

Bosna i Hercegovina

Босна и Херцеговина



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

Case no: S1 1 K 003541 14 Krž 12

Session held on: 23 January 2015

Written copy sent on: 10 March 2015

Appellate Panel:

Judge Senadin Begtašević, Presiding Judge

Judge Mirza Jusufović, Member

Judge Mirko Božović, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Milun Kornjača

SECOND INSTANCE VERDICT

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

Dževad Muratbegović

Defense Counsel for the Accused Milun Kornjača: Attorney Milana Bulić Borovčanin

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CONTENTS:

| | |
|--|-----------|
| Operative Part | 3 |
| Reasons..... | 3 |
| I – Procedural history | 3 |
| II – Appeals..... | 4 |
| III – Essential violations of the criminal procedure: | 6 |
| Appeal of the Defense for the Accused Milun Kornjača | 6 |
| 1. Essential violation of the criminal procedure pursuant to Article 297(1)(k) of the CPC of BiH | 6 |
| 2. Essential violation of the criminal procedure pursuant to Article 297(1)(g) of the CPC of BiH | 9 |
| 3. Essential violation of the criminal procedure pursuant to Article 297(1)(d) of the CPC of BiH | 10 |
| IV – Appellate allegations about incorrectly established facts | 12 |
| A. Appeal of the Defense Counsel for the Accused Milun Kornjača | 13 |
| B. Appeal of the Prosecutor's Office of BiH..... | 18 |
| 1) Section 1g. of the acquitting part of the Verdict (dismissal) | 18 |
| 2) Sections 1l. and 1n. of the acquitting part of the Verdict (revocation)..... | 20 |
| V – Appeal pursuant to Article 300 of the CPC of BiH: | |
| Decision on the criminal sanction | 23 |
| Defense and Prosecutor's Office of BiH Appeals against the criminal sanction pursuant to Article 300 of the CPC of BiH..... | 24 |

Number: S1 1 K 003541 14 Krž 12
Sarajevo, 23 January 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA !

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel of the Appellate Division composed of Judge Senadin Begtašević, as the Presiding Judge, and Judges Mirza Jusufović and Mirko Božović, as members of the Panel, with the participation of Legal Advisor Denis Podžić as the record-taker, in the criminal case of the Accused Milun Kornjača, charged with the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in relation with sub-paragraphs a), e), f), k), as read with Article 180(1) and (2) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), deciding upon the Appeals filed by the Prosecutor's Office of BiH and the Defense Counsel for the Accused Milan Kornjača, attorney Milana Bulić Borovčanin, against the Verdict No: S1 1 K 002641 10 Krl of 21 May 2014 issued by the Court of BiH, having held a session in the presence of the Prosecutor of the Prosecutor's Office of BiH, Dževad Muradbegović, the Accused Milun Kornjača and his Defense Counsel, Attorney Milana Bulić Borovčanin, pursuant to Articles 310, 313 and 315 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), on 23 January 2015 rendered the following:

VERDICT

I – The Appeal filed by Defense Counsel for the Accused Milun Kornjača against **the convicting part** of the Verdict No: S1 1 K 003541 10 Krl of 21 May 2014 issued by the Court of BiH **is hereby entirely dismissed as unfounded. The Appeal filed by the Prosecutor's Office of BiH against Section 1g. of the acquitting part** of the same Verdict and against **the decision on the sentence is hereby dismissed**, and the first instance Verdict is upheld in that part.

II - The Prosecution Appeal is hereby upheld in the part relevant to Sections **1l. and 1n.** of the acquitting part of the first instance Verdict, so that the Verdict is hereby **revoked** in that part and **a trial is scheduled** before the Appellate Division Panel of the Court of Bosnia and Herzegovina.

R e a s o n s

I – PROCEDURAL HISTORY

1. Under the first instance Verdict No: S1 1 K 003541 10 Krl of 21 May 2014 issued by the Court of BiH, the Accused Milun Kornjača was found guilty of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH, all as read with Articles 180(1) and 29 of the CC of BiH by committing the offenses described under Sections 1, 2 and 3 of the Operative Part of the appealed Verdict. Pursuant to Article 285 of the CPC of BiH, and Articles 39, 42, 48, 49 and 50 of the CC of BiH, he was sentenced to a prison term of 5 (five) years. Pursuant to Article 56 of the CC of BiH, the time the Accused spent in custody from 16 December 2009 to 30 August 2012 was credited towards the imposed prison sentence. Pursuant to Article 188(4) of the CPC of BiH, the Accused was relieved of the duty to reimburse the costs of the criminal proceeding and the relevant lump sums, which would be entirely covered from the budget appropriations of the Court of BiH. Pursuant to Article 198(2) of the CPC of BiH, the aggrieved parties were instructed to take civil action to pursue their claims under property law.

2. Pursuant to Article 284(1)(c) of the CPC of BiH, the Accused was acquitted of the charges that by his acts described under Sections 1g, 1k, 1l. and 1n. of the Operative Part of the appealed Verdict, he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH (persecution), in relation with sub-paragraphs a), e), f) and k), all as read with Articles 180(1) and (2) and 29 of the CC of BiH. As a result, the Accused was relieved of the duty to reimburse the costs of the criminal proceeding pursuant to Article 189(1) of the CPC of BiH, which were entirely covered from the budget appropriations of the Court of BiH. Pursuant to Article 198(3) of the CPC of BiH, all aggrieved parties were instructed to take civil action to pursue their potential claims under property law.

3. Under the same Verdict, pursuant to Article 283(b) of the CPC of BiH, the Accused Milun Kornjača was acquitted of the charges that by his acts described in the Operative Part thereof, he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH (persecution), in relation with sub-paragraphs a), e), f) and k), as read with Article 180(1) and (2) of the CC of BiH. As a result, the Accused was relieved of the duty to reimburse the costs of the criminal proceeding pursuant to Article 189(1) of the CPC of BiH, which were entirely covered from the budget

appropriations of the Court of BiH. Pursuant to Article 198(3) of the CPC of BiH, all aggrieved parties were instructed to take civil action to pursue their potential claims under property law.

II - APPEALS

4. The Verdict was timely appealed by both the Prosecutor's Office of BiH and Defense Counsel for the Accused Milun Kornjača, attorney Milana Borovčanin Bulić.

5. The Prosecutor's Office of BiH appealed the Verdict on the grounds of erroneously and incompletely established facts in the acquitting part of the Verdict relevant to the offenses charged under Section 1-g), 1-l) and 1-n) of the Operative Part of the Verdict and the decision on the criminal sanction in the convicting part of the Verdict for the offenses charged under Sections 1), 2) and 3) of the Verdict. The Prosecution moved the Appellate Division Panel to uphold the Appeal by revoking the appealed Verdict in relation to the acquittal of the offenses under Sections 1-g), 1-l) and 1-n) of the Operative Part, to schedule a trial and to revise the appealed Verdict in its convicting part by imposing on the Accused Milun Kornjača a lengthier prison sentence for the offenses under Sections 1, 2 and 3 of the Operative Part thereof, without applying the mitigation provisions set forth in Article 49 of the CC of BiH.

6. Defense Counsel for the Accused Milun Kornjača, attorney Milana Borovčanin Bulić, responded to the Appeal and moved the court to dismiss the BH Prosecution Appeal as unfounded.

7. Defense Counsel for the Accused Milun Kornjača, attorney Milana Borovčanin Bulić, appealed the Verdict on the grounds of essential violations of the criminal procedure (Article 297 of the CPC of BiH), erroneously and incompletely established facts (Article 299 of the CPC of BiH), violations of the criminal code (Article 298 of the CPC of BiH) and the decision on the criminal sentence (Article 300 of the CPC of BiH), moving the court to uphold the Appeal, revise the appealed Verdict and acquit the Accused Milun Kornjača of the charges concerning the criminal offense of Crimes against Humanity committed by persecution in violation of Article 172(1)(h) of the CC of BiH, as read with Articles 180(1) and 29 of the CC of BiH and/or to mitigate the severity of the sentence imposed or to

impose a different, more lenient sentence.

8. The Prosecutor's Office of BiH responded to the Appeal filed by Defense Counsel for the Accused Milun Kornjača, and moved the Appellate Division Panel to dismiss the Appeal as unfounded.

9. At a public session that was held by the Appellate Panel on 23 January 2015 pursuant to Article 304 of the CPC of BiH, the Prosecutor of the Prosecutor's Office of BiH, Dževad Muratbegović, and Defense Counsel for the Accused Milun Kornjača, attorney Milana Borovčanin Bulić, verbally presented their reasons for appeal, and maintained their written allegations and proposals. The Accused Milun Kornjača entirely supported the allegations of his Counsel. The Prosecutor of the Prosecutor's Office of BiH and Defense Counsel for the Accused Milun Kornjača maintained their written responses to the appeals filed by the adverse party.

10. Pursuant to Article 306 of the CPC of BiH, the Appellate Panel examined the impugned Verdict within the allegations of the Appeal, inspected the case file, and evaluated the evidence, whereafter they decided as stated in the Operative Part herein for the reasons as follows.

III - APPEALS – ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE

APPEAL OF THE DEFENSE FOR THE ACCUSED MILUN KORNJAČA

1. Essential violation of the criminal procedure pursuant to Article 297(1)(k) of the CPC of BiH

11. Article 297(1)(k) of the CPC of BiH provides that the criminal procedure is violated *if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts.*

12. In the Appeal, the Defense alleges essential violations of the criminal procedure in the impugned first instance Verdict since the wording of its Operative Part is incomprehensible, internally contradictory, contradicts the grounds of the verdict and does not cite reasons concerning the decisive facts, so that it cannot be examined. The Defense argues that the Verdict is internally contradictory, confusing, imprecise, and its reasoning does not show that the Accused Milun Kornjača committed the offenses of which he was found guilty and sentenced. In addition, the Operative Part of the Verdict does not contain the subjective element – the *nexus* between the Accused and the acts of perpetration and the consequences thereof.

13. The Appellate Panel first recalls the obligation of the Appellant to provide clear and substantiated reasons for each and every piece of evidence or action of the court that is disputed, and to give clear and substantiated reasons in support of the relevant objection raised in the appeal. Arbitrarily raised objections and alleged irregularities of the first instance proceeding, in absence of any corroboration, do not constitute valid grounds for examining the first instance verdict.

14. In that respect, the Appellate Panel notes that the Defense Counsel, when alleging the essential violations of the criminal procedure pursuant to Article 297(1)(k) of the CPC of BiH, only cites the relevant provision, without any explanation whatsoever as to why the Verdict is incomprehensible, internally contradictory and/or contradicts the grounds of the verdict. Moreover, the Defense failed to identify the deficiencies in the first instance Verdict relevant to the absence of reasons concerning the decisive facts, so that the Appellate Panel could not examine the Verdict within this allegation/ground of the Appeal.

15. The Appellate Panel examined the Operative Part of the first instance Verdict and, contrary to the Defense allegations, found that it is sufficiently clear and comprehensible, that the reasoning of its convicting part is not contradictory, and that its form and contents satisfy the requirements of the procedural law. The Appellate Panel also holds that the reasoning of the impugned Verdict provides adequate and sufficient arguments relevant to the offenses charged against the Accused, which ensue from the account of facts of the convicting part of the Verdict. This is why the Appellate Panel dismisses as unfounded the Defense allegation that the reasoning does not show that the Accused Milun Kornjača committed the offenses of which he was found guilty and punished.

16. The reasoning of the convicting part of the appealed Verdict provides the reasons as to the decisive facts that are relevant for adjudication, and a detailed analysis of the entire body of evidence, both individually and in correlation. In the appealed Verdict, the Trial Panel reflected upon those pieces of evidence that were relevant for adjudication, and included in the reasoning their conclusions about the facts of vital importance for adjudication that concerned the essential elements of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in relation with sub-paragraphs a), e), f) and k) of the CC of BiH.

17. The Defense is also incorrect in alleging that the Operative Part of the Verdict does not contain the subjective element – the *nexus* between the Accused and the acts of perpetration and the consequences thereof. The introductory part of the conviction clearly states that:

“In the period between mid April 1992 and mid May 1992, in the Čajniče Municipality, within a widespread and systematic attack against the non-Serb civilian population of the Čajniče Municipality carried out by the Territorial Defense of Čajniče, members of the Plavi orlovi unit, and Public Security Station of the Municipality of Čajniče, assisted by paramilitary formations from Serbia and Montenegro, knowing of the attack, as the Commander of the Plavi orlovi unit, which was later on transformed in the 7th Infantry Company, he ordered and perpetrated the persecution of non-Serb civilian population of the Čajniče Municipality on ethnic and religious grounds, by detention and other inhumane acts of similar character committed with the intention of causing great suffering or serious physical injuries or health impairment ...”

after which the Verdict provides the account of facts relevant to the specific acts perpetrated by the Accused.

18. As opposed to the allegations of the Appeal, this Panel holds that the quoted part of the Verdict clearly states the subjective element - the *nexus* between the Accused and the acts of perpetration and the consequences thereof. The impugned Verdict expressly states that the Accused was aware of the widespread and systematic attack against non-Serb civilians of the Čajniče Municipality and that his acts were part of the attack. Also, as the

Commander of the *Plavi orlovi* unit, which was later on transformed into the 7th Infantry Company, alone or together with members of his unit, he detained non-Serb inhabitants of the Čajniče Municipality and beat them up. The ultimate goal of all those acts was the expulsion of the non-Serb population from the Municipality of Čajniče.

19. The Accused was aware that there were no legal grounds for the detention of those civilians, nevertheless he, alone or together with members of his unit, consciously kept the people in inhumane conditions, in an utterly cramped space, without adequate accommodation, sufficient air, light, food and water, thereby showing that he wanted to cause precisely such consequences. Furthermore, by beating the civilians all over their bodies, kicking and punching them, hitting them with his pistol and rifle butt, the Accused inflicted severe physical or mental suffering or injuries on the victims, thereby clearly demonstrating that it was precisely the consequence he wanted to cause – to inflict severe physical or mental pain on the civilians as a result of the beatings.

20. Based on the foregoing, the Appellate Panel is satisfied that the Defense Appeal failed to provide valid arguments in support of the conclusion that the impugned Verdict is incorrect and unlawful on the grounds of a violation of the provisions of Article 297(1)(k) of the CPC of BiH. The Defense Appeal is therefore dismissed as unfounded in this part.

2. Essential violation of the criminal procedure pursuant to Article 297(1)(g) of the CPC of BiH

21. Pursuant to Article 297(1)(g) of the CPC of BiH, essential violation of the criminal procedure exists *if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction.*

22. In the Appeal from the first instance Verdict, the Defense for the Accused Milun Kornjača disputed subject-matter jurisdiction of the Court of BiH, alleging violation of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. According to the Defense, in the relevant period, the Accused Milun Kornjača perpetrated the offenses which satisfy essential elements of one of the minor offenses which fall within the jurisdiction of the Minor Offense Court of the Čajniče Municipality, or potentially the Basic Court in Čajniče. The Appeal alleges that the first instance Verdict

failed to explain why the objections to the jurisdiction of the Court of BiH, raised by the Defense also earlier in the proceeding, were dismissed.

23. Indeed, in the first instance Verdict, the Trial Panel did not specifically address the issue of lack of subject-matter jurisdiction of the Court of BIH in this criminal matter. However, after examining the Defense allegations raised in the Appeal, the Appellate Panel dismissed this Defense objection as entirely unfounded and unsubstantiated.

24. Article 7 of the Law on Court of Bosnia and Herzegovina clearly defines the jurisdiction of the Court of Bosnia and Herzegovina. Its paragraph 1 reads:

"The Court has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina."

25. This legal provision empowers precisely the Court of Bosnia and Herzegovina to adjudicate this criminal matter, since the Accused is charged with perpetration of acts whose elements satisfy the elements of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) of the CC of BiH, involving the criminal offense in violation of Article 180(1) and (2) of the CC of BiH. Both criminal offenses are defined and codified precisely under the Criminal Code of BiH.

26. The Defense tried to subsume the acts of the perpetration of the Accused under the elements of a minor offense, and denied the existence of the elements of the criminal offense of Crimes against Humanity. However, there were no legal grounds for such an averment, but the Defense simply attempted to diminish the culpability of the Accused.

27. It should be noted that the issue of jurisdiction is present throughout the criminal proceeding. Thus, immediately after receiving the Indictment, the Preliminary Hearing Judge has to examine whether the Court has jurisdiction, while the Article 28(1) of the CPC of BiH provides that the Court shall be cautious of its jurisdiction and, as soon as it becomes aware that it is not competent, it shall issue a decision that it lacks jurisdiction and, once such decision has taken legal effect, it shall forward the case to the competent court. By confirming the indictment in this case, the Court of BiH clearly showed that its

jurisdiction to adjudicate this case was beyond dispute.

28. Relying on the above stated, the Appellate Panel dismissed as unfounded the Defense allegations raised in the Appeal. Notwithstanding the absence of any legal grounds whatsoever, the Defense still attempted to challenge the jurisdiction of this Court by alleging the violation of the right to a fair trial guaranteed under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because the case was adjudicated by the Court of BiH, not by the Minor Offense Court, that is, the municipal court.

3. Essential violation of the criminal procedure pursuant to Article 297(1)(d) of the CPC of BiH

29. Article 297(1)(d) of the CPC of BiH provides that essential violation of the provisions of criminal procedure occurred *if the right to defense was violated*.

30. The Defense appealed on this grounds by arguing that the Trial Panel did not allow the Defense to present the entire body of the proposed evidence, but the attorney did not specify which evidence. In appealing the Verdict on the grounds of erroneously and incompletely established facts, the Defense argued that the Court refused the presentation of additional evidence relevant to the personality structure of the Accused, in particular whether Milun Kornjača was prone to committing criminal offenses, if he suffered from any disorders and, if so, how they were manifested. In the opinion of the Defense, establishing those facts was of crucial importance for the court decision, so that the Court erred in not allowing the Defense to present relevant additional evidence.

31. Essential violations of the criminal procedure overpower all other grounds for appeal. Therefore, if the Appellate Panel finds that any of the essential violations of the criminal procedure listed in Article 297(1) of the CPC of BiH was made by the Trial Panel in the appealed Verdict, the Verdict must be revoked and a trial scheduled before the Appellate Panel. Bearing in mind the effects that the review of the impugned Verdict may have on the Accused, the Appellate Panel first examined whether any violations of the criminal procedure were made in the appealed Verdict, that is, if the right to a defense was violated.

32. However, as opposed to the allegations of the Appeal, when the Appellate Panel examined the first instance Verdict, it dismissed as unfounded the Defense's claim that their right to a defense was violated because they were not allowed to present additional evidence about the health condition and personality structure of the Accused.

33. On several occasions during the proceeding, the Trial Panel adduced evidence and established facts relevant to the health condition and sanity of the Accused, allowing the Defense to hire an expert witness to give his opinion with regard to the circumstances alleged in the Appeal. Expert witness, Prim. Dr. Zorica Lazarević, a neuropsychiatrist and a forensic psychiatry subspecialist, examined and questioned the Accused as requested by the Defense. She started her expert evaluation report by stating that the Court of BiH issued an order for psychiatric evaluation of mental health and sanity of the Accused Milun Kornjača at the time of perpetration of the criminal offense of Crimes against Humanity - April/May 1992. According to the expert witness, the Accused was ... at the relevant time, which resulted in a reduction of certain mental functions of organic etiology (intelligence, thinking and voluntary-instinctive dynamisms), which is supported by all available medical documentation. At the time of perpetration, the ability of the Accused to understand the significance of the offense was reduced, so was his ability to control his actions, but not considerably.

34. Therefore, the Defense was given the opportunity to present the evidence relevant to the circumstances stated in the Appeal by engaging a psychiatrist expert witness of their own choice to examine the Accused and give her opinion. The Appellate Panel is satisfied that the Trial Panel was correct in dismissing the motion for presenting additional evidence in that respect. Prim. Dr. Zorica Lazarević, a neuropsychiatrist and a forensic psychiatry subspecialist, possesses all necessary qualifications and experience required to perform a good quality expert evaluation. Doctor Lazarević was proposed as an expert witness precisely by the Defense. Her expert evaluation report, which is now disputed in the Appeal, incorporates the expert evaluation report drafted by psychologist Mirjana Milinković. This renders unsubstantiated the appellate objection to the expert evaluation report made by Zorica Lazarević and the alleged necessity for a new expert evaluation, because the personality structure of the Accused could not have been defined by only one doctor. In the opinion of the Appellate Panel, the Defense merely intends to lengthen the proceeding, since additional defense evidence would aim to prove the facts that have

been sufficiently clarified during the proceeding.

35. Having examined the impugned Verdict, the Appellate Panel concluded that the Trial Panel was also justified in refusing the presentation of other proposed evidence, and provided a correct explanation thereof. This Panel will not further elaborate on this issue since no objection to this effect was raised in the Appeal.

36. Based on the foregoing, the Panel dismissed as unfounded the alleged violation of the right to a defense by the Trial Panel, as raised in the Defense Appeal. The Prosecutor's Office of BiH did not appeal the Verdict on the grounds of essential violations of the criminal procedure.

IV – APPELLATE ALLEGATIONS ABOUT ERRONEOUSLY AND INCORRECTLY ESTABLISHED FACTS

STANDARDS OF REVIEW

37. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.

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

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

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

A. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED MILUN KORNJAČA

41. Guided by the above stated standards of review, the Appellate Panel dismissed as unfounded the Defense’s allegation that the Court based its decision on the incorrect finding that the Accused Kornjača was Commander of the *Plavi orlovi* unit, and/or the 7th Infantry Company, because this Unit and the Company are not the same entity. The Defense argues that the Accused Kornjača never personally stated during the proceeding that he was Commander of the *Plavi orlovi* unit. Furthermore, the Prosecution did not present a single official document that would prove that the *Plavi orlovi* unit had existed, or that Milun Kornjača was its commander.

42. The Appellate Panel upholds as correct the finding of the Trial Panel that the 7th Infantry Company and *Plavi orlovi* unit was one and the same unit. This fact was confirmed by the Accused himself when he testified at the main trial as a defense witness. When asked by the Prosecutor if inhabitants of Čajniče called his unit *Plavi orlovi*, he responded:

“Well, I did not call it like that. Some people did, but I don’t know about that, I could not forbid anyone to call it like that, but I did not call it like that, I called it the 7th Infantry Company, first it was a Territorial Defense infantry platoon, then it became the 7th Infantry Company of the Territorial Defense of the Čajniče army”.

43. Obviously, the Accused did not deny that his unit was called the *Plavi orlovi*, he only said that he had called it the 7th Infantry Company. This leads to the conclusion that he himself did not claim those were different units, but that it was one and the same unit, which was under his command, he called it in one way, while others called it differently.

44. Witnesses for both Prosecution and Defense confirmed that the unit whose commander was Milun Kornjača was called the *Plavi orlovi* unit. According to defense witness Njegoš Manović, Milun Kornjača was the “*commander of the Plavi orlovi unit*”. The witness heard that at the beginning of the war, and, when the combat activities started, he heard the same thing from his colleagues, friends and citizens“. As stated by prosecution witness Desimir Đerić, the Accused Milun Kornjača „had his unit whose name was *Plavi orlovi*”, and “no one can deny that because everyone knew it.”

45. The truth is that the Prosecutor’s Office of BiH did not tender into the case file a single official document to show that there was a unit in the area of Čajniče municipality at the relevant period whose name was *Plavi orlovi*. However, it undeniably follows from the testimony of witnesses that such a unit indeed existed and that it was its unofficial name used in everyday communication. In addition, according to witness Đerić, “everyone knew that name”. Finally, in the opinion of this Panel, the name of the unit itself, viewed from the aspect of the criminal offenses of which the Accused was found guilty in the convicting part of the Verdict (persecution by imprisonment and other inhumane acts of similar character), does not bear such importance that its different name could result in a different decision about the culpability of the Accused.

46. Anyhow, having correctly established the fact that the official name of the unit whose commander was the Accused was the 7th Infantry Company, but that the unit was also called *Plavi Orlovi*, the Trial Panel used precisely those terms in the appealed Verdict – commander of the *Plavi orlovi* unit, that is, the 7th Infantry Company, since it correctly concluded that it was the same unit.

47. The Appellate Panel is therefore satisfied that the Trial Panel properly and correctly established the relevant facts, while the Appeal failed to prove the alleged error that would eventually lead to a miscarriage of justice.

48. Finally, the Defense alleged in the Appeal that the Accused did not have any discriminatory intent, in the sense that his unlawful actions were targeted only against non-Serb civilians. In support of this averment, the Defense referred to a number of witnesses of non-Serb ethnicity who testified that the Accused had helped and saved people.

49. The Appellate Panel does not deny that some witnesses of Bosniak ethnicity stated that they had been released, that is, freed from captivity. However, not a single witness mentioned the Accused as the person who released them, but they gave credit for it to Duško Kornjača, Milun Kornjača's brother. According to the witnesses, it was precisely the Accused who opposed their release. Particularly relevant in this respect is the testimony witness Dževad Šeko, who stated he had left the metal container together with Safet Tanjo, when Duško Kornjača released them. Witness Ratomir Milović corroborated this statement and added that Duško Kornjača first brought them to a café at Mostina, and while they were waiting for him, they heard a quarrel between Duško Kornjača and Milun Kornjača about the release of captives from the container. After that, Duško told them to go away with a solider.

50. The Trial Panel was correct in concluding that the offenses perpetrated by the Accused, of which he was found guilty in the convicting part of the Verdict, were targeted exclusively against non-Serbs, the victims were selected only on the grounds of their Bosniak religious and ethnic identity, while the Accused did not target a single act at Serb inhabitants. The Appellate Panel too is satisfied that this clearly shows the discriminatory intent of the Accused, so that this objection raised in the Defense Appeal is dismissed as unfounded.

51. The Defense also argued that the Trial Panel erred in finding that the Accused was aware of the attack, but the Defense failed to support this averment by any facts or circumstances that would possibly point toward a different state of affairs.

52. The Appellate Panel upholds the clear and substantiated conclusions of the appealed Verdict – that the Accused was aware of a widespread and systematic attack and that his acts were part of the attack – since he participated in the deprivation of liberty of non-Serb civilians at Mostina and their confinement in the containers, without any legal grounds whatsoever. After that, the Accused inhumanely treated those people, beat them up and kept them in inhumane conditions, knowing that all imprisoned people were non-Serbs, that they were surrounded and could not move freely, nor could they leave Čajniče, which was completely under the Serb control.

53. It is important to note that the Accused lived with his brother Duško

Kornjača in his brother's flat at the relevant time, and he must have been aware of the decisions issued by the Crisis Staff and by his brother as its President. It is irrelevant here whether the Accused was aware of all details and aspects of the attack. The presented evidence shows that Milun Kornjača's unit was engaged in combat activities at the Goražde front line and that the Accused personally participated in them. This fact leads to the conclusion that the Accused was aware of the combat objectives, more precisely, when he perpetrated the acts of which he was found guilty, he knew of the widespread and systematic attack and was aware that his acts formed part of the attack.

54. The Defense alleges that the appealed Verdict did not firmly establish that the Accused committed the criminal offense of Crimes against Humanity by persecution, since the Accused could not have physically expelled such a huge number of non-Serb inhabitants. According to the Defense, a number of heard witnesses admitted they had left Čajniče on their own due to the generally known political situation.

55. In response to this allegation, the Appellate Panel first recalls that persecution can be perpetrated by commission of all acts which, in their entirety, amount to intentional and severe deprivation of fundamental rights on the ground of their belonging to a group of people or a community, in violation of international law. Persecution may encompass other offenses of discriminatory nature, including attacks upon political, social and economic rights. Even a single offense may amount to persecution. Apparently, in such a situation too, discriminatory intent must be clearly supported by evidence.

56. First of all, the Prosecution never claimed that the Accused was the only person who, at the relevant time and in the relevant place, committed the offenses that amount to persecution. This does not follow from the appealed Verdict either. Quite the opposite, the presented evidence clearly shows that many other people participated in the persecution of non-Serb civilians, not only the Accused, as the Appeal seeks to impute to the Trial Panel. However, this criminal matter focuses specifically on the acts of the Accused. To that end, the Appellate Panel recalls that the impugned Verdict found the Accused guilty of the criminal offense of Crimes against Humanity by persecution, through imprisonment and other acts of inhumane nature. In this context, the Appellate Panel invokes the specific provisions of Article 172(1)(h) of the CC of BiH. The Operative Part of the convicting part of the Verdict clearly states the acts perpetrated by the Accused and lists the

names of individual victims against whom those acts were targeted, which makes unfounded and substantiated the appellate allegations that the Accused could not have possibly physically persecuted such a huge number of non-Serb inhabitants.

57. The Appeal pointlessly argues that the Accused did not torture any person, since the Trial Panel did not at all accept such a qualification from the Indictment for the acts committed by the Accused against civilian Mehmed Trgo. Having examined the presented evidence, the Panel concluded that those acts amounted to inhumane treatment, rather than to torture, as charged under the Indictment.

58. The Appellate Panel dismisses as unfounded the appellate allegations that the Accused's Command should be held accountable for the acts of the Accused, considering that those acts were committed on the order of his superiors and the Accused did not personally perpetrate them.

59. In this respect, the Appellate Panel notes that individual criminal responsibility may be charged for planning, initiating, ordering, *perpetrating* or instigating the perpetration of the criminal offense, and/or for aiding and abetting in planning, preparing or perpetration of the offense. *Perpetration* encompasses physical commission of a criminal offense or causing a punishable omission, which results in a violation of criminal legislation.

60. In the opinion of the Appellate Panel, the impugned Verdict reasons every section of the Operative Part thereof. Following an analysis of the presented evidence, the Verdict gives conclusions relevant to the established facts and the pertinent reasoning, which undeniably show that Milun Kornjača is criminally culpable for the prohibited acts he committed, that he acted with direct intent and as a direct perpetrator. The Accused committed the majority of those offenses personally, while some acts he perpetrated together with other members of the unit. Taking into account that everyone is responsible within the scope of his intent, the defense's claim that it is the Accused's superior command that should be held accountable, not the Accused, is absolutely misplaced. In any event, his responsibility does not preclude the responsibility of others, including members of the superior command. Similarly, their responsibility for the same incidents would not automatically exclude the responsibility of the Accused.

61. The Defense alleges in the Appeal that the incorrectly and improperly established facts resulted in the violation of the Criminal Code of BiH. However, due to the above stated reasons, the Appellate Panel has already dismissed as unfounded such allegations about erroneously and incompletely established facts in the convicting part of the Verdict which were raised by the Defense in the Appeal. As for the alleged violations of the Criminal Code of BiH, the Appellate Panel notes that the Appeal only perfunctorily raises this objection, without any particular corroboration and with no reference to the specific provisions of the criminal law that were allegedly violated. In such a situation, the Appellate Panel could not examine this allegation into more detail when considering the alleged violation of the criminal law.

62. In view of the foregoing and pursuant to Article 306 of the CPC of BiH, which defines that the Verdict shall be reviewed insofar as it is contested by the appeal, the Appellate Panel concludes that the Trial Panel correctly established facts in the convicting part of the Verdict and correctly applied the Criminal Code of BiH to the thus established facts. Therefore, this Defense objection too, that is, this ground for appeal, is dismissed as unsubstantiated.

B. APPEAL OF THE PROSECUTOR'S OFFICE OF BiH

1) Section 1g. of the acquitting part of the Verdict

63. The Prosecutor's Office of BiH disputes the first instance Verdict on the grounds of erroneously and incompletely established facts. According to the Prosecution, the Trial Panel was incorrect in concluding that there was no evidence to show that the Accused Milun Kornjača beat up captives Salih Čolak and underage Zlatko Bukva in front of the metal container. The Appeal focused only on the offenses allegedly committed against captive Salih Čolak.

64. The Prosecution referred to the testimony of witness Mirzet Čolak, who was also imprisoned in the metal container at Mostina. According to this witness, his brother Salih Čolak told him that the Accused had knocked out several of his teeth by pushing his pistol into his mouth. Witnesses Himzo Čolak, Semka Čolak, M -1 and Mehmed Trgo

indirectly confirmed this when they talked about the inflicted injuries. Mehmed Trgo's testimony was admitted into evidence pursuant to Article 273(2) of the CPC of BiH. The Prosecution argues that the Trial Panel was incorrect in concluding that the testimony of a single witness, who was not an eye-witness to the incidents and had only indirect information about Salih Čolak's injuries, was not sufficient to reach a conclusion about Milun Kornjača's culpability beyond a reasonable doubt.

65. The Panel recalls Count 1g. of the amended Indictment which charged the Accused Milun Kornjača as follows:

"On or about 1 May 1992, at Mostina, Čajniče Municipality, dressed in a camouflage uniform and armed with a pistol, the Accused took out of the metal container the detainees Salih Čolak and underage Zlatko Bukva a.k.a. Prle. He pushed his pistol barrel into Salih's mouth, twisted it fiercely, and in so doing broke his several teeth. Using a knife blade, the Accused engraved a cross on Zlatko Bukva's chest, thereby causing severe mental and psychological trauma to the underage detainee."

66. With regard to this Count of the Indictment, the Appellate Panel upholds as correct the conclusion of the Trial Panel that the presented evidence did not prove beyond a reasonable doubt that the Accused had committed the offenses precisely as it was described under Count 1g. of the Indictment.

67. The Appellate Panel agrees with the Prosecution that the testimony of one witness only, provided that it is reliable and credible, can suffice to conclude that the criminal offense was committed. The same applies to the testimony of a number of witnesses who have indirect information about the relevant decisive facts. However, the Panel notes that such testimony must be completely consistent and compatible, leaving no room for ambiguity with regard to the decisive facts. In addition, when criminal offenses against humanity and values protected by international law are involved, the hitherto standards of proof must also be taken into account.

68. In view of the presented evidence relevant to this count of the Indictment, the Appellate Panel notes that the testimony of witness Mirzet Čolak, who too had indirect information about the alleged offenses perpetrated by the Accused, was only

partially supported by testimony of other witnesses. Thus, witnesses Himzo Čolak and Semka Čolak only confirmed to have seen injuries on Salih Čolak's face when he returned home from Mostina, while witness M-1 stated that the Accused and another corpulent man in uniform took all detainees out of the container on the relevant occasion, beat them up and sent them back to the container. When addressing this Count of the Indictment, the Prosecution referred to the testimony of Mehmed Trgo, who stated he had seen Bosniak civilians from Čajniče when he entered the container, and he gave full names of the imprisoned people, but he mentioned detainee Salko Čolak, not Salih Čolak.

69. In such a situation, the Appellate Panel upholds as correct the conclusion of the Trial Panel that the presented evidence did not prove beyond a reasonable doubt that it was precisely the Accused who inflicted the injuries on Salih Čolak that the witnesses had seen on his face, nor did it prove that the Accused perpetrated the offenses exactly as it was described in the account of facts under this Count of the Indictment. Since the facts detrimental to the Accused could not have been established beyond doubt, the *in dubio pro reo* principle had to be applied pursuant to Article 3 of the CPC of BiH. Therefore, the decision made by the Trial Panel with regard to this Count of the Indictment is valid and based on law, while the Prosecution's appellate allegations relevant to this Count are dismissed as unfounded.

2) Sections 1l. and 1n. of the acquitting part of the Verdict

70. The Prosecution appeals the first instance Verdict on the grounds of erroneously and incompletely established facts relevant to the acts described in Sections 1l. and 1n. of the acquitting part of the Verdict. According to the Prosecution, the Trial Panel incorrectly concluded that the presented evidence failed to prove that the Accused Milun Kornjača had effective control over Veljo Tadić, a member of the *Plavi orlovi* unit, because of parallel systems of subordination and/or authority and influence Duško Kornjača had as the President of the Crisis Staff of the Čajniče Municipality. As for Section 1n. of the acquitting part of the Verdict, the Prosecution argues that a wrong conclusion was made about the non-existence of intent on the part of the Accused to deprive of life the imprisoned civilians from the Brdo village at Mostina, and that it was precisely the Accused who ordered that the imprisoned civilians from the Brdo village be taken to Mostina.

71. The Appellate Panel upholds as founded these objections and the Prosecution's Appeal relevant to Sections 1 l. and 1. n. of the acquitting part of the first instance Verdict.

72. Having examined the reasons provided by the Trial Panel with regard to the acts described under Section 1l. of the acquitting part of the Verdict, the Appellate Panel first concludes that the Trial Panel correctly found that the presented evidence showed the existence of a parallel system of subordination when they examined the effective control over the members of the *Plavi orlovi* unit. Even though the Accused Milun Kornjača was commander of that unit, Duško Kornjača, President of the Crisis Staff of the Čajniče Municipality, also had significant influence on the members of this unit. This was corroborated by testimony of the heard witnesses. However, significant influence of the President of the Crisis Staff does not automatically exonerate the Commander of the unit from his responsibility.

73. In the opinion of the Appellate Panel, the Prosecution's appellate allegations, supported by the testimony of the witnesses heard, seriously challenge the conclusion of the Trial Panel that the Accused Milun Kornjača, as the Commander of the *Plavi orlovi* unit and its immediate superior, did not have effective control over his subordinates. As a result, in absence of such control, he could not punish a member of his unit - Veljo Tadić for the committed crime.

74. With regard to this Section of the acquitting part of the Verdict, the Appellate Panel recalls that the Indictment charged Milun Kornjača as the superior with failing to take all necessary and reasonable measures to punish the perpetrator of the criminal offense. Nevertheless, since the degree of effective control the Accused had over his subordinates at the time he was supposed to take action remained unclear, the question is what type and scope of measures the Accused was supposed to take, that is, what measures were available to him, in particular because the Accused himself stated that he could have proposed their punishment. However, he did not do even that much. In assessing what the Accused could and should have done, the timing of Veljo Tadić's departure to Montenegro and his return play an important role, but this fact also remained unclear.

75. On the other hand, the Appellate Panel upholds as substantiated the

Prosecution's appellate allegations relevant to Section 1n. of the acquitting part of the Verdict. Under this Count, the Accused was charged with individual criminal responsibility, specifically that he, as the co-perpetrator, participated in depriving of life the civilians imprisoned at Mostina, by giving the order to take those people to Mostina and imprison them there. The Appellate Panel concludes that the impugned first instance Verdict failed to evaluate the credibility of conflicting evidence, that is, the testimony of witnesses who claimed that the order to imprison civilians came from the Accused Milun Kornjača.

76. The Appellate Panel reaffirms the provisions of Article 290(7) of the CPC of BiH which *inter alia* provide that the Court shall specifically and completely state which facts and on what grounds the Court finds to be proven or unproven, furnishing specifically an assessment of the credibility of contradictory evidence.

77. As regards this Section of the acquitting part of the appealed Verdict, the Trial Panel merely cited the testimony of witnesses and gave its own conclusion thereof, completely ignoring the opposing evidence that suggested a different account facts that could have produced a different conclusion. In the opinion of the Appellate Panel, the impugned Verdict does not contain appropriate reasoning as why the conflicting testimony was not accepted, which amounts to essential violation of the criminal procedure. On top of that, the Verdict also failed to clarify a decisive fact – the charges that the Accused gave a substantial contribution to depriving the civilians of their lives. Specifically, the question is whether his words: "Go to Mostina", uttered in front of the Čajniče Hotel, were indeed the order to imprison civilians, that is, whether that was the true meaning of those words. This is particularly important because it was common knowledge that arrested Bosniaks were imprisoned precisely at Mostina, without any previously conducted procedure, not to mention the procedure defined by the law.

78. Based on the foregoing, the Appellate Panel concludes that the Prosecution's appellate allegations cast serious doubt on the correctness of the established facts in this part of the impugned first instance Verdict, thereby indicating the validity of the Appeal on the grounds of erroneously or incompletely established facts. Accordingly, the Prosecution's Appeal relevant to Sections 1l. and 1n. of the acquitting part of the Verdict is upheld and the impugned Verdict is revoked in that part, pursuant to Articles 310(1) and 315 of the CPC of BiH.

**V - APPEAL PURSUANT TO ARTICLE 300 OF THE CPC OF BIH: DECISION ON
THE CRIMINAL SENTENCE**

STANDARDS OF REVIEW

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

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

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

82. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion

properly.

83. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

**APPEALS OF THE DEFENSE AND PROSECUTOR'S OFFICE OF BIH AGAINST THE SENTENCE PURSUANT
TO ARTICLE 300 OF THE CPC OF BIH**

84. Both Defense and Prosecution appealed the imposed criminal sentence pursuant to Article 300 of the CPC of BiH.

85. The Defense argues that the imposed prison sentence of 5 (five) years is too harsh and not commensurate with the gravity of the committed offense. According to them, the Accused is a seriously ill man, he has a heart condition and psychological problems, and his years long imprisonment left lasting consequences on his health.

86. Contrary to the allegations of the Appeal, the Appellate Panel is satisfied that, when meting out the sentence, the Trial Panel correctly evaluated and gave adequate weight to all extenuating circumstances found on the part of the Accused. The Trial Panel even assessed them as particularly mitigating circumstances and imposed a sentence below the statutory minimum for this criminal offense. In the opinion of the Appellate Panel, the circumstances referred to in the Appeal relevant to the health of the Accused, were evaluated by the Trail Panel, therefore, the Defense is unjustified in arguing that the imposed prison sentence of 5 (five) years is too strict and not commensurate with the gravity of the perpetrated criminal offense.

87. This Panel holds that a sentence less stringent than the imposed one would not achieve the purpose of punishment; therefore, the Defense's Appeal is unjustified in disputing the length of the imposed sentence.

88. The Prosecution, on the other hand, argues that the Trial Panel erred when meting out the sentence by overestimating the extenuating circumstances on the part of the Accused and by applying the provisions for sentence mitigation. According to the Prosecution, health condition cannot amount to a particularly mitigating circumstance. The Trial Panel overrated the facts that the Accused had no prior convictions, his proper conduct, respect of the court and compassion for the victims, given that the Accused refused to appear at some hearings, although the medical expert witnesses confirmed that he was fit to stand trial. The Prosecution also argues that the Trial Panel did not give sufficient weight to the position of the Accused as the commander of the unit, to the number of beaten up civilians, the brutality and persistence in the commission of the criminal offense, and to the physical and mental pain that civilians suffered during their imprisonment and beating.

89. Contrary to the allegations of the Appeal, the Appellate Panel is satisfied that the Trial Panel, when meting out the sentence, correctly evaluated all the circumstances and the consequences thereof referred to in the Prosecution's Appeal which are relevant to the participation and role of the Accused (which show how the criminal offense was committed and who were its victims). The Trial Panel also correctly correlated those with other circumstances, like the gravity of the criminal offense and the degree of criminal responsibility.

90. On the other hand, in addition to these circumstances, the Trial Panel had to take into account the mitigating circumstances found on the part of the Accused Milun Kornjača: his no prior convictions, proper conduct during the first instance proceeding and in particular his seriously deteriorated health. In the opinion of the Trial Panel, those circumstances in their totality amounted to particularly mitigating circumstances. The Appellate Panel is satisfied that the Trial Panel was justified in finding that a milder sanction, below the statutory minimum, could also achieve the purpose of punishment, as in accordance with Articles 49 and 50 of the CC of BiH. Contrary to the Prosecution's allegations, this Panel agrees with the Trial Panel that the imposed prison sentence of 5 (five) years is commensurate with the gravity of the criminal offense, all the circumstances of the case, and the personality of the perpetrator, so that it achieves the purpose of both general and special deterrence. Therefore, the Appellate Panel dismisses as unfounded

the Prosecution's objections to the imposed criminal sanction that are raised in the Appeal.

91. Based on the foregoing, and pursuant to Articles 310, 313 and 315 of the CPC of BiH, the Appellate Panel dismisses as entirely unfounded the Appeal filed by the Defense for the Accused Milun Kornjača, and partially upholds the Prosecution's Appeal. As a result, the first instance Verdict is revoked with regard to Sections 1n. and 1l. of the acquitting part of the Verdict and a trial is ordered before the Appellate Division Panel of the Court of BiH. With regard to Section 1g. of the acquitting part of the Verdict and the decision on the sentence, the Appellate Panel dismisses as unfounded the Prosecution's Appeal and upholds the first instance Verdict in that part. The Appellate Panel notes that none of the Appeals disputed the part of the first instance Verdict in which the charges were dismissed, nor did they dispute the decision on crediting the time spent in detention towards the imposed sentence, the decision on the costs and potential property claims of the aggrieved parties, so that the first instance Verdict remained unchanged in that part.

92. In a reopened proceeding, pursuant to Article 317 of the CPC of BiH, the stated deficiencies will be remedied, and, where necessary, the already presented evidence relevant to the incompletely established account of facts under Sections 1 l. and 1n. of the acquitting part of the first instance Verdict (Counts 1l. i 1n. of the Indictment) will be presented anew, and, if necessary, new evidence relevant to those circumstances will be presented.

**Record-taker:
Legal Advisor**

Denis Podžić

PRESIDING JUDGE

Senadin Begtašević

LEGAL REMEDY: No appeal lies from this Verdict.