenced circumstances pertaining to the acts described in Section 1 of the operative part of the Verdict that the case has a character of a finally adjudicated matter, the Panel will comment on this complaint in the part of the Verdict dealing with the objections pertaining to the criminal code violations.

procedure provisions, this Panel has concluded that the Trial Panel's evaluation of evidence was made fully in compliance with Article 281(2) of the CPC of BiH. This Panel has also concluded that all the evidence, including the witnesses' statements given during the investigation stage, the evidence tendered in the case record by the Defense, as well as the evidence in favor of the Accused, was evaluated both individually and in correlation with the other pieces of evidence, and that the Trial Panel drew the conclusion on the decisive facts following a comprehensive analysis of the evidence adduced.

71. The Counsel's efforts were aimed at diminishing the credibility of witness Šiniković and witness Vukalo, whose statements were indeed crucial for the decision on the accused Macić's guilt regarding the acts described in Section 1 of the operative part of the Verdict. The Counsel has emphasized the alleged differences in their statements, the mutual contradictions in their statements, and the circumstances that could possibly create certain doubts as to their credibility. Notwithstanding the foregoing, this Panel has concluded, like the Trial Panel, that these witnesses' statements are sincere, reliable, mutually consistent, and supported with witness Janko Gotovac's testimony, and that therefore credence can be given to these statements.

72. More specifically, contrary to the Counsel's objection, witness Šiniković and witness Vukalo have consistently and convincingly described the way in which the injured party Šćepo Gotovac was beaten. Both these witnesses, including witness Janko Glogovac, testified that Šćepo Gotovac was twice taken out of the hangar „number six“, and beaten in front of it. In addition, witnesses Šiniković and Vukalo reliably and consistently described that Hazim Delić and some other guards had entered the hangar, that Hazim Delić asked the injured party Šćepo Gotovac something about the event from „1940 and something“, and that, following Šćepo's answer that „he had never joined the Chetniks“⁹, or that he “remembered no such thing”¹⁰, they took him out of the hangar and started beating him. Both these witnesses consistently testified that a number of persons had taken part in the beating, namely the camp guards Hazim Delić, Esad Landžo, and some others, including the accused Eso Macić.

⁹ Witness Branko Šiniković's testimony of 8 February 2011.

¹⁰ Witness Mladen Vukalo's testimony of 8 February 2011.

73. According to witness Šiniković, while Gotovac was still in the hangar, Hazim Delić, Eso Macić aka Makaron, Esad Landžo, Almir Padalović and some other persons started beating him, namely kicking and punching him, and hitting him with rifle butts. Thereupon, some of them grabbed his shoulders, took him out of the hangar „number six“, where they continued beating him for the following 10-15 minutes. Those inside the hangar could hear the blows' sounds and the moans. Thereafter, Novica Zelenović and he (witness Šiniković), who were closest to the door, were selected by Esad Landžo to bring back into the hangar Šćepo Gotovac who had lied prone on the concrete. Inside the hangar, they placed him by the door, and Hazim Delić, Eso Macić and some others continued beating him on this spot too. The beating stopped at a certain point, and they left the hangar saying that they would be back in a half an hour. They indeed returned as they said, and told again this witness and Novica Zelenović to take Šćepo Gotovac out, which they had to obey. “The group“ that was present there, which started beating Šćepo Gotovac again, was the same as the first one, except that, this time, the witness no longer saw Hazim Delić in this group. This beating lasted for around 20 minutes to a half an hour, that is, as additionally explained by the witness, “until they saw he was dead“. The witness and Novica Zelenović watched all this from a distance of a meter to a meter and a half.

74. In relation to the decisive facts, witness Mladen Vukalo has, at the main hearing, identically described this incident. The witness described Šćepo Gotovac's beating as follows:

“...They took him out, in front of the hangar, and started beating him. There was moaning and screaming. I do not know ... and they brought him back to the hangar, and started beating him with batons, punching and kicking him, hitting him with pick handles and electric cables. They took him out, in front of the hangar for 2-3 times...I was so frightened that I could do nothing more...”

The Prosecutor asked who had beaten Šćepo Gotovac in the referenced way, and this witness responded that those who had beaten him were *“Azim¹¹, Makaron¹² and one Landža ... and that there were some other young men wearing camouflage uniforms.”*

75. Contrary to the Counsel's objection, that witness Vukalo could not indicate any feature by which he identifies the accused Eso Macić as a person who took part in the beating of the injured party Šćepo Gotovac, it ensues from witness Vukalo's testimony that he has, with certainty, indicated the accused Macić, by his nickname „Makaron“, as a

¹¹ Hazim Delić.

¹² The accused Eso Macić's nickname.

person who participated in the beating described in Section 1 of the operative part of the Verdict. According to the witness's detailed testimony, he had known the Accused from before, from Konjic, he knew where the Accused was employed, and he used to see him around the town before the war. Even when he testified in the courtroom, witness Vukalo had no dilemma when he identified the Accused as „Makaron” who had participated in Šćepo Gotovac's beating. Like witness Branko Šiniković, this witness has also identified the Accused from among the photos with which he was presented when he gave a statement for the Prosecution.

76. According to this Panel, also ill-founded are the complaints suggesting that the Trial Panel's findings are erroneous in relation to the Accused's participation in the charges set out in Section 1 of the operative part of the Verdict. This is so because, contrary to the Counsel's argument, in their statements given during the investigation, neither witness Šiniković nor witness Vukalo mentioned the Accused as a person who participated in the beating. The Trial Panel has, however, examined both these statements, and the witnesses' explanation for not mentioning the accused Eso Macić therein. The Trial Panel has found that their explanations were convincing and reasonable, and this Panel has upheld this conclusion too. More specifically, witness Branko Šiniković clarified that, for him each testimony brings trauma and fear, and that, therefore, in his earlier statement given on the premises of the CSB Trebinje¹³ he did not remember every detail so as to be able to give the statement about the events exactly in a way in which they indeed occurred. Having analyzed the referenced statement's contents, this Panel has concluded that, on that occasion, witness Šiniković was examined in relation to a series of different circumstances, that he mentioned Šćepo Gotovac in only one sentence as a person who was killed while he was detained in the camp, and that he was not examined about the way in which the murder was committed, or about the participants therein. This witness did not even mention that the injured party's death was a result of this beating. Contrary to this, in the statement given for the Prosecution¹⁴, witness Vukalo described Šćepo Gotovac's beating in detail, and indicated the accused Eso Macić as one of the participants in this beating. Responding to the Prosecutor's question posed at the main hearing, witness Vukalo resolutely stated that his testimony at the main hearing was true,

¹³ Witness Examination Record for Branko Šiniković, CSB Sector SNB no. 28/93 of 17 March 1993.

¹⁴ Witness Examination Record for Branko Šiniković. No. KT-RZ-147/06 of 8 September 2010 (Exhibits T-1 and O-7).

and that its content was indeed consistent with the content of his statement given for the Prosecution.

77. At the main hearing, witness Mladen Vukalo also provided reasons for which, in the statement given during the investigation,¹⁵ he did not mention the persons who participated in Šćepo Gotovac's beating, including the Accused. This witness has explained that it was not because he could not remember these persons, but rather because of the very examination concept, where he was just told „to talk, further and further...“. Notwithstanding the foregoing, in both the statement given for the Prosecution and his testimony at the main hearing the witness consistently and explicitly stated that the accused Macić was one of the guards who took part in the referenced beating. Not even the Counsel succeeded in undermining the impression of the witness's sincerity and objectivity, or in discrediting him through cross-examination.

78. Witness Janko Glogovac, witness A, and witnesses Dragan Đorđić and Marko Draganić testified about Šćepo Gotovac's beating. Regarding the decisive facts, they all confirmed that the incident indeed occurred in the way as described in the operative part of the Verdict, but they did not indicate that the accused Eso Macić participated therein. Witness A mentioned Hazim Delić as a participant in the referenced beating, and as a person he had known. Witness Janko Glogovac does not know who had beaten and ultimately killed the injured party Gotovac. These witnesses, however, testified that a number of persons participated in the beating of the injured party Šćepo Gotovac. Even though there is a certain “gap” in the referenced witnesses' statements regarding the identity of the persons who had beaten the injured party Šćepo Gotovac, because the witnesses do not know these persons, or they did not see them, or they do not remember them, their statements with respect to the other decisive facts related to the very incident corroborate the statements of witnesses Vukalo and Šiniković. The very fact that the witnesses did not indicate the Accused as a participant in the referenced incident, stating that they either had not seen the beating, or that they do not know who actually participated in the beating, does not, *per se*, exclude the Accused's role in this incident. Unlike these witnesses' statements, witnesses Vukalo and Šiniković have clearly, consistently and convincingly described, named and identified the accused Macić as a person who took part in the beating. In addition, their statements are also consistent with

¹⁵ Witness Examination Record for Mladen Vukalo, SIPA, No. 17-13/3-1-126/07 of 19 July 2007.

the other witnesses' statements with regard to the very incident. In view of the foregoing, this Panel has concluded that the Trial Panel properly concluded that the accused Eso Macić is one of the guards who participated in the beating of the injured party Gotovac, in the way as described in the operative part of the Verdict.

79. Witness Marko Draganić's testimony is the only testimony which fully denies that the Accused's was present in the Čelebići camp on the critical day (witnesses A and Janko Glogovac stated they did not see him, but not that he was not present there). However, this testimony is contrary to all other adduced evidence that shows that the Accused visited the Čelebići camp, not only in late June, but much later too. This is why, contrary to the Counsel's objection, this Panel, like the Trial Panel too, could not accept this witness's testimony as sincere and objective, and could not base its decision on it. More specifically, when it comes to witness Marko Draganić's testimony, like the Trial Panel, this Panel has also concluded that this evidence was given in an effort to help the Accused, and to improve his procedural position.

C. STATE OF THE FACTS IN RELATION TO SECTION 2 OF THE CONVICTING PART OF THE VERDICT

80. The Counsel also submitted that the state of facts was erroneously established in relation to Section 2 of the operative part of the contested Verdict, pertaining to the act of Milorad Kuljanin's murder. According to the Counsel, the Trial Panel concluded, with regard to the charges under this Section, that Milorad Kuljanin was shot by a number of bullets, and that this was an intended murder, even though such a conclusion on the decisive fact is contrary to the objective facts. More specifically, the testimony of witnesses Janko Glogovac, Boško Gligorević and Dragan Đorđić formed the sole basis for the Trial Panel's conclusion on Milorad Kuljanin's intended murder, while neglecting the witnesses' statements speaking in support of the Defense arguments (witnesses Rustem Murić, Zdravko Đorđić, Jovan Kuljanin, the Accused himself when heard as a witness, Dževad Turak and Hazim Delić), namely that it was a manslaughter, committed in self-defense, with a single bullet. The Counsel's submission, that the state of facts concerning the said decisive fact regarding the manner, or the number of shots that killed Milorad Kuljanin, was erroneously established also transpires from the testimony of expert witnesses Milko Marić and Dr. Željko Karan. Obviously, the Trial Panel has failed to evaluate their testimony since the expert witnesses agreed that the wound could have resulted from a single shot fired. Considering the foregoing, the Counsel argues that, in relation to the acts described

in Section 2 of the operative part of the Verdict, the Trial Panel erroneously applied the principle of *in dubio pro reo*, having taken as proved the facts to the prejudice of the Accused, but which were, through the testimony of witnesses Gligorević and Glogovac, made merely probable, and whose precision was brought under suspicion by the testimony of the other witnesses heard.

81. As properly evaluated by the Trial Panel too, there was no dispute among the parties to the proceedings that the critical incident of Milorad Kuljanin's murder indeed took place in the Čelebići prison/camp, in the first half of June 1992, during the Muslim religious holiday "Kurban Bajram (Eid al-Adha)", and that the perpetrator thereof was the accused Eso Macić. The disputable fact is the issue of the very way in which the killing was perpetrated, more precisely, whether it was done, as advocated by the Accused's Defense, in a necessary self-defense following Milorad Kuljanin's attempt to seize the Accused's rifle, or whether the accused Eso Macić deprived Milorad Kuljanin of his life with direct intent, of which the Accused was found guilty under the contested Verdict.

82. Even though, in principle, the Counsel does not contest that the Accused indeed deprived Milorad Kuljanin of his life, arguing that this was done in self-defense, his appeal to a certain extent addresses the issue of who was actually the person who took the injured party Kuljanin out of the hangar "number six". The Counsel's appeal stated that witnesses Zdravko Đorđić and Ranko Žuža could not confirm beyond a doubt that it was the accused Eso Macić who did this. Contrary to these appellate complaints, this Panel has evaluated the consistent statements of eye-witnesses to this incident, Janko Glogovac, Boško Gligorević, Dragan Đorđić, and Rustem Murić, and the statements of Defense witnesses Hazim Delić and Zoran Đorđić, who have certain information about this incident even though they were not eye-witnesses, but they all consistently testify that the Accused indeed took Milorad Kuljanin out of the hangar "number six". This Panel has concluded that the Counsel's complaints pertaining to the allegedly erroneously established state of facts concerning the take-out of the injured party Kuljanin, are ill-founded. This is all the more so because witness Zdravko Đorđić, referred to by the Counsel, although not being able to confirm with certainty at the main hearing that the Accused called and took out Milorad Kuljanin, himself had no dilemmas as to the fact that the Accused entered the hangar and said: "It is Bajram today, and someone's throat must be cut", and that, shortly thereafter, Milorad Kuljanin was called out and went out of the hangar.

83. This Panel has further concluded, like the Trial Panel too, that all adduced evidence suggests that the Accused took Milorad Kuljanin out of the hangar “number six”, with the intent to deprive him of his life, which he indeed did. According to this Panel, such a state of fact ensues from the analysis of all the circumstances under which the referenced murder was perpetrated, both the ones that preceded it and those that followed thereafter, about which the eye-witnesses to the incident have testified. That the Accused approached the hangar with the intent to deprive someone of his life is visible not only from Zdravko Đorđić’s testimony, who stated that the Accused entered the hangar, and told them it was a Bajram holiday on that day, and that someone’s throat had to be cut, but also from the statements of Janko Glogovac and Boško Gligorević, who had overheard a part of the conversation between the Accused and the guard who had, together with him, entered the hangar “number six”, and who remembered the Accused’s significant sentence, that is, cursing someone’s mother with vulgar threats suggesting that someone would be hurt¹⁶.

84. Furthermore, witnesses Janko Glogovac, Dragan Đorđić and Boško Gligorević consistently testified that, after being called out, Milorad Kuljanin went out of the hangar. Thereupon, the Accused and the other soldier who accompanied him immediately started beating and pushing the injured party Kuljanin. They “pushed” him all the way to a drain where the two mentioned witnesses had previously come to urinate, together with three other men. The foregoing eye-witnesses to the incident at issue testified that the Accused forced Milorad Kuljanin to wallow in their urine and feces there. The Accused asked the injured party Kuljanin if he was a volunteer, namely if he participated in the war. Witness Gligorević testified that, after Kuljanin stood up and responded that he did not, Eso Macić fired at his direction.

85. This Panel has also accepted the Trial Panel’s arguments concerning witness Dragan Đorđić’s testimony. Neither witness Janko Glogovac nor witness Boško Gligorević mentioned him as a person who had urinated there with a group of prisoners, and who said in one of his statements that Janko Glogovac had told him about this incident. However, this Panel has, like the Trial Panel, concluded that the analysis of Dragan

¹⁶ Main trial transcript in case S1 1 K 002593 10 Krl of 22 March 201/*sic*/, Janko Glogovac’s testimony, p. 10 of the transcript: „...We saw two soldiers coming, and we heard them saying „we will f...their mother... One of them was Esad Macić“, and witness Boško Gligorević’s testimony, p. 50:“ We will f... their mother, we will now show them, they will see, they will see what Bajram is... I see and I know ... this Eso Makaron...”

Đorđić's statements (two statements given during the investigation and the main hearing testimony) showed that he had indeed eye-witnessed the incident, but that he subsequently discussed it with witness Glogovac, who stood a bit closer to the spot where the killing was executed. More specifically, even though they testified that, in addition to the two of them, Željko Čečez was also within the group that went out to urinate, witnesses Janko Glogovac and Boško Gligorević consistently testified about the fact that two other prisoners were with them, but they could not remember their names. Therefore, such statements of theirs do not exclude Dragan Đorđić's presence in this group. In addition, already in his first statement given during the investigation Dragan Đorđić described the incident identically as witnesses Glogovac and Gligorević. Therefore, this Panel has concluded that, with a reasonable explanation of his conversation with Janko Glogovac, witness Đorđić does not bring into question that he was present on the spot at the moment when Milorad Kuljanin was killed. In addition, pursuant to the Trial Panel's finding, this witness's sincerity is also corroborated with the fact that there are no incriminations against the Accused in the remaining part of his testimony. The witness even testified that the Accused had never personally taken any prisoner out to beat or abuse him. This Panel has therefore concluded that witness Đorđić testified about the facts he had eye-witnessed, and about which he had knowledge, with no intent to exaggerate things and incriminate the Accused on any grounds.

86. Concluding that the murder was committed with intent, rather than in self-defense, the Panel has paid special attention to examining the events that followed after this very act. More specifically, the witnesses who had been in the hangar and who had heard a shot (which is a fact that will be specially addressed by this Panel), testified that, immediately thereafter, Željko Čečez run into the hangar and said that Eso Macić had killed Milorad Kuljanin. It further ensues from the witnesses' statements that, after this, Željko Čečez was beaten up to death. According to this Panel, the foregoing suggests the conclusion that there was an attempt to cover up the referenced incident, and to „hush up” the witnesses.

87. Furthermore, witnesses Janko Glogovac, Dragan Đorđić and Boško Gligorević testified that the camp guards made efforts to cover up the incident, more specifically, to exclude anyone's responsibility for the committed murder, and to present that it was done in self-defense. These witnesses have consistently testified that, following this incident, all of them who were within the group which had gone out to urinate at the very moment when

Milorad Kuljanin was killed by the Accused, that is, the five prisoners-eye witnesses to the incident, were ordered to enter the hangar, and that thereupon Miralem Macić came in to make a list of all those who had seen the killing. Miralem Macić told them that, if anybody asked them anything about this, they should say they had seen nothing. However, they were subsequently told that, if there were any questions about the referenced incident, they should say that Milorad had tried to escape which is why the guard killed him. The third version of the story would be that Milorad had tried to seize the guard's rifle, and that therefore the guard killed him point blank. This was, according to the Trial Panel's finding, recorded in the Official Note dated 11 June 1992, and this was the Accused's defense during the main trial. Such a factual description of the incident, however, contradicts the statements of all the Prosecution witnesses, and of the Defense witness Rustem Murić. Witness Murić has never mentioned any attempt of the injured party to seize the rifle, or to escape, even though he tried, by his testimony, to exculpate the Accused by omitting to mention the circumstances under which Milorad Kuljanin was escorted to a provisional toilet (by being beaten, pushed and ultimately forced to lay down in the urine), even though he had watched all this from an elevated spot, but which was described in detail by the three eye-witnesses to the incident.

88. According to this Panel, the Trial Panel properly concluded that Milorad Kuljanin was killed by several rifle shots, fired in his chest and the head. More specifically, three eye-witnesses to the incident, who had watched this from the immediate vicinity, and who are quite certainly the most reliable witnesses thereof, consistently testified that the Accused had fired a short burst of fire into Milorad Kuljanin's head and chest. The witnesses referred to by the Defense's appeal, namely Zdravko Đorđić and Jovan Kuljanin, who had been inside the hangar at the time of the referenced killing, testified that they had heard a shot, but they provided no explanation as to the nature of the shot, namely whether this was a single shot, or a burst of fire. Quite certainly, their testimony about the indirect information concerning the incident at issue cannot be accepted as more reliable and more convincing than the three fully consistent statements of the witnesses who had watched the incident from the immediate vicinity. Ultimately, this Panel has concluded that, as a guard in the Čelebići camp, witness Rustem Murić had a motive to try with his testimony to protect and to exculpate the Accused, who was his colleague at the critical time. Therefore, witness Murić's statement, that Milorad Kuljanin was killed with a single shot from a *Papovka* rifle which has no burst-of-fire option, is not surprising. In addition, as also found by the Trial Panel, even if the Defense arguments that the Accused carried a semi-

automatic rifle (*Papovka*) were accepted, this does not exclude a possibility that firing several shots in a row in the injured party's head and chest created an impression with the witnesses that it was a short burst of fire, as they described. In this way, no changes were made to the decisive facts related to the way in which the killing was committed.

89. Ultimately, the Defense argued that the state of facts was erroneously established because the expert witnesses who were heard at the main trial¹⁷ and who orally presented their findings and opinion¹⁸, following an autopsy of Milorad Kuljanin's remains, left a possibility that he was killed with a single shot. The Appellate Panel notes that the experts' findings and opinion should be viewed and evaluated both individually and in relation to other pieces of evidence, rather than by way of an isolated sentence expressed during the examination at the main trial, as the Counsel's appeal did. To wit, the fact which, according to this Panel, must not be disregarded is that, at the time of examination, the mortal remains had already been fully in the skeleton form, with no soft tissues, wherefore the expert witnesses could only analyze the bones' damages, which was insufficient to precisely determine the way in which the lethal injuries were inflicted. The expert witnesses could not but determine, and they indeed noted so in their written findings and opinion, that, in terms of the head injuries, the facial bones were intact, and that the lower jaw had multiple fractures, that old fractures existed in the other parts of the skeleton, including bone defects on both scapulae, the second right-rib and the fourth left-rib fractures. The expert witnesses concluded that these injuries could have been inflicted with shots fired from some fire weapon or with explosive device fragments. Truly, at the hearing held on 12 October 2012, responding to the Counsel's questions in cross-examination, the expert witnesses stated it was possible that the law jaw fracture could have been caused by a single fire weapon projectile. However, contrary to the Defense's arguments, the expert witnesses also left a possibility that such injuries could be also caused by a number of projectiles. The condition in which the skeleton remains were found at the autopsy provided no possibility to determine the distance from which it was fired.

90. Contrary to the Counsel's objection, the expert witnesses left an option that the murder was perpetrated with a number of projectiles. This is consistent with the statements of the three eye-witnesses to the referenced incident. Just like the Trial Panel,

¹⁷ Dr. Željko Karan, forensic medicine expert, and Milko Marić, engineer and ballistic expert.

¹⁸ Exhibit T-54 Record on forensic and mortal remains identification procedure and background checks of 22 June 2000.

this Panel deems these statements sincere, objective and above all reliable. Following a comprehensive analysis of all the evidence adduced, within the context of the Counsel's appeal, this Panel has concluded that, in relation to Section 2 of the operative part of the Verdict, the Trial Panel properly established the state of facts, namely that, having acted with intent, the Accused had deprived Milorad Kuljanin of his life. That is why the Counsel's complaints, advanced along this line, are ill-founded.

91. Consistently with the foregoing, this Panel considers as ill-founded the Counsel's appellate complaints that the state of facts in relation to Section 2 of the operative part is still fully undetermined because the Trial Panel refused the Defense's proposal to examine ballistic expert Bruno Franjić regarding the fact of whether the *Papovka* rifle, with which the accused Eso Macić was issued, had a burst of fire option, or just a single-shot option. As explained above, and as found by the Trial Panel too, it was established unequivocally that the Accused had fired several shots in Milorad Kuljanin's direction, and killed him. However, this Panel concluded, like the Trial Panel, that, in the concrete circumstances, it is irrelevant whether several shots were successively fired from the *Papovka* rifle thus leaving in the eye-witnesses an impression of a short burst of fire, or whether it was indeed just a short burst of fire. For the foregoing reasons, this Panel concludes, contrary to the Counsel's objection, that the Trial Panel has properly decided to dismiss the Defense's proposal to carry out an expert analysis of the *Papovka* rifle's elementary features, and that such a proposal was irrelevant to determining the decisive facts.

D. THE STATE OF FACTS CONCERNING SECTION 3 OF THE CONVICTING PART OF THE VERDICT

92. The Counsel's appeal has also contested the proper determination of the state of facts under Section 3 of the operative part of the Verdict. The appeal stated that no piece of evidence adduced in the conducted proceedings proved with certainty that it was exactly the accused Eso Macić who accorded inhuman treatment and intentionally inflicted severe bodily pains and mental suffering on the injured parties Momir Mrkajić, Velibor Mrkajić and Velimir Kuljanin, in the way as described in the operative part of the Verdict. More specifically, the Counsel argued that the Trial Panel draws the conclusion about the referenced acts of the Accused solely on the basis of the injured parties' statements, disregarding the contradictions in the statements of the injured parties given in different stages of the proceedings, and disregarding the contradictions in the evidence given by both the injured parties and the other eye-witnesses to the incident.

93. The Counsel submitted that witness Momir Mrkajić also testified at the main trial that, at the time when the beating took place, he was not aware of the identity of the guards who had beaten him, including the Accused's identity, and that he learned this not sooner than he was detained in the Čelebići and Musala camps. However, the Counsel argued that, in his statements given before the Basic Court in Nevesinje on 25 June 1994, and in the Security Services Center (SSC) Bijeljina, the referenced witness did not mention the accused Macić as a person who had beaten him. At the main hearing, this witness explained that he had in a way „probably omitted him (the Accused), or forgotten him, or could not remember him at that moment“. The Panel, however, explains this fact by stating that „the witness was not generally examined with regard to the concrete circumstances“, which is not consistent with the referenced witness's testimony. In his testimony given before the Basic Court in Nevesinje, the same witness also does not mention the accused Eso Macić as a person who had beaten him, but rather mentions with certainty four other persons who had inflicted physical injuries on him. Accordingly, the Counsel argues that, particularly bearing in mind the fact that if the traumas were sustained in a way as explained by the witness he would certainly not forget the person who participated in their infliction, and that the witness did not mention the accused Eso Macić in his repeated statements, the Accused did not participate in the described actions.

94. The Appellate Panel concludes that the referenced objection is ill-founded.

95. It ensues from the contested Verdict that the Trial Panel has analyzed all the statements given by witness Momir Mrkajić in the various stages of the proceedings, and based on them drawn the conclusion about the referenced witness's credibility and the extent to which credence may be given to his testimony. Contrary to the Counsel's objection, witness Mrkajić testified in detail at the main hearing¹⁹ that he was beaten up in front of the building no. 22 in the Čelebići prison/camp by four persons, including Eso Macić, and that as a result of this beating his ribs were broken. It is true, as particularly highlighted in the Counsel's appeal, that witness Momir Mrkajić indeed stated that at the time when the beating took place he knew none of the four persons who had beaten him, and that he subsequently learned their names from other detainees while he was detained in the Čelebići prison/camp. According to this Panel, however, such contents of this

¹⁹ Witness Momir Mrkajić's testimony of 5 April 2011.

witness's testimony does not bring into doubt the proper conclusion about the decisive facts that the Accused indeed participated in the injured party's beating.

96. Witness Momir Mrkajić testified that he had spent a whole year in the prison/camp and that during this time he had learned the identity of the guards who worked there. The Prosecutor strictly asked witness Mrkajić how could he be certain that the Accused was the person who beat him, considering that he did not know him, and the witness responded:

“I spent a year in the camp. That man was present there every day. I saw that he was present there, and I found out his first and last name...”

This witness further described the Accused's physical features (a bit stronger man, blond, with a characteristic, boxer-like nose), and he thereupon recognized him in the courtroom. Therefore, according to both this Panel and the Trial Panel, there is no doubt that, even though he did not know the identity of the guards who had beaten him at the time, the witness indeed saw their faces at those critical moments, and that subsequently, while being detained in the camp, he correlated them with their full names he had meanwhile learned. This Panel concludes that witness Mrkajić's objectivity and sincerity particularly ensues from his explanation given with regard to his statement taken during the investigation stage²⁰. He explained, as presented to him during the main trial hearing, that he had known the Accused, but at the main trial he maintained what he had said on that day, namely that he had subsequently learned the Accused's first and last name, and that if he had said something like that during the investigation, it was just a slip.

97. Furthermore, the Counsel objected that the erroneously established state of facts is indicated by the fact that in his statement given in 1994²¹ witness Mrkajić did not mention the Accused as a person who took part in the beating. According to this Panel, the foregoing cannot be accepted as a well-founded complaint. More specifically, witness Mrkajić was, at the main hearing, also heard with regard to these circumstances. He explained that he had in detail recounted the events that occurred, and that he was among the first persons to be exchanged. The witness stated:

²⁰ Witness Examination Record for Momir Mrkajić No.KT-RZ-147/06 of 29 May 2009, Exhibit O-17.

²¹ Witness Momir Mrkajić's testimony of 25 June 1994 given in the Basic Court in Nevesinje (O-15).

“...I do not remember now if I had strictly mentioned the names, because, you know, a man spends that much time...you stay somewhere for a year, and all of a sudden....I stayed there for a year, and considering what I have experienced there, I could talk for a whole year about that, and still I could omit something, I could not remember everything...”

98. This Panel has evaluated the witness Mrkajić's statement from 1994, as referred to by the Counsel's appeal. The Panel has fully accepted as reasonable and convincing this witness's explanation provided at the main hearing. Witness Mrkajić explained that, due to the number of events, and an extended period of time he testified about (the whole period of his detention in the Čelebići prison/camp), he has perhaps omitted or forgotten certain things. However, the witness was convincing and certain, testifying at the main trial, that the accused Macić had also taken part in the beating with which he is charged. Witness Mrkajić explained how he had learned the Accused's first and last name, and described his physical characteristics. This witness also stated that, in his statement given for the Prosecution during the investigation (the statement of 29 May 2009), he indicated the Accused as a co-perpetrator in the beating as a result of which his ribs were broken, and recognized him from the photos with which he was presented. The Appellate Panel has therefore fully upheld the Trial Panel's conclusion concerning the charges under Section 3 of the operative part of the Verdict. More precisely, contrary to the Counsel's objections, this Panel has concluded that the Trial Panel properly found that the accused Eso Macić, in concert with three other persons, participated in the beating of the injured party Momir Mrkajić in front of the building no. 22, and that, on that occasion, his ribs were broken.

99. In addition to witness Momir Mrkajić's testimony, the Counsel's appeal also referred to witnesses Velibor Mrkajić's and Velimir Kuljanin's statements, arguing that these statements are contradictory with regard to the decisive facts related to the charges under this section of the Verdict. These decisive facts pertain to the way in which the injured parties were taken to a manhole, the groups they formed, and the time period they spent in the manhole. According to the Counsel, all the foregoing suggested that the state of facts was erroneously established in relation to section 3 of the operative part of the Verdict.

100. Contrary to such a Counsel's objection, this Panel has held that, even if there were contradictions in the witnesses' statements they do not concern the decisive facts so as to be able to accept the objection on the erroneously established state of facts. More specifically, both witnesses have with certainty confirmed that the accused Eso Macić was with a group of camp guards who stood in a gauntlet by the manhole, through which the detainees had to pass, and who beat the detainees before pushing them down in the

manhole. Witness Velimir Kuljanin has particularly convincingly described these incidents.

This witness testified as follows:

“...We passed by the [building] number nine, and then we saw one of the fields, meadows, and an opening up front. I only saw that men were disappearing, but where they disappeared... they [guards] stood by this opening, hitting them with their rifle butts, and with whatever was handy. So, as my turn came, I simply jumped, into I do not know what, only to receive as less blows as possible, I fell down into that space...”

This witness further explained that the accused Eso Macić was also among the guards who had beaten the detainees before falling down in the manhole. Even though he was uncertain that it was exactly Eso Macić who hit him, witness Kuljanin was certain that the Accused was one of the guards who gave blows to them because he had indeed seen the Accused hitting the prisoners in front of him. The witness explains the foregoing with their position at the time, because they had to „*hold their hands and look in front of them...*“

101. Witness Velimir Kuljanin testified how they were escorted to the manhole and how they were beaten. Ultimately, this witness testified about the conditions in the manhole in which all detainees were tortured, and about the consequences they have all suffered in terms of the inflicted physical and mental pain and suffering. Contrary to the Counsel's objection, the foregoing was consistently described by witnesses Velibor Mrkajić and Rajko Đorđić. Describing the beating before their fall in the manhole, Velibor Mrkajić stated that all present guards had beaten them, including the accused Eso Macić, and that he is certain that Macić gave blows to him.

102. Considering the statements of the foregoing witnesses - direct victims, and the parties injured by the incident at issue, which are consistent in the decisive facts, the Appellate Panel concludes, contrary to the Counsel's objection, that the state of facts, regarding the Accused's participation in the incriminating acts described in Section 3 of the operative part of the Verdict, was properly established. More specifically, all examined witnesses-direct victims of the referenced incident have consistently testified that the accused Eso Macić participated in the acts of beating and closing the Čelebići camp detainees in the manhole. Possible contradictions between witness Velibor Mrkajić's testimony and that of witness Velimir Kuljanin as to the group in which they were escorted to the manhole, or to the length of time they had spent therein, is not a fact of decisive importance so as to bring into question the properly established state of facts.

103. For the foregoing reason, the Counsel's objections advanced in relation to this incrimination are ill-founded.

E. THE STATE OF FACTS IN RELATION TO SECTION 4 OF THE CONVICTING PART OF THE VERDICT

104. The Counsel argues that the state of facts in relation to two decisive facts pertaining to the charges described under Section 4 of the convicting part of the enacting close of the Verdict, was erroneously established. Having primarily relied on witnesses Marko Draganić's and Hazim Delić's statements, the Counsel argued that, in August 1992, the Accused was no longer present in the Čelebići camp. According to the Counsel, witness Jovan Kuljanin's testimony also corroborates such a state of facts. This witness testified with certainty that he did not see the accused Eso Macić on the day when they were beaten up on a mass-scale, that is, on 12 August 1992. The Counsel further argued that the contested Verdict contains erroneous findings regarding the decisive facts also because none of the witnesses-injured parties could confirm seeing Eso Macić giving blows to them personally. According to the Counsel, witness Branko Šiniković was not a credible witness, which is why he could not confirm this decisive fact. Nor could Witness Boško Gligorević, who only confirmed that the accused Macić had indeed entered the building „number six“, but he could not see the Accused hitting him, or any other detainees. The Counsel further argued that witness A also testified that, while he was interned in the building „number six“, the Accused had never entered this facility, or that he beat him or other detainees, not even on the critical day of 12 August 1992.

105. Therefore, the Counsel submitted that the conclusion that the accused Macić is guilty of the acts described in Section 4 of the convicting part of the Verdict is based solely on Hazim Delić's testimony, that is, on the part thereof in which the witness confirms that the referenced incident indeed occurred, and that the guards were told to beat up the detainees, whereas the part of this witness testimony in which he denied that on the critical day and generally during that period the Accused was present in the Čelebići prison/camp was disregarded.

106. Contrary to such Counsel's complaints, the Appellate Panel has concluded that, in relation to the decisive facts pertaining to the acts described in Section 4 of the operative part and to the Accused's guilt, the Trial Panel properly determined the decisive facts on the basis of a conscientious evaluation of all the statements of the witnesses, who had testified about the referenced circumstances, both at the main hearing,

and during the investigation, and that these statements were tendered in the case record as evidentiary material.

107. It should be first noted that during the first instance proceedings and in their appeal neither the Accused nor his Counsel contested that, following the IRC representatives' visit, the beating of the detainees indeed occurred in the Čelebići prison/camp, nor the fact that it occurred exactly on 12 August 1992. With regard to the foregoing, the Defense witness Hazim Delić testified that the prison warden, Pavo Mucić, had allowed the detainees to speak alone with the IRC representatives. However, since the detainees had informed the IRC representatives about the circumstances of their internment in the Čelebići prison/camp, which Pavo Mucić subsequently learned from certain detainees, he ordered the guards to line up, and to beat up the detainees interned in the hangar „number six“, and in the tunnel „number nine“. According to witness Delić, the guards had to comply with this order. Therefore, the incident itself, as described under Section 4 of the operative part of the Verdict, is not disputable according to the Accused's Counsel either. However, the Counsel's appeal contested that the accused Eso Macić participated in the referenced beating, which is the theory he maintained during the first instance proceedings too, primarily on the basis of the Accused's alibi, namely the fact that the Accused was not present in the Čelebići camp during that period. The Counsel has primarily relied on Marko Draganić's and Hazim Delić's statements, who had testified in support of the arguments advanced by the Accused's Defense, namely that Eso Macić had left the Čelebići prison/camp much earlier, that is, before August 1992.

108. However, contrary to such Counsel's objections, and contrary to witnesses Hazim Delić's and Marko Draganić's statements, obviously given with the aim to support the Accused, and as properly evaluated by the Trial Panel too, a number of the witnesses heard confirmed that the Accused was indeed present in Čelebići also at the time encompassed by the charges described in Section 4 of the operative part of the Verdict, that is, on 12 August. Such consistent statements of the witnesses, some of whom had known the Accused from before, while some met him when the forbidden acts were taken, and who have learned from other persons his full name, or at least his nickname „Makaron“, while they were interned in the Čelebići prison/camp, and who related him with certainty to the incident that had taken place on 12 August 1992, are sufficient for this Panel to conclude that the Accused was also present in the camp on the critical day. According to both this Panel's view, and the Trial Panel's conclusion, the Accused's alibi,

based on the two Defense witnesses' testimony, in the absence of any solid evidence confirming that at the relevant time he was present in the Musala prison, contrary to the consistent statements of a number of witnesses who directly related the Accused to the August incidents, is not convincing, and thus could not be accepted as such.

109. Therefore, having found that the objections contesting the Accused's presence in the Čelebići prison/camp on 12 August 1992 are ill-founded, the Panel also reviewed, within the appellate complaints' context, the Trial Panel's conclusion regarding the Accused's participation in beating the civilians in the manner, at the time and in the places as described in Section 4 of the operative part of the Verdict.

110. The Panel was first mindful of the fact that the witnesses, both those beaten in the tunnel called "number nine" (Velimir Kuljanin, Mile Kuljanin and Rajko Đorđić), and those beaten in hangar "number six" (Branko Šiniković, Ranko Žuža, Boško Gligorević, Zdravko Đorđić and Jovan Kuljanin), indicated that the Accused was one of the guards who took part in the beatings. The Counsel, however, argued that, given the fact that none of the witnesses confirmed that the Accused had beaten exactly him, the state of facts in this part of the enacting clause of the Verdict was not properly established.

111. Contrary to such Counsel's objections, this Panel has examined all statements of these witnesses, who are victims of the beatings in both the tunnel "number nine" and in the hangar "number six". They have all similarly described that, after the guards had entered their detention room following the IRC's visit, the detainees were ordered to kneel or sit down on the ground and put their hands behind their heads, and that thereupon the guards kicked their backs from both sides.

112. Witnesses Velimir Kuljanin, Mile Kuljanin, Velibor Mrkajić, Zdravko Đorđić testified that the beatings in the tunnel "number nine" indeed occurred in the said way. Witness Momir Mrkajić testified that they were placed in the said position, but that they also received blows in their heads too. In addition, the prisoners from the hangar "number six", Branko Šiniković, Ranko Žuža, Boško Gligorević, Zdravko Đorđić and Jovan Kuljanin, have identically described the beating in the room (number six) following the IRC's visit.

113. Contrary to the Counsel's objection, that none of the injured parties could confirm that the Accused had beaten exactly him, the Appellate Panel has concluded that not only that all the foregoing witnesses actually confirmed that the Accused indeed took part in the beatings, and that they had seen him in the group of guards who beat the prisoners, but

also that a certain number of witnesses were certain that they received blows exactly from the Accused.

114. As to the prisoners from room “number nine”, Mile Kuljanin testified with certainty at the hearing that the Accused had given him “perhaps two blows, but not hard ones”. This witness, however, saw the Accused beating some other prisoners who had kneeled beside him. Even though he did not see the Accused hitting him, witness Velimir Kuljanin testified that he did not miss him either, and that *„all the guards had taken their turn“*.

115. Witness Ranko Žuža, one of the prisoners from “number six” room, is certain that he received a number of blows exactly from the accused Macić. Witness Žuža testified that, regardless of the position he took, his head was slightly lifted, and he could see the person who beat him. Thus he saw the Accused passing by him only to beat the two other prisoners who had sat in a line further downwards from him. Witness Boško Gligorević testified that even though he could not see from his position (he was standing, deeply bowed down) who was the guard who gave him blows, he saw that Eso Macić was present among the guards who had beaten them. This witness stated that Macić *„kept beating them, that they all kept beating them, and that whoever came in that room gave them blows.“* The foregoing was confirmed by witness Zdravko Đorđić too. This witness testified that they were all beaten up by each guard, namely that the beatings continued as long as each prisoner finally ended up beaten by each guard individually. Witness Gligorević was certain that, among others, he had received beatings from the accused Eso Macić too.

116. Therefore, in view of the foregoing, and particularly in view of the specific prisoners’ position and the fact that they mostly received the guards’ blows from behind, in their kidneys’ area, the Panel has concluded that it is not realistic, as implied by the Counsel’s appeal, that each injured party could see the guard who gave him blows. Considering the angle from which they watched the beatings, the injured parties had better view of those who beat other prisoners rather than them personally. In addition, the witnesses have confirmed, as described above, that mostly all guards beat and gave blows to all the prisoners. Considering the consistent statements of most injured parties, that the Accused Macić was within the group of guards who had beaten the prisoners both in the rooms “number six” and “number nine”, the fact that witnesses Branko Šiniković, Boško Gligorević or some other witnesses could not confirm with certainty that they received blows exactly from the Accused, does not bring into question the Accused’s role in the

incriminating acts in the way as described in the operative part of the Verdict.

117. This Panel has fully accepted the Trial Panel's arguments under para. 246 of the Verdict concerning witness Jovan Kuljanin's testimony. At the hearing before the Trial Panel, this witness testified that he did not remember that the Accused participated in the incident that occurred on 12 August 1992. However, in response to the Prosecutor's question as to why, in his statement given during the investigation, he indicated the Accused as one of the actors in the incriminating act, this witness explained that the elapsed time affects his memory and that he keep forgetting things. This witness confirmed that his memory was better before, and thereby gave space to a possibility that he erred at the main hearing.

118. Also, even though witness A testified about the beatings, his testimony actually shows that he avoids to mention any other guards' names, except for the name of Hazim Delić, who took part in the beatings, or Pavo Mucić, the camp warden, who ordered these acts (both convicted under the final ICTY judgments), including the Accused's name. Witness A testified that the Accused had beaten nobody, and that he has never heard any prisoner stating he was beaten up by Eso Macić. Such a testimony of his contradicts the statements of the witnesses who have consistently described the Accused's participation in a series of beatings that occurred during the critical period. In addition, this witness's possible motive to conceal the Accused's role in the incriminating acts may, according to this Panel, also be the fact that the Accused's brother had correctly treated him while he was detained in Čelebići. Accordingly, bearing in mind the witness A's testimony in relation to the statements of the other witnesses-eye witnesses to the incidents in which Eso Macić took part, including the incident described in Section 4 of the operative part of the Verdict, this Panel has concluded that witness A's testimony is not reliable so as to give credence to it in this part.

119. In view of the foregoing, the Appellate Panel has concluded that the Counsel's objections concerning the erroneously and incompletely established state of facts regarding the Accused's participation in, and his guilt of, the acts described in Section 4 of the enacting clause of the impugned Verdict, are ill-founded.

IV. VIOLATIONS OF THE CRIMINAL CODE

120. According to the Counsel, in the contested Verdict the Trial Panel made a violation of Article 298(1)(d) of the CPC of BiH because it applied a law that should not have been applied. More specifically, the Defense argued that the acts, described in both the Prosecution's Indictment and the appealed Verdict, were prescribed under Articles 142 and 144 of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (the CC of SFRY), which was in force at the time those criminal offenses were committed, and that, therefore, this Code should have applied to the concrete case. This is all the more so because the minimum prescribed sentence under the CC of SFRY was a 5-year imprisonment, with its optional commutation due to the existence of particularly extenuating circumstances on the part of the accused, which is, as such, more lenient to the perpetrator. Considering that the Trial Panel failed to apply the Code that was in effect at the time when the offense was committed, namely the law more lenient to the perpetrator of the crime, the Trial Panel has violated the Criminal Code, and thereby put the Accused into a discriminatory position in relation to the other accused persons before the Court of BiH.

121. This Panel has concluded that such objections are ill-founded.

122. According to this Panel, in dealing with the issue of which code should apply in the concrete case, the Trial Panel took, as a starting point, all relevant provisions of both the national law, which was in effect at the time when the crime was committed, and the law which was in force at the time when the referenced offense was prosecuted. The Trial Panel was also mindful of the relevant provisions of both the ECHR and the International Covenant on Civil and Political Rights (the ICCPR), as the regulations important for governing the issues pertaining to this field.

123. Contrary to the complaints advanced by the Accused's Counsel, the Appellate Panel has held that the Trial Panel properly concluded in the impugned Verdict that, in the concrete case, the CC of BiH is the more lenient law to the perpetrator, wherefore this Code was applied.

124. In so concluding, the Trial Panel has relied on the principle of legality prescribed under Article 3 of the CC of BiH. This Article provides that "*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 offense by law or international law, and for which a punishment has not been prescribed by law". As also concluded by the Trial Panel, this provision of the national law is consistent with both Article 7(2) of the ECHR, which almost identically prescribes the principle of legality, and Article 15 of the ICCPR.

125. Therefore, starting from the referenced principle, and bearing in mind that the criminal offense of War Crimes against Civilians, of which the Accused was found guilty, was also prescribed by Article 142 of the CC of SFRY, that was in effect at time when the crime was committed, the Trial Panel properly concluded that no violation of the principle of legality was made, or, more precisely, that the principle of *nullum crimen sine lege* has been satisfied.

126. Furthermore, the Trial Panel has properly taken into account that, in accordance with Article 4 of the CC of BiH, which is compliant with Article 7(1) of the ECHR, the law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense, and if the law has been amended on one or more occasions, the law that is more lenient to the perpetrator shall apply.

127. Considering that both laws prescribe the criminal offense of which the Accused was found guilty, and that none of the laws provides for an optional exemption from conviction and sentence, this Panel has concluded that, in determining which law is more lenient to the perpetrator, the Trial Panel started from the sentence prescribed for the referenced criminal offense under both these laws.

128. Article 142 of the CC of SFRY prescribed for the said criminal offense a sentence of imprisonment for a term of 5 years or the death penalty, while under Article 173 of the CC of BiH the same criminal offense carries a minimum of 10 years in prison, or a long-term imprisonment.

129. Raising this complaint, the Counsel has started from the special minimum sentence prescribed for the referenced criminal offense, that is, "minimum 5 years", which is undoubtedly lower than the special minimum sentence prescribed under the CC of BiH for the same offense, that is, "minimum 10 years". The Counsel has, however, disregarded the fact which was, according to this Panel, properly evaluated by the Trial Panel, namely that under the law that was in effect at the time when the criminal offense was committed the same criminal offense also carried the death penalty, which is undoubtedly a more

stringent sentence than that of a long-term imprisonment which is, for the same criminal offense, prescribed under the law pursuant to which the Accused was found guilty. Even though the death penalty was, in the meantime, abolished, the sentence that was prescribed for the referenced criminal offense cannot be fully excluded and disregarded in evaluating the gravity of the law in relation to the perpetrator.

130. Despite his reference to an optional commutation of the sentence below the special minimum sentence of 5 years in prison, by way of applying particularly extenuating circumstances, the Counsel disregarded the fact that, the Trial Panel found no particularly extenuating circumstances on the part of the Accused, and that the Accused received no sentence that would incline towards this special minimum sentence. On the contrary, the Accused received a sentence that is, by its gravity, more adequate to the maximum sentence of imprisonment under the previous law.

131. In addition, in evaluating which law is to be considered more lenient to the perpetrator, this Panel was also mindful of the facts that were not provided in the contested verdict's reasons, and which are obviously also disregarded by the Accused's Counsel, namely that the contested Verdict found the Accused guilty of co-perpetration, as a form of complicity in the commission of the criminal offense.

132. Pursuant to Article 29 of the CC of BiH, complicity is regulated as follows:

"If several persons who, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense, shall each be punished as prescribed for the criminal offense."

Complicity, as a form of co-perpetration, was also prescribed under the CC of SFRY, as the law which was in effect at the time when the criminal offense was committed, but somewhat differently. More specifically, Article 22 of the CC of SFRY, which governed complicity, prescribed the following:

"If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act."

133. Comparing the above definitions of complicity under the new law (the CC of BiH) and the law which was in effect at the time when the criminal offense was committed (the CC of SFRY), it can be concluded that the requirements for the existence of complicity are more stringent under the CC of BiH rather than under the CC of SFRY. More specifically, in order to treat an individual's acts as complicity under the new law, in a situation

where this person takes no active part in the act of commission of the criminal offense, but in some other way contributes to the commission thereof, it is necessary to prove a larger extent of this contribution (**decisive contribution**), which was not required under the CC of SFRY's legal definition. In this way, the notion of complicity has been reduced under the CC of BiH, namely it has been lowered in relation to the CC of SFRY's determination. Considering this standard too, the Appellate Panel concludes that the CC of BiH is, in the concrete case, more lenient to the Accused than the law that was in effect at the time when the criminal offense was perpetrated (the CC of SFRY), the application of which was proposed by the Counsel's appeal.

134. Ultimately, regarding the complaint that the Accused was discriminated against in relation to some other persons, accused or convicted under the CC of SFRY before the same Court, the Appellate Panel notes that the application of law is an issue which is being dealt with and determined on a case-to-case basis, on the grounds of a comprehensive evaluation of all the circumstances surrounding the concrete case, and that, in deciding on this matter, any analogy is excluded.

135. In view of the foregoing, this Panel has concluded that, in the contested Verdict and contrary to the Counsel's complaint, the Trial Panel drew a proper conclusion that the CC of BiH is more lenient to the Accused. Having properly applied the Criminal Code, this Panel found the Accused guilty of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the CC of BiH, as read with Article 29 and Article 180(1) of the CC of BiH.

136. According to the Counsel, the Trial Panel made a violation of the CC of BiH, in terms of Article 298(1)(a), (b), (c) and (d) of the CPC of BiH, also because the action charged against Eso Macić, that is, the action of Šćepo Gotovac's murder, described in Section 1 of the enacting clause of the Verdict, is a finally adjudicated matter, while in relation to the act described under Section 2 of the enacting clause of the Verdict, there are circumstances and facts excluding the Accused's criminal liability.

137. According to this Panel, the Counsel's complaint that Šćepo Gotovac's murder is an adjudicated matter (*res judicata*) is ill-founded. The basis for this Counsel's complaint is the fact that Esad Landžo has already been convicted of this criminal offense under the ICTY judgment. It ensues both from the state of facts established in the final ICTY Judgment, under which Esad Landžo was convicted of Šćepo Gotovac's murder, and from

the factual findings in this case, in which the accused Eso Macić was found guilty of inflicting severe bodily injuries and mental suffering on the referenced injured party, that the convicted Esad Landžo, in concert with other persons, participated in the beating of the referenced party. The fact that, in relation to Esad Landžo, the matter has been already adjudicated by a final decision, does not bring into question the possibility to conduct proceedings and prosecute those persons who took part in the referenced criminal offense as co-perpetrators, or possibly as aiders and abettors. More specifically, had this Court, or any other court, ruled on the accused Eso Macić's guilt, and handed down in such proceedings a final decision, this complaint concerning an adjudicated matter would have been reasonable. However, in the concrete case, where the ICTY has not even addressed the issue of participation, or has not established the guilt of the accused Macić, considering that Macić was not even accused in the referenced case conducted against Esad Landžo *et al.*, does not bring into question the possibility to prosecute the accused Eso Macić for the same criminal offense. This is so particularly if one takes into account that the enacting clause of the Verdict, under which Esad Landžo was found guilty of Šćepo Gotovac's murder, reveals that, in concert with some other persons, Landžo participated in the severe beating of the injured party, which resulted in his death, and that, as established in this case, one of those persons was the accused Eso Macić too.

138. For the foregoing reasons, this Panel has concluded that the Counsel's complaint, that the acts described in Section 1 of the enacting clause of the Verdict pertain to an already adjudicated matter, is ill-founded.

139. Furthermore, the Counsel's appeal stated that, in relation to Milorad Kuljanin's murder, the ICTY's final judgment established that this was not an intended murder, but rather manslaughter. Such a conclusion was drawn exactly due to the different statements given by the witnesses with regard to the decisive facts. According to the Counsel, there is an identical situation in the concrete case too. More specifically, the Counsel argues that the statements of the witnesses, who have differently described the same critical incident, both regarding the calling out of Milorad Kuljanin, and his being taken out of the facility number 6, and the manner in which the killing was committed, all suggest that this was manslaughter, or a killing in self-defense, wherefore the intent, as an important element of the criminal offense of war crime, does not exist. Also, since the acts of the Accused have satisfied the elements of the criminal offense of manslaughter, the appeal stated that there is an absolute statute of limitation, because more than 20 years have elapsed since the act

of crime commission, while the sentence prescribed under Article 173 of the CC of F BiH ranges from 6 months to 5 years.

140. Contrary to such a complaint by the Counsel, the Appellate Panel has concluded, providing its reasons for such a conclusion in examining the Verdict on the grounds of the complaint concerning the erroneously and incompletely established state of facts, that the Trial Panel properly found that the Accused killed Milorad Kuljanin with direct intent. This is why, according to this Panel, the Counsel's complaint concerning the criminal code violation for the lack of intent, as an important element of the criminal offense, is ill-founded.

141. Also, this Panel has held that the complaint concerning the statute of limitations, and consequently the criminal code violation by the Trial Panel, is completely ill-founded because the Accused was charged with, and found guilty of, the criminal offense of War Crimes against Civilians, whose underlying element is killing, and because there is no statute of limitations for war crime cases.

V. DECISION ON CRIMINAL SANCTION

142. The appeal has also contested the decision on criminal-legal sanction which the Accused received under the impugned Verdict, and which the Counsel considers too stringent, particularly bearing in mind the ICTY's penal policy in the Čelebići case.

143. The Appellate Panel has concluded that the Trial Panel properly established the state of facts in the impugned Verdict, but erred in the legal qualification of the Accused's acts described in Section 1 of the enacting clause of the Verdict. Ultimately, this had no impact on the final qualification of those acts, but in fashioning the Accused's sentence the Trial Panel did not properly evaluate all the circumstances that may affect the duration of sentence.

144. Thus, even though the Trial Panel has found and taken into account, in meting out the sentence, the extenuating circumstances on the part of the Accused, that is, his previous life, and the fact that he had no criminal record up to the commission of the concrete criminal offense, as well as the aggravating circumstances apparent from the particular brutality, cruelty and ruthlessness showed in the crimes commission, the Accused's persistence in committing the referenced crimes, as reflected in a large

number of criminal acts committed over a relatively short period of time, the number of victims against whom the prohibited acts were taken, and the fact that at no point in time he showed any remorse or compassion toward the victims of the crime, this Panel has concluded that all these circumstances were not properly evaluated, and that even though the aggravating circumstances were properly determined, they were overestimated in fashioning the Accused's sentence.

145. Having found no new extenuating or aggravating circumstances on the part of the Accused, but being mindful of all the foregoing circumstances, and the fact that the acts of the Accused, described in Section 1 of the operative part of the Verdict, have satisfied the elements of the act of *intentional infliction of severe physical pain and suffering (torture), rather than murder*, as the criminal offense of war Crimes against Civilians, this Panel concluded that the sentence of imprisonment for a term of 13 (thirteen) years is fully adequate to, and proportionate with the gravity of the committed crime, considering the circumstances, the consequences, the manner of commission, the concrete acts committed by the Accused, and his personality, and that by such a sentence the purpose of punishment, as provided by the law, would be fully achieved in terms of both special and general deterrence.

146. In view of the foregoing reasons, pursuant to Article 314 of the CPC of BiH, the Appellate Panel has revised the Trial Verdict in its part concerning the decision on sentence, and decided as stated in the operative part of this Verdict.

RECORD-TAKER:

Nevena Aličehajić

PANEL PRESIDENT

JUDGE

Dragomir Vukoje, LLM

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