

Bosna i Hercegovina

Босна и Херцеговина



Court Bosne i Hercegovine
Суд Босне и Херцеговине

Docket No. S1 1 K 013929 15 Krž 7

Delivered on: 27 October 2015

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Before the Appellate Panel composed of:

Judge Mirza Jusufović, Presiding

Judge Hilmo Vučinić, Panel member

Judge Dr. Miloš Babić, Panel member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the accused J. T.

SECOND-INSTANCE JUDGMENT

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

Defense Counsel for the Accused: Attorney Rifat Konjić from Tuzla

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Appellate Division of Section I for War Crimes, sitting in a panel composed of Judge Mirza Jusufović as the judge presiding, and judges Hilmo Vučinić and Dr. Miloš Babić as the Panel members, with the participation of legal advisor Dženana Deljković Blagojević, as the minutes-taker, in the criminal case versus the accused J.T., concerning the criminal offense of War Crimes against Civilians under Article 142(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia (the CC SFRY), which was adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, in conjunction with Article 22 of the same Code, deciding on the appeal filed by the BiH Prosecutor's Office and Defense Counsel for the accused, attorney Rifat Konjić, from the Judgment delivered by the Court of BiH No. S 1 1 K 013929 13 Kri of 20 March 2015, following a public session of the Appellate Panel held in accordance with Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH) in the presence of the Prosecutor representing the BiH Prosecutor's Office, Milorad Barašin, the accused and his defense counsel, on 27 October 2015 delivered the judgment as follows.

J U D G M E N T

The appeal filed by the BiH Prosecutor's Office, as well as the appeal filed by defense counsel for the accused J. T., attorney Rifat Konjić, are hereby **DISMISSED** as ill-founded, and the Judgment issued by the Court of BiH No. S 1 1 K 013929 13 Kri of 20 March 2015 is upheld.

R E A S O N I N G

I. PROCEDURAL HISTORY

1. Section I of the Operative Part of the Judgment issued by the Court of Bosnia and Herzegovina, No. S 1 1 K 013929 13 Kri of 20 March 2015, found the accused J. T. guilty

that by taking the actions described in Sub-Sections 1-5 of the Judgment's Operative Part he committed the criminal offense of War Crimes against Civilians under Article 142(1) of the CC SFRY, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, in conjunction with Article 22 of the same law, so the accused was sentenced to 10 (ten) years of imprisonment. The time the accused spent in pre-trial custody since 3 July 2013 was credited towards the imposed sentence. Under Section II of the Judgment, pursuant to Article 284, Subparagraph c), of the CPC BiH, the accused was acquitted of the charges that by taking the actions described in Sub-Sections 1-7 of the Judgment he committed the criminal offense of War Crimes against Civilians under Article 142(1) of the CC SFRY, adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, in conjunction with Article 22 of the same law.

2. Pursuant to Article 188(4) and Article 189(1) of the CPC BiH, the accused is relieved of the obligation to cover the costs of the criminal proceeding, while pursuant to Article 198(2) and (3) of the CPC BiH the injured parties were instructed that they may pursue their claims under property law in a civil action.

II. APPEAL

3. The Prosecutor filed an appeal from the acquitting part of the Trial Judgment (Acquittal), on the grounds of essential violations of criminal procedure provisions under Article 297(1)k) of the CPC BiH, the incorrectly and incompletely established facts under Article 299(1) of the CPC BiH, and the decision on criminal sanction under Article 300(1) of the CPC BiH.

4. The Prosecutor moves that the Appellate Panel uphold the appeal as well-founded, revoke the challenged judgment in its acquitting part and order a trial at which to re-adduce the evidence due to which facts were established incorrectly and incompletely, after which the accused should be found guilty of all acts of perpetration of the criminal offense the indictment charges him with and receive a sentence of long-term imprisonment.

5. Defense Counsel for the accused J.T., attorney Rifat Konjić, has filed an appeal from the convicting part of the Trial Judgment on the grounds of essential violations of

criminal procedure provisions under Article 297 of the CC BiH, the incorrectly and incompletely established facts under Article 299 of the CC BiH and decision on criminal sanction under Article 300 of the CC BiH.

6. Defense Counsel moves the Appellate Panel to revoke the judgment in the challenged part and order a trial before the Appellate Panel, which will result in a complete acquittal in relation to the accused J.T., or to modify the judgment with regard to sentencing, which would result in imposing a more lenient sentence on the accused.

III. RESPONSES TO THE APPEAL

7. Defense Counsel filed a response to the Prosecutor's appeal, arguing that the appeal is ill-founded and moving that it be dismissed as such.

8. The Appellate Panel held a public session on 27 October 2015, at which the BiH Prosecutor's Office, as well as defense counsel, stood by their arguments presented in their respective written appeals.

IV. GENERAL CONSIDERATIONS

9. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant is supposed to include in his appeal both the grounds for contesting the verdict and the reasoning behind the appeal.

10. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the verdict. In that respect, the appellant must specify the grounds on the basis of which he contests the verdict, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

11. Mere arbitrary indication of the appellate grounds, and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers, is not a valid ground for reviewing the trial judgment, wherefore the Appellate Panel will *prima facie* dismiss as ill-founded the unreasoned and unclear appellate complaints.

V. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE

12. Essential violations of criminal procedure, as grounds of appeal, are defined in Article 297 of the CPC BiH, and are as such listed in Subparagraphs a) through k), Paragraph 1, of this Article.

13. Considering the gravity and significance of the procedural violations, the CPC BiH distinguishes between the violations which, if found to be in existence, create an irrefutable assumption that they have negatively affected the validity of the imposed judgment (absolutely essential violations) and violations in relation to which the Court has discretion, in each concrete case, to evaluate whether the violation found affected or could have negatively affected the validity of the judgment (relatively essential violations).

14. Unlike absolutely essential violations, relatively essential violations are not specified in the law, but rather exist in situations where the court, during the main trial or in the rendering of the judgment, did not apply or improperly applied a provision of the criminal procedure code, but only if this affected or could have affected the rendering of a lawful and proper judgment (Article 297(2) of the CPC BiH).

15. If the Appellate Panel has found any essential violations of the criminal procedure provisions, it shall revoke the first instance judgment, pursuant to Article 315(1)(a) of the CPC, except in cases provided for in Article 314(1) of the CPC BiH.

A. GROUND OF APPEAL UNDER ARTICLE 297(1)K) OF THE CPC BiH

1. Prosecutor's Appeal

16. The Prosecution argues that the Operative Part of the Judgment, in relation to the alleged essential violations of criminal procedure provisions under Article 297(1)k) of the CPC BiH, contains parts that are in contravention of the reasons of the judgment, and that it does not provide any reasons on decisive facts, from which it ensues that in reasoning the Judgment the Court did not specify or provide complete facts which it took as proven or unproven, while not providing a specific evaluation of the credibility of contradictory evidence. In its appeal, the Prosecution merely outlines its theory that the Trial Judgment

contains an essential violation of criminal procedure provisions, without specifying or providing any arguments to that effect.

17. An analysis of the Prosecutor's objections raised on appeal shows that they are based fully on challenging the validity and completeness of established facts. The Prosecution's appeal did not indicate in a reasonable fashion that the Judgment may contain some of the essential violations defined in Article 297 of the CPC BiH, so the examination of further objections raised on appeal will be limited only to the analysis of those objections that pertain to whether the facts were properly established.

2. Appeal filed by defense counsel

18. In his appeal, defense counsel argues that the convicting part of the Judgment does not contain reasons on decisive facts, which constitutes an essential violation of criminal procedure provisions under Article 297(1)k) of the CPC BiH. However, in this case too, the Defense evidently argues that the facts were not established in a proper manner, specifically under certain counts of the indictment, by challenging the testimony of the witnesses heard, albeit without providing reasons as to what the alleged essential violation of criminal procedure under Article 297(1)k) of the CPC BiH actually consists of. The Panel will therefore review the Judgment in the context of the objections that the facts were not established in a proper manner, the reasons for which will be given in the text below.

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

A. STANDARDS OF REVIEW

19. In the context of this ground of appeal, the Appellate Panel notes that a judgment may be contested because the state of the facts has been incorrectly or incompletely established, when the Court has erroneously established some decisive fact or has failed to establish it, or when new facts or new evidence so indicate, all in line with Article 299 of the CPC BiH.

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

21. 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. 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".

1. Appeal by defense counsel for the accused J.T.

(a) Section 1 of Conviction

22. Section 1 of Conviction has found that during the period of May-July 1992, the accused, together with other HVO members, accorded inhuman treatment to Serb prisoners at the detention facility set up on the premises of the elementary school in Odžak, where Serb civilians were detained unlawfully, in the manner described in more detail under this Section of the Operative Part of the Judgment.

23. The Trial Panel has found that the accused J.T. has participated in the incriminating activities in the described manner based on the testimony of witnesses AB 1, AB 2, M.N., J.M., D.N.1., D.N.2., N.T., B.K., R.M., M.B. and others (a total of 24 witnesses heard), who were themselves detained at the facility, and who were eye-witnesses to the incident.

24. The Defense contested the Trial Panel's finding that the accused was guilty of the mentioned actions, because the witnesses-victims whom, among others, the accused took out of the facility and beat up, based on which the Trial Panel made the finding on the accused's participation, especially witnesses N.T., B.L. and M.P., were not at all placed in a gym, but were detained on the *Strolit* premises. Consequently, the alleged actions which were established to have been committed by the accused could not have been committed by the accused, for those persons (from *Strolit*) did not have any contact with the persons in the gym at all.

25. However, the Panel finds this objection of the Defense to be ill-founded, since all these three witnesses have said that the accused either beat them directly, or they have seen the accused take part in the beating. Witness N.T. said he was taken to a classroom where he saw the accused, J.B. and several other HVO members, which is when the accused hit him with a baton. The witness confirmed what was characteristic of the accused, which is that he often used to kick the victims in the chest, and punch them in the ears. Witness M.P. also confirmed that the accused used to kick him himself, as well as other persons, and that all of that was taking place at the elementary school in Odžak. Witness B.L. was not beaten by the accused, but said that the accused J.T. used to call out prisoners' names telling them to step out of the gym, after which screams would be heard. All these three witnesses, in conformity with other witness statements, described the accused's participation in the beatings, so the Trial Panel was right when, *inter alia*, it based its Judgment on their testimony.

26. Also, the Defense bases its claim that the three witnesses were not in the gym on the List of Detained Persons (Exhibit T.26), which does not show their names. In that regard, the Appellate Panel notes that the name of N.T. is indicated under No. 413. of the typewritten list, and under No. 412. of the handwritten list. By reviewing the entire list of detained persons, one may infer that the list is not dated, and it was not indicated when a particular person was brought to or taken from the school. That is why the list could only be admitted as evidence if the persons listed therein were detained in the school over a certain period of time, whereas the fact that a name was not indicated on the list does not preclude the possibility that he was detained there. Also, it can be concluded from the witness hearing transcripts for witness B.L. (Defense Exhibit O.6) and witness M.P. (Defense Exhibit O.15) that upon their capture the two witnesses were first detained on the *Strolit* premises, and were thereafter transferred to the gym of the elementary school in Odžak. Witness B.L. confirms he was detained in the school for some 7 days. Witness M.P. also confirms he was detained at *Strolit*, after which he was transferred to the elementary school, where he spent a few days. After their incarceration at the school, both witnesses were transferred to Novi Grad. Therefore, defense's theory that these witnesses were not held at the elementary school in Odžak and could not see the events that took place there, in which the accused participated, is ill-founded.

27. The Defense also objected to the fact that many of the witnesses heard had not at all mentioned the accused J.T. in their previous statements. This particularly pertains to witnesses G.P., S.G., B.S., M.B., P.K., B.K.1. who had given statements before they were

heard as witnesses at the main trial, when they did not at all mention the accused as the person who participated in their beating.

28. This objection, however, is ill-founded. This Panel finds that the Trial Panel was also mindful of the fact that some of the witnesses had given previous statements, in which the accused J.T. was not mentioned, but according to this Panel the Trial Panel provided a proper reasoning as to why it found that the discrepancies between the statements are justifiable and cannot be interpreted as ruling out the accused's guilt. The Trial Panel had that in mind while examining this count of the indictment, and ultimately found that numerous justifiable circumstances have affected various departures in the statements of particular witnesses, which is completely acceptable in this case.

29. The Trial Panel considered the method of witness examination in previous investigations, aware of the fact that many of the witnesses were never really questioned on specific circumstances and specific suspects. Also, it is quite acceptable that due to the ordeal the victims went through while they were incarcerated in various detention facilities in Odžak and Bos. Brod, they experienced numerous traumatic events, so if we take into account the various age of the witnesses, and their ability to remember different details, plus the lapse of time after the events at issue, it is quite clear that all witnesses could not have possibly remembered all the details. On the other hand, all witnesses who testified at the trial were consistent and positive in providing evidence based on which one could conclude unambiguously and beyond any reasonable doubt that it was none other than the accused J.T. who participated in the events he has been charged with under this Count of the Indictment, so they left no doubt whatsoever regarding his participation.

30. Also, during the trial the accused himself has said that on two occasions he beat up the prisoners on the premises of the school in Odžak, while the characteristic method of beating the victims he said he had applied is consistent with the descriptions provided by the examined witnesses, as listed in more detail on page 43 of the challenged judgment (Paragraph 112).

31. Regarding this section, the Defense argued that the Trial Court considered the evidence given by certain witnesses only partially, in terms that the court had found that certain parts of a witness statement were reliable, whereas it did not accept other parts or some other descriptions. However, this Panel is mindful of the fact that the Trial Court considered the decision on the accused's participation in the incriminated actions in the mutual context of all testimonies provided, and wherever it found that a particular

testimony was not corroborated by the testimony of other witnesses, it did not accept that particular testimony as proven, which is a standard of proof this Panel finds to be proper.

32. The Panel concludes that the Trial Judgment contains exhaustive descriptions and arguments as to why it found proven the accused's actions under Section 1 of the Operative Part of the Judgment, which is the reasoning the Defense's appeal never really brought into question.

(b) Section 2 of Conviction

33. Section 2 of Conviction found the accused guilty that at the relevant time, together with other HVO members, he participated in the beating of victim R.T. who was detained in the gym of the elementary school in Odžak, due to which the victim died. The Defense objected to such a conclusion made by the Trial Court, since on that day the accused was not on duty at the relevant facility, arguing that the Trial Court failed to properly establish the facts based on which it follows that the accused is liable under these charges. In its appeal, the Defense argues that the Trial Court did not credit the defense witnesses who denied the accused's participation in the beating of the victim, and also challenged the admission of testimony of those witnesses who at the trial added the accused's name in relation to the previous statements in which they had not mentioned him.

34. The Trial Court based its conclusion on the accused's participation in the mentioned actions on the testimony provided by numerous eye-witnesses, witness J.D., AB 1, AB 2 and others, who all confirmed that the accused did take part in the beating of victim R.T., due to which the victim, thus beaten up, was tied to a post, after which he died.

35. The Defense noted that the Trial Court did not properly consider the testimony of defense witness S.M., who described the manner in which the accused had beaten up the victim, explaining that the blows were not aimed at hurting anyone, but to create an impression with other guards that he too was taking part in the beating. The Defense also claims that the Trial Court has noticed discrepancies in the statements of particular witnesses, and that in such a context one should place more trust in the witness statements given 10 or 15 years ago in relation to the more recent ones in which they mentioned the accused.

36. Analyzing the reasoning provided by the Trial Court, as well as the testimony of the witnesses who testified on the circumstances relevant to this section of the operative part

of the judgment, it follows beyond a doubt that F.H. and A.G., but also other persons, participated in the beating of victim R.T.. The Trial Court particularly analyzed the accused's presence at the school and his participation in the event from the aspect of the witnesses who said multiple persons had participated in the beating of the victim, including the accused J.T.. In their trial testimony, six witnesses mentioned the fact that the accused kicked the victim (J.N., P.R., S.G., N.T., D.N.2., AB 1). Witness B.K.2. is certain that the accused participated in the beating of the victim, as he said in 2013, and repeated at the trial. This witness too, as well as witness V.D., said it was none other than the accused who gave the handcuffs to another guard so they could tie the victim to a volleyball post where he died. Apart from these statements, it follows from the statement of witness D.N.1. that it was rumored among the inmates that the accused J.T. also participated in the beating of the victim, while witness R.M. said he had heard J.T.'s and A.G.'s voices at the moment when F.H. was seeking handcuffs to tie the victim.

37. Based on the aforementioned, this Panel concludes that the Trial Court properly established decisive facts under this Count, for which it provided detailed and acceptable arguments. Defense's objection that the Trial Panel should have considered previous statements of particular witnesses when they did not mention the accused at all could not be sustained, because the Trial Court in that respect too provided acceptable reasons on pp. 51-53, with which this Panel concurs, so they will not be repeated here. The noticed discrepancies mostly concern the number of persons who participated in the beating, the manner of beating or just how the accused beat the victim, the circumstances under which the victim was beaten up etc., but none of those witnesses ruled out the accused's participation, which is why this Panel too concludes that such details are marginal in relation to the reliable and solid statements confirming that the accused indeed was one of the participants in the beating, which resulted in the death of victim R.T..

38. The fact that some of the witnesses denied the accused's participation in the event also cannot be accepted as credible, since all the evidence the Defense pointed to was not that reliable or precise at all so as to completely rule out the accused's presence and participation in the event, or bring into doubt the fact of his presence. The Trial Court has explained that in great detail, *inter alia* stating the reasons of friendship certain witnesses (p. 47) had with the accused or the privileges he provided them.

39. The statements of these witnesses who deny the participation of the accused are even in contravention of the statements of one of the defense witnesses – S.M.1., who

said the accused participated in beating the victim, although, as the witness explained, it was described as hitting without any intention to cause victim any pain, but to create such an impression with the other guards. However, such an argument is unacceptable since the victim eventually died of the beating, and as already stated, other witnesses were convincing in saying that the accused was definitely one of the persons whose blows caused victim's death.

40. Therefore, the reasons raised on appeal did not bring into question the conclusion presented in the challenged judgment regarding the accused's participation in this event, which is the conclusion this Panel finds to be correct.

(c) Section 3 of Conviction

41. In Section 3 of Conviction, the Trial Court found that during the month of August 1992, together with other HVO members, the accused participated in the physical mistreatment of victim M.P.1. at the detention facility of the *Fric Pavlik* high school in Bosanski Brod, who was beaten up after the accused learned that the victim had left a note to representatives of the International Red Cross that there were numerous captured Serb civilians in the building. Due to the beating the victim was subjected to, he died of the injuries suffered.

42. The Trial Court has found that the accused's participation was proven in the foregoing manner, based on the statements of witnesses G.P., M.A., J.N., M.P., M.G., J.I., S.G.2. and others, many of whom saw for themselves when A.G. and J.T. took the victim to the hallway, and when it was none other than the accused who called the victim to step out, and when the accused J.T. and A.G. started hitting him.

43. With regard to this Count, the Defense objected that the Trial Court has failed to use the adduced evidence to correctly establish the fact that the accused J.T. participated in the beating of victim M.P.1., challenging the accounts of witness S.G.2. who in his previous statements given in 1995 and 2013 did not mention that the accused had hit the victim in the gym, but said that he had done so only when he testified at the main trial.

44. However, an analysis of the reasons the Trial Panel provided shows that the Court had indeed examined those discrepancies, but decided that the witness had offered acceptable explanation for them, for he said he had never really been asked about the specific circumstances concerning the accused's participation, which ensues from the

mentioned statements, which is why this Panel found this objection raised by the Defense to be ill-founded, and the judgment's reasoning well-founded.

45. Regarding the evidence given by witness G.P., the Defense argues that the Trial Court stated in the challenged judgment that the witness had seen J.T. and A.G. taking the victim M.P.1. from the gym into the hallway, from where they could hear moaning and screams, and that the judgment also stated that the witness had heard from other inmates that J.T. had participated in the beating of the victim, so according to the Defense these two statements are mutually exclusive. The Panel disagrees that those two statements rule each other out, but, on the contrary, they supplement each other and point that the witness is consistent in his testimony, since he described the events exactly in the way he had seen them: the accused took the victim out of the gym, after which he personally heard screams, after which he heard from others that the accused had participated in the beating, whereby the witness made it clear he had not personally seen the accused beating the victim. Consequently, the Trial Panel's assessment of this testimony was correct, and this Panel concurs with its explanation.

46. Also, the Defense challenges M.G.'s testimony, in which he said he had heard that the accused had participated in the beating of victim M.P.1. However, this claim presented on appeal is not correct. Reviewing the statement of this witness, this Panel concluded that the witness clearly and decidedly described the manner in which the accused participated in the beating of professor M.P.1., saying he had seen him kicking the victim in the hallway, which he subsequently confirmed during cross-examination.

47. The appeal objected to the testimony of witness J.I. in which he stated he had seen the accused and A.G. and F.H. killing M.P.1., as opposed to his previous statements from 2008 in which he said he only had information that the accused had participated in the beating of the victim. However, in his 2013 statement the witness provided more details about the event, describing the manner in which the beating of the victim had taken place, which makes correct the Trial Court's explanation of its admitting the testimony. Ultimately, the Defense challenged the testimony of witness M.A., who said that A.G., J.T. and others had formed two parallel rows within which they beat the victim, which none of the other witnesses had seen.

48. However, on p. 62 of the challenged judgment the Trial Court analyzed in detail the discrepancies between statements of particular witnesses, pertaining to individual circumstances and different special observations of witnesses, so this Panel too concurs

that the inconsistencies in witness statements, as reflected in the lack of precision regarding certain circumstances, such as the number and names of the persons detained, the participation of guards in the beating of inmates, the location of the beating etc., cannot be considered as inconsistencies in crucial observations, such as the participation of specific persons in a particular event, if there is other reliable evidence for that, as in the case of beating the victim M.P.1..

49. With reference to this Count, witnesses other than those whose testimony was challenged testified as well, such as E.P., victim's wife, M.P., D.P. and other witnesses, whose testimony the trial judgment properly cited and from which it beyond a doubt follows that the accused, together with other HVO members, participated in the beating of M.P.1., due to which the victim died. Therefore, the foregoing objections raised on appeal did not bring into question the established state of facts as presented in the challenged judgment regarding this section of Conviction, so the relevant objections raised on appeal are hereby refused as ill-founded.

(d) Section 4 of Conviction

50. Under this section of the judgment, the accused was guilty that in July 1992 he participated in taking some of the detained women from the detention facility in Bosanski Brod to a private apartment, which is when he forced B.T. to sexual intercourse.

51. The Trial Court based its conclusion about the accused's participation on the victim's statement that was read out before the court, since she had meanwhile died, as well as the statements of witnesses N.T., S.Č., S.G.2., V.M., M.A. and M.P., defense witness S.M.1., and the accused J.T. himself.

52. The Defense challenges the finding that the accused participated in the abductions, especially because the Trial Court based its judgment on the victim's statement that was read out before the court, and on the statement of witness M.P.. In its appeal, the Defense stated the victim had a relationship with the accused, denying she was ever forced to have sexual intercourse with him. The Defense argues that, after everything that happened, it was difficult or impossible for the victim to justify their relationship to her family in any other way.

53. Having analyzed the evidence on which the Trial Court based the challenged Judgment under this Section, the Panel finds that besides the evidence speaking for the

theory that the accused forced the victim to sexual intercourse, other evidence has been adduced as well concerning the circumstances of temporal and factual context in which the incriminating act took place. The Trial Court thus adduced evidence by hearing the witnesses who had been detained in the construction warehouse facilities, from which it follows that women were separated from men in the administrative building of the warehouse, from which they were able to hear cries for help on a daily basis and see that the women could “barely walk” after exiting the building.

54. The Panel concludes that the Trial Court, based on the testimony of the witnesses heard, in particular witnesses S.Č., N.T. and M.A., was able to determine the entire context in which the acts of rape of detained women beyond a doubt took place at the facilities in question. It also concluded based on the testimony of those witnesses that the facilities were guarded by members of the military police from Odžak, which the accused belonged to.

55. Specifically regarding the participation of the accused in the incriminating act against the victim, the Trial Court has adduced evidence by reading out the deposition given by the victim since she had died in the meantime following her deposition. Also, witness M.P. said that two or three months after she got out of the detention facility the victim had told him that the accused J.T. had forced her to sexual intercourse, threatening he would force her to sexual intercourse with “the entire regiment” unless she consented. Such a testimony of the witness is fully consistent with the statement the witness gave regarding the coercion the accused performed against her too, when he threatened to bring “10 guardsmen” unless she consented to sexual intercourse with him.

56. The accused’s testifying for the needs of his own defense is unacceptable, bearing in mind that his testimony is apparently inconsistent with regard to other circumstances related to this Count, which the Trial Court was mindful of when it considered the accused’s statement in relation to other adduced evidence. This inconsistency is particularly reflected in the assertion that in early May or June 1992 the victim asked the accused to help her put her father into hospital, but the evidence clearly shows that victim N.T.1.’s father was admitted to the Health Center on 11 May 1992, which covers the period of time when the accused claims he was not in the Odžak school at all. Also, the Panel was mindful of the inconsistencies in the accused’s statement in the part concerning the victim’s stay in the settlement of Tulek in Bos. Brod, which the victim explained was caused by her being brought to the Tulek prison, after which she was transferred to a

construction warehouse facility, which stands in contravention of the accused's statement that he had brought the victim to a private apartment in the Tulek settlement for her own safety. That the victim indeed stayed at the warehouse as she said in her statement was confirmed by witnesses N.T. and M.P. who had seen her there.

57. The Panel finds the defense's objections raised on appeal to be completely ill-founded with regard to this section of the judgment, and that the accused's statement the Defense refers to does not bring into question the testimony of the Prosecution witnesses or that of the victim herself, and ultimately the facts established with regard to this Section.

(e) Section 5 of Conviction

58. Under Section 5 of the Conviction the accused was found guilty that during the period of July-November 1992 he participated in taking inmates from the detention facilities in Bos. Brod to forced labor – digging trenches on the frontline, where some of the inmates were wounded and killed.

59. The Defense raised an objection regarding this Count, arguing that the facts were established incorrectly and incompletely, first because the Court failed to find that the accused did not have any powers in relation to the military visiting the detention facilities in Bos. Brod, and when the military asked for detainees to be assigned to them no one could really say no.

60. In his testimony, the accused claimed he came into conflict with his superior officer A.G. regarding the taking of detainees to the frontline, but ultimately could not protect them. The Defense cites the statement of witness D.P.1. who confirmed there had been a conflict between the accused, A.G. and J.B. with members of the military police from Bos. Brod on account of their taking away the detainees, and the statements of witnesses M.G. and S.G.3. who said it was the Croat army members that were taking them away to dig trenches (M.G.) and that they went to dig trenches only at the specific orders issued by A.G. (S.G.3.).

61. However, having analyzed the judgment and the Trial Court's findings, the Panel concludes that the state of facts regarding this Section is completely clear and well-established, the Trial Court has provided acceptable and detailed conclusions, which leaves no room for any doubt that the accused participated in the actions described in this Section of Conviction. A large number of Prosecution and Defense witnesses (14 of them),

convincingly described the accused's participation in taking the prisoners to perform forced labor, which consisted of digging trenches on the frontline. Some of those witnesses have confirmed that the accused had picked them personally to go digging trenches,¹ while some of them still remember the comments the accused would make whenever the prisoners were taken to dig trenches.²

62. Witness M.G.'s testimony of 4 April 2007 (Defense Exhibit O-8), which the Defense cites, is neither credible nor convincing enough to serve as a basis for bringing into question the undisputable conclusion regarding the accused's participation in the *actus reus* pertaining to this Section of the Judgment. Contrary to his investigative statement, at the main trial the witness clearly and unambiguously stated that the accused and A.G. called out and decided who would go to dig trenches. Regarding the objections raised on appeal, pertaining to the investigative statements given by witnesses D.P.1. and S.G.3., the Panel notes those statements have not been admitted into evidence. However, even if one brings into connection the objections raised on appeal and the entire body of adduced evidence pertaining to this Section of the Judgment, it is easy to conclude that the said objections do not bring into question Trial Court's conclusion regarding the accused's guilt.

2. Prosecutor's Appeal

(a) Section 1 of Acquittal

63. This Section of Acquittal found the accused not guilty of the charges that in May 1992, together with other HVO members, he picked victim P.M. from a group of detainees at the detention facility located on the premises of the elementary school in Odžak, and took him to an unknown direction, and P.M. has been reported missing ever since.

64. Regarding Section 1 of the Acquittal, the Prosecution challenges Trial Court's conclusion that it was not proven that the accused participated in the actions described in this part of the judgment, and that, in that sense, the Court drew an erroneous conclusion from the adduced evidence regarding the accused's involvement in the abduction of victim P.M., for although the witnesses the Court cites did not state that the accused J.T. participated in the abduction, all witnesses could not have seen who of the remaining

¹ Witnesses: D. N.2. ., B. K., R. M., S. G.2., J.I., S. B., J. N., M. P. and M. S..

soldiers was with Z.M., who allegedly took the victim from the facility, bearing in mind that the accused was a guard at that very detention facility.

65. The Panel finds this objection by the Prosecution to be ill-founded since it is not followed by a detailed elaboration as to what the incorrect state facts consists of, except stating that the accused participated in the commission of this incriminating action merely because he was a guard at the given detention facility. Analyzing the argument provided by the Trial Court, one concludes that the Trial Court approached the analysis of these statements in the same manner as the analysis of the statements of witnesses based on which it had found that the accused is responsible for the actions described in Conviction. All the witnesses, testifying for either Prosecution or Defense, concur that one Z.M. had taken the victim from the detention facility, and that none of them has ever mentioned the accused as one of the participants. Since their statements are detailed and convincing, the Panel is of the opinion that it was not proven beyond a reasonable doubt that the accused participated in the described actions.

66. The evidence adduced by the Prosecution (statements of witnesses M.N., J.I., V.D., S.B., M.A. and P.R.), which the appeal argues were not duly considered, is insufficient to uphold the Prosecutor's theory that the accused was at all present during the incriminating actions of taking the victim from the detention facility, nor was any of the witnesses able to confirm that the accused was even present at the detention facility that day, all of which indeed suggests that the Trial Court's conclusion regarding this Section of the Acquittal was right on.

(b) Section 2 of Acquittal

67. This Section of the Operative Part of the Judgment acquitted the accused of the charges that on a yet unknown day in May 1992, on the premises of the elementary school in Odžak, together with HVO members, he participated in taking prisoner S.D. from the gym, after which he was, beaten with visible injuries, taken to the Strolit detention facility, where the victim died of those wounds.

² Witness D. N.1. : „let the chetniks kill you all because you are digging trenches“. Witness B. K.3. : „better that your people kill you than for me to do it myself.“

68. Based on Prosecution's evidence adduced under this Count of Indictment, the Trial Court did not find that it was proven beyond a reasonable doubt that the accused J.T. participated in the incriminating actions. In its appeal, the Prosecution argues that the Trial Court did not determine decisive facts, so the state of facts basically remained incompletely established under this Count of Indictment. The Prosecution referred to the statements of P.R., whose deposition was read out, and of witness D.N., both of which suggest that the accused J.T. took part in the incriminating action. Also, the witnesses who did not confirm the accused's participation did not rule it out; one of the witnesses said that other detainees were asleep so they could not see which one of the soldiers took the victim out of the room.

69. An analysis of the arguments provided by the Trial Panel shows that the Trial Court was mindful of the fact that only one witness has confirmed the accused's participation by claiming he had seen him himself, which was the witness P.R., whose deposition was read out at the trial hearing. The other witness the Prosecution cites is witness D.N., who told the Trial Panel that he had but heard that the accused J.T. had participated in taking the victim S.D. out of the room. Also, the Trial Court properly took into account a certain inconsistency regarding witness P.R.'s statement, which is that the witness described the accused's participation and the circumstances under which the incident occurred in a rather different manner, and that no other witnesses actually corroborated his allegations, when it comes to the circumstances under which the event occurred. Also, the Panel finds that this witness' deposition was read out at the trial, and that the accused did not have the possibility to cross examine the witness about the inconsistencies, which practically prevented his statements from being scrutinized for inconsistencies, which would in any case render the statement credible and reliable.

70. The Panel has taken note of the already accepted positions adopted by the European Court of Human Rights (ECtHR) regarding the application of Article 6 of the European Convention. The ECtHR took a clear position that there is a violation of the right to a fair trial if there was no adequate and proper opportunity for the accused to question a witness, whereas the conviction is based solely or in most part on his statement³. This means that granting the Prosecutor's appeal would mean that the trial judgment would be

³ Judgment of 20 November 1989. Kostovski, A.166, p. 21; Judgment of 20 September 1993. Saidi, A.261-c, p. 57.

based exclusively on a witness deposition that was read before the court, which would be in violation of Article 6 of the European Convention.

71. Taking into account the testimony of witness D.N., who said he had not seen the accused taking away the victim, but that he had only heard so, and the statement of witness P.R., who described the event in a manner no other witness could confirm, one could not conclude beyond a reasonable doubt that the accused J.T. participated in the incriminating actions of abducting the victim SD, so the Prosecutor's objection did not bring into question this Trial Panel's conclusion, which means that the objection raised on appeal in this part cannot be granted as well-founded.

(c) Section 3 of Acquittal

72. Section 3 of the Acquittal acquitted the accused of the charges that on or about 4 July 1992, together with F.H. and several other HVO members, he took detainee R.D. from the gym of the of the elementary school in Odžak into the hallway, after which they beat him up using metal bars and other objects, hitting him in his head and other parts of his body, and then returned him to the gym all beaten up, where he died of those injuries.

73. The Prosecution states in its appeal it was true there are certain inconsistencies in the statements of witnesses that are incriminating for the accused, arguing that those inconsistencies are reflected in specifying the manner of mistreatment, in the exact identification of the HVO members present at the scene, and in specifying the location of mistreatment (some have said it was in a gym, others in the school hallway etc.), but all of them were consistent in saying that the accused was one of the victim's abusers. The Prosecution argues that the Trial Court stated the reasons why it did not credit the witnesses who in their testimony incriminated the accused too broadly and generally. The Prosecution also pointed out the fact that there exists a final judgment against the sentenced person F.H. in which it was proven that the accused, together with F.H. and other HVO members, committed a criminal act against R.D., which the Trial Court did not address at all in its judgment.

74. The Panel finds the objection concerning this section of the judgment to be ill-founded. Analyzing the conclusions on which the Trial Court based its decision that it was not proven that the accused participated in the given incrimination, the Panel found the submitted arguments to be correct, which makes it clear why the Panel found that it was

not possible, based on the testimony of all witnesses, to make a solid and reliable conclusion on the accused's involvement in the beating of victim R.D., because the statements of those witnesses who incriminated the accused were not mutually consistent, nor individually sufficiently convincing so as to justify the opposite conclusion, which is why the Panel could not grant Prosecutor's objection claiming that the reasons were provided too generally and without any basis.

75. Contrary to the Prosecutor's objection that the inconsistencies in the statements of these witnesses are reflected in irrelevant details such as the specific manner of victim mistreatment, specific identification of all members who participated in the event, or the location where the mistreatment took place, the Panel disagrees that the discrepancies in their statements are negligible or marginal, in terms that they do not completely alter the quality of the statement and its reliability. On the contrary, they completely bring into doubt the claim presented in the indictment that they indeed were able to see the accused in the manner they described.

76. Out of the six examined witnesses who incriminated the accused, three witnesses (AB 2, M.G. and R.D.) have altered their testimony substantially in relation to the previous statements given during the investigation. The changes to the statements could in essence affect the general impression that the witnesses could not remember the event well, and that their memories regarding the accused's participation are perfunctory, without details, and obviously do not paint a real picture that they had indeed seen the accused for themselves, including all the usual details related to his conduct (the accused's comportment, speech or casual remarks, his talking to other people, his entrance into the gym etc.), which would be characteristic of average testimony of a witness who has really seen what he is testifying about. This way, it turns out that they merely associated the accused with the actions that were obviously committed by other HVO members under this Count of Indictment, without specifying why they failed to mention him in their previous statements.

77. As for the three other witnesses who incriminated the accused (D.N., S.B. and S.M.), the Panel finds acceptable the Trial Court's explanation that the evidence given by D.N., who said he had seen from a distance of 15 m - 20 m that the accused took part in the beating of the victim, is not reliable since it is quite certain that the witness failed to provide a credible explanation for that, especially if taking into account the statements of

other witnesses, none of whom said that they could at all observe the event through the prison bars, nor that the victim was beaten with metal bars.

78. Witness S.M.'s statement also could not have been accepted as reliable, in which regard the Trial Court was correct when it decided not to accept this testimony as credible, as a testimony that would constitute a basis for making a conclusion on the accused's responsibility for the actions described in Section 3 of Acquittal. This witness said that the victim had been beaten up in the gym, whereas all other witnesses said the victim R.D. had been taken out of the gym and beaten in the hallway, and was returned to the gym all beaten up. Finally, when it comes to the statement of witness S.B., the Trial Court was properly mindful of the fact that the witness did not claim he had seen the accused beating the victim, but that he only claimed he had heard the voices of the accused and A.G. swearing and cursing while the victim was being beaten. That is why one cannot, based on this statement only, make a reliable conclusion that the accused indeed committed the actions in question.

79. Also, the Panel will briefly address the objection that the Trial Court did not consider the final judgment against the sentenced person F.H., delivered by the District Court in Dobož, which stated that the accused J.T. participated in this event together with the sentenced person F.H..

80. The Panel found this objection to be ill-founded, since a judgment of another court, in which F.H. was found guilty and which mentioned the accused J.T.'s participation, cannot be used as evidence for the conviction of the accused before this court. Such a course of action would be in contravention of the rules of CPC BiH under which the Court of BiH operates, and would constitute a violation of the principle of adversary procedure, and also the accused's right to a defense in the context of the requirements laid down in Article 6 of the European Convention. The accused J.T. was not the subject of the proceedings before the court in Dobož, which has delivered the judgment at issue, nor did he at all participate in the proceedings before this other court in which F.H. was the only accused person. Given the aforementioned, the Panel does not find that the judgment ..., is one of the facts on which to base a conclusion with regard to the accused's guilt.

(d) Section 4 of Acquittal

81. Under this section of the judgment the accused was acquitted of the charges concerning the physical mistreatment of victim S.C., detained in the detention facility of the elementary school in Novi Grad, where the victim ultimately died of the injuries. The reason for such Trial Court's conclusion is the fact that apart from witnesses B.K. and R.M. no other witness corroborated the accused's participation in the manner the witnesses described in their testimony.

82. The Prosecution raises the objection that the Trial Court did not sufficiently take under consideration the statements of two witnesses, B.K. and R.M., who were consistent about the fact that it was none other than the accused J.T. who took part in the mistreatment of victim S.C., who subsequently died of the wounds he suffered on that occasion. Regarding the testimony of other witnesses, who according to the Trial Court's opinion did not agree that J.T. participated in the critical event, the Prosecution argues that the confusion the other witnesses demonstrated may be attributed exclusively to the lapse of time, but also the trauma the survivors inevitably suffered by eye-witnessing the event. Also, in this part too the Trial Court did not consider the judgment ... which had found that the accused J.T., together with F.H. and other HVO members, had participated in the beating of victim S.C..

83. Analyzing the statements of all witnesses who testified about the circumstances under this Count, the Panel concluded that Trial Court's explanation and conclusion are correct in finding that it was indeed impossible to conclude with certainty from the mentioned statements that it was none other than the accused who beat the victim, or that he was present while the victim was mistreated. The Panel does not concur with the Prosecutor's assessment with regard to the testimony of those witnesses whose statements were found to be unreliable, that the discrepancies in their statements were caused by the lapse of time or the trauma they went through. The Appellate Panel noted that out of the total of seven prosecution witnesses, only two of them actually incriminated the accused, while the five remaining witnesses did not even mention the accused as a participant in those events.

84. Witnesses B.K. and R.M. confirmed the accused's participation in the event. Both these witnesses were also examined during the investigation (witness B.K. twice, witness

R.M. once) and said nothing about the victim's mistreatment. Conversely, at the main trial they incriminated the accused. However, the evidence given by these two witnesses contains mutual differences that were analyzed in detail by the Trial Panel (Paragraph 293 of the trial judgment). Their testimony stands in complete contradiction with the testimony of other witnesses, who were also direct participants in the event.

85. Witnesses J.I. and D.N. were eye-witnesses when A.G. entered the room where the victim was, and killed him with a bayonet, about which they gave consistent evidence, whereas witness J.M. said that the victim was gored with bayonet by certain M.L.. Therefore, it is evident that different witnesses have given different evidence about the murder, regarding the manner in which he was killed as well as regarding the identity of the person who killed the victim. Therefore, bearing in mind the inconsistencies and certain contradictory aspects of the evidence given by witnesses B.K. and R.M., especially when their testimony is compared to other completely opposite testimonies, the Trial Court made a correct conclusion that it was not possible to conclude beyond a reasonable doubt that the accused participated in the commission of the offense under this Count of Indictment.

86. Also, as already stated regarding the previous count, the fact that there has been a conviction against F.H., rendered before another court in another case, in which it was established that the accused J.T. too participated in the commission of the incriminating action, the Panel also notes that no such judgment is nor can be evidence in the proceedings against the accused in this case. That is why the objection raised on appeal, in which the prosecutor cites the foregoing judgment, in terms that the Trial Court failed to take it into consideration, cannot be accepted as well-founded for the reasons mentioned above.

(e) Section 5 of Acquittal

87. Section 5 of Acquittal acquitted the accused of the charges that at the incriminated time, on the premises of the elementary school in Odžak, together with other HVO members, he forced some of the detainees to sexual intercourse or another form of serious sexual violence with ... detainee S.S., who was also detained at the school, and that they beat up those detainees who refused.

88. The Trial Court has found it was not proven beyond a reasonable doubt that the accused indeed participated in those actions. The reason for making such a conclusion is

the fact that only one of the witnesses, witness AB-2, in his testimony at the main trial, identified the accused as the person who had forced him to the mentioned sexual actions, whereas on the other hand, no other witness had either seen or confirmed it.

89. In its appeal, the Prosecution objects that the Trial Court failed to properly establish the state of facts, and failed to give due consideration to the statement of witness AB-2, who described the accused's participation. Also, the Trial Panel failed to consider the statement of witness G.P., who said the accused was present during the sexual violence against the witness in question.

90. Having analyzed the reasons provided in the judgment and the ensuing facts regarding this Count of the Indictment, and in that context also the Prosecutor's appeal arguing that the Trial Court failed to properly establish facts regarding the accused's participation in the described actions, the Panel did not find the Prosecutor's appeal to be well-founded. All the witnesses have indeed said that the acts described in Section 5 of Acquittal had taken place in the facilities at issue⁴. The testimony of witness AB-2, who was the only one incriminating the accused, is on its own insufficiently convincing and consistent, and lacks the required quality so as to be able to serve as a basis for determining the accused's guilt.

91. It is true that witness AB-2 has said that the accused had spoken to him and forced him to participate in a sexual intercourse or another form of violence with the victim, as described above. However, the fact that the witness had not mentioned such an action of the accused in his earlier statement given in relation to these events, nor the explanation he gave for such a statement, is not sufficiently acceptable for concluding, based on this statement alone, that it was a reliable testimony, especially if there is no other evidence to support it.

92. Also, witness G.P., to whom the Prosecution refers in its appeal, told the trial that the accused had only been present there, standing by the door at the entrance to the school, when an unidentified person had taken the witness from the gym to the upper floor, and ordered him to "do" the victim S.S.. Therefore, witness G.P. did not incriminate the accused in any other way, apart from saying he had seen him at the critical moment, which, in any case, could not serve as proof that the accused had taken the action he was

charged with by the Indictment. The Appellate Panel therefore finds that the Trial Court acted properly when rendering an acquittal for the act in question.

(f) Section 6 of Acquittal

93. This Section of the Acquittal acquitted the accused of the charges that between May and October 1992, together with other HVO members, he participated in the torture and inhumane treatment of Serb civilians who were unlawfully detained at multiple locations in Odžak and Bosanski Brod, by repeatedly calling them out by last names and years of birth, after which they would take them outside and beat them with their hands, feet and police batons, parts of school furniture and other objects.

94. The Trial Court has found that based on the adduced evidence it is not possible to conclude beyond a reasonable doubt that the accused participated in the described actions. Although individual pieces of the adduced evidence indicated the accused's participation, they in any case were not convincing enough to serve as a basis for a firm and reliable conclusion on the commission of the actions charged under this count of indictment.

95. The Prosecution noted that under one Section of the Conviction the Court has already found that the accused participated in the beating of prisoners in the detention facility, and that such actions of his fit his usual pattern of behavior. Also, one should not ignore the fact that all the acts of the beating mostly took place at night, when the witnesses were not able to see everything. For those reasons, the Prosecution argues that the Trial Court has failed to determine decisive facts, due to which the state of facts has remained unresolved.

96. Based on the completed evidentiary proceeding, it could be concluded that in relation to this count of indictment there are two groups of witnesses: the first one includes witnesses who in their testimony said they had not seen nor had any information that the accused took part in the beating of prisoners.⁵ The group includes witnesses who said they had only heard from other inmates that the accused had participated in the beating of

⁴ Witnesses AB-2, AB-1, .M.A., J.D., G.P. were heard regarding this Count of Indictment, and the deposition of witness P.R. was read out.

⁵ Witnesses : J.D., M.N. and S.Ć..

prisoners, without providing any details about particular events.⁶ The other group includes those witnesses who testified about the accused's participation in the events that are the subject of indictment, whose statements have been analyzed in detail by the Trial Panel⁷.

97. As correctly concluded by the Trial Panel, the statements of these witnesses from the second group are inconsistent; they speak about the accused's participation in their testimony at trial, while they did not at all mention him in their investigative statements, even though they were personally victims of beating by the accused. Also, none of the examined witnesses has said that before the beating they were called out by last names and years of birth and then beaten up, as stated in the indictment. Witness D.N. remains unconvincing, for he is confused and tends to forget a lot of things. Witness S.G.2. confirms that the beating of his father M.G. took place at the elementary school in Odžak, not in Novi Grad, as claimed by witness-victim M.G. himself. The Appellate Panel notes that the accused's guilt for the events at the elementary school in Odžak has already been established.

98. All this speaks towards the conclusion that the accused's criminal responsibility for the acts of torture and inhumane treatment at the elementary school in Novi Grad could not have been established beyond any reasonable doubt based on such statements. Therefore, the Prosecutor's appeal referring to the usual pattern of the accused's behavior could not have brought into question Trial Court's conclusion regarding the accused's guilt concerning this particular action.

99. The situation is identical regarding the credibility of statements given by witnesses who testified about the accused's actions and conduct in the events that took place at the detention facility in Bosanski Brod, the construction material warehouse and the *Fric Pavlik* high school.

100. Therefore, if one analyzed individually each piece of evidence related to this count of the indictment, and if they are correlated to all other statements given by the witnesses who testified on these circumstances, one was indeed not able to conclude beyond a reasonable doubt that the accused participated in the described actions. The Panel concludes that the Trial Court has, based on the adduced evidence, properly established

⁶ Witnesses: M.A. and J. N.

⁷ Witnesses: M.B., D.N.1., M. P., M.G. and S.G.2..

all decisive facts, which is why it found the Prosecutor's objection regarding this section of the operative part of the judgment to be ill-founded.

(g) Section 7 of Acquittal

101. Under this section of the judgment, the accused J.T. was acquitted of the charges that during the critical period between May and October 1992 he participated in pillaging the prisoners in Odžak, appropriating their money, gold and other valuables.

102. The Trial Court has found that based on the evidence it was not possible to find beyond a reasonable doubt that the accused participated in the actions described under this section, because the examined witnesses did not credibly and reliably identify the accused as the perpetrator of the incriminating act.

103. Regarding this count of indictment, the Prosecution objected that the Trial Court has failed to establish decisive facts, for it failed to consider what witness AB-1 stated, which is that the accused participated in the pillaging of detainees, and that the witness N.T. claimed that the accused was present when the pillaging and looting of valuable were taking place. The Court also did not consider the fact that the accused was a guard at the detention facility at issue.

104. The prosecutor's objection that the Trial Court has failed to establish decisive facts regarding the specific count of indictment is ill-founded. It is true that witness AB-1 has said that the accused J.T. had personally appropriated jewelry from the prisoners, and that A.G. and A.H. were there too, but he could not remember who issued the order that the detainees be stripped off and that gold be taken from them.

105. Evidently the Trial Court was mindful of the fact that witness AB-1 was the only witness who said that the accused J.T. had taken valuables from him. Witnesses M.G. and V.D. confirmed that unidentified uniformed persons had taken money, gold and other valuables from them, and put them all into a bag. These witnesses are positive that the accused did not participate in this act, for they knew him from before the war. Also, none of the examined witnesses confirmed the statement of witness AB-1 that, following the appropriation, A.H. returned about a dozen rings to the detainees. Witness AB-1 was not able to name a single inmate from whom the accused had taken an item of value. That is why the Trial Court has arrived at a correct conclusion that there was insufficient evidence about the accused's involvement in these acts.

106. Such a conclusion has not been brought into question by the objection raised on appeal that the statement of witness N.T. was not properly considered. The witness confirms that gold was taken from the detainees, at the order of T.Đ., that there were multiple persons present there, including the accused, but the witness did not see whether the accused took money or gold from anyone. Since no other witness confirmed these allegations, this statement on its own is insufficient to be used as a basis for making a reliable conclusion that the accused took valuables from the detainees or in some other way participated in the pillaging of prisoners. Based on the aforementioned, it follows that the Prosecutor's objection, that the state of facts has been established erroneously and incompletely in relation to this count of indictment, is ill-founded.

VII. GROUNDS OF APPEAL UNDER ARTICLE 300 OF THE CPC BIH: SENTENCING

A. STANDARDS OF REVIEW

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

108. 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.

109. 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.

110. 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.

111. 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.

112. 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.

113. Regarding the criminal sanction, appeals from the judgment have been filed by both the Prosecutor and Defense Counsel for the accused.

1. Prosecutor's Appeal

114. Regarding the criminal sanction imposed on the accused by the trial judgment, the Prosecutor argues in his appeal that the sentence was not proportionate to the gravity of the offense committed, and will not, as such, satisfy the purpose of criminal sanctions in terms of Article 6 of the CC BiH. The Prosecution argues that the Trial Court did not sufficiently consider the aggravating circumstances on the part of the accused, such as the consequences the offense has produced, as well as the very manner of perpetration by the accused, his callousness towards the victim's situation, as well as the continuity and persistence in the commission of the offenses he has been convicted of.

115. Analyzing the arguments provided by the Trial Panel, the Appellate Panel found ill-founded all objections raised by the Prosecution that the 10-year sentence of imprisonment will not serve the purpose of punishment. The Panel disagrees with the Prosecutor's allegations that such a sentence of imprisonment does not reflect the proper evaluation of all circumstances of the case and the perpetrator, which is why it is not proportionate to the gravity of the crime committed.

116. Also, the Prosecution argues that the Trial Court did not consider the fact that the accused committed the offenses in question with direct intent. However, the Panel concludes that the imposed sentence of 10 years ultimately includes the finding that the offense was committed with direct intent, since it follows from the judgment that while fashioning the sentence the Trial Court took into account the accused's role and participation in the commission of the crime.

117. The Trial Court has properly considered the particularly important circumstances, such as the method of perpetration, the gravity of injury and the consequences of the offense, reflected in the death of two persons, the rape of one person, in inflicting serious mental and bodily suffering on the detained civilians, and in bringing the detainees into situations that are dangerous to their lives and health. Also, it was properly assessed that the sentence imposed on the accused would send out a clear message to all potential perpetrators of such and similar crimes, that crimes like this cannot go unpunished, which is why the Panel concludes that the sentence imposed will achieve the purpose of punishment, including general deterrence.

2. Appeal by defense counsel for the accused T.

118. In his appeal, defense counsel argues that the Court did not sufficiently consider the extenuating circumstances on the part of the accused, that more than 20 years have passed since the events in question, and that during that period the accused did not commit new criminal offenses, all of which are particularly extenuating circumstances, which is why the accused should receive a more lenient penalty below the threshold prescribed by the law.

119. In consideration of the Defense's appeal, the Panel does not find that the Defense has brought into question the correctness of the sanction imposed, and that, by putting forward reasons such as the lapse of time since the perpetration of the crime and the fact that the accused has not committed another crime ever since, it failed to provide a justifiable indication that the accused should receive a punishment below the level prescribed by law.

120. The Panel concludes that the Trial Court has properly considered the extenuating circumstances such as the accused's previous life, the fact that he did not have a criminal record, that he is a family man, that he had helped some of the detainees, and that he has

shown remorse for all the bad things he had done, which ultimately resulted in the properly fashioned punishment of 10 years of imprisonment.

121. In line with the above, finding that the reasons for which the judgment was appealed do not really exist, the Appellate Panel decided as stated in the Operative Part of the Judgment, pursuant to Article 313, as read with Article 310, of the CPC BiH.

JUDGE PRESIDING

Mirza Jusufović

Minutes-taker:

Legal Advisor

Dženana Deljković Blagojević

LEGAL REMEDY NOTE: No appeal lies from this Judgment.