SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

COURT OF BOSNIA AND HERZEGOVINA

Case No. S1 1 K 011047 15 Krž

Judgment delivered on: 30 October 2015

Before the Panel composed of:

Judge Meddžida Kreso, presiding

Judge Tihomir Lukes, reporting judge

Judge Mirko Božović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA
v.
Ibro Macić

SECOND-INSTANCE JUDGMENT

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

Counsel for the accused Ibro Macić:
Fadil Abaz

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Number: S1 1 K 011047 15 Krž
Sarajevo, 30 October 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as an Appellate Division Panel composed of Judge Meddžida Kreso, presiding, and judges Tihomir Lukes and Mirko Božović, members, with the participation of legal adviser Medina Džerahović as the record-taker, in the criminal case against the accused Ibro Macić for the criminal offense of War Crimes against Civilians in violation of Article 173 Paragraph 1 Subparagraphs (c) and (e) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 29 of the Criminal Code of Bosnia and Herzegovina, having deliberated on the respective appeals of the Prosecutor's Office of Bosnia and Herzegovina of 4 June 2015 and attorney Fadil Abaz as counsel for the accused Ibro Macić of 1 July 2015 against Judgment of the Court of Bosnia and Herzegovina S1 1 K 011047 13 Kri of 17 April 2015, having held an open session in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Sanja Jukić, the accused and his counsel Fadil Abaz, pursuant to Article 310 Paragraph 1 as read with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina, on 30 October 2015 delivered the following

J U D G M E N T

The respective appeals of the Prosecutor's Office of Bosnia and Herzegovina and counsel for the accused Ibro Macić **are dismissed as ill-founded**, and Judgment of the Court of Bosnia and Herzegovina S1 1 K 011047 13 Kri of 17 April 2015 **is upheld**.

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REASONING

I. PROCEDURAL HISTORY

A. FIRST-INSTANCE JUDGMENT

1. By Judgment of the Court of Bosnia and Herzegovina S1 1 K 011047 13 Kri of 17 April 2015, the accused Ibro Macić was found guilty that he, by the acts described in the enacting clause of the judgment, committed the criminal offense of War Crime against Civilian Population in violation of Article 142 Paragraph 1 of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY)[1] in conjunction with Article 22 thereof, and, by applying Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH) and Articles 38 and 41 of the CC SFRY, the accused was sentenced to 10 (ten) years' imprisonment. By the same judgment, pursuant to Article 188 Paragraph 4 of the CPC BiH, the accused was relieved of the duty to reimburse costs of the criminal proceedings and the scheduled amount, and the costs would be paid from within the Court's budget appropriations. Pursuant to Article 198 Paragraph 2 of the CPC BiH, the injured parties were instructed to take civil action to pursue their claims under property law.

B. APPEALS AND RESPONSES THERETO

2. The Prosecutor of the Prosecutor's Office of BiH and the defense counsel filed timely appeals against the judgment.

3. The Prosecutor's Office of BiH appealed the decision on the punishment, petitioning the Appellate Panel of Section for War Crimes of the Court of BiH to apply Article 314 of the CPC BiH and revise the First-Instance Judgment in terms of the decision on the punishment and impose a lengthier prison sentence on the accused.

4. Defense counsel filed the appeal on the grounds of error of law, violation of the criminal procedure provisions, error of fact and the decision on the punishment, petitioning the Appellate Panel to grant the appeal, revise the judgment and absolve the accused

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[1] Decree Law of 11 April 1991 on the adoption of the Criminal Code of the Socialist Federal Republic of Yugoslavia, whereby the Criminal Code of SFRY (*Official Gazette of SFRY*, 44/76, 36/77, 56/77, 34/84, 37/84, 37/84, 74/87, 57/89, 3/90, 38/90 and 45/90) was adopted as a Republic law.

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from criminal responsibility for the acts charged. Alternatively, counsel petitioned the Panel to revoke the judgment and hold a trial.

5. The Prosecutor's Office of BiH and Defense respectively submitted responses to the appeals, each petitioning that the appeal of the opposing party be dismissed as ill-founded.

6. Pursuant to Article 304 of the CPC BiH, the Panel held an open session on 30 October 2015 at which the parties and defense counsel maintained their written submissions as well as the allegations in the responses to the appeals.

7. Having reviewed the impugned judgment insofar as it was contested by the appeals, the Appellate Division Panel (Appellate Panel/Panel) ruled as stated in the enacting clause for the following reasons.

II. GENERAL CONSIDERATIONS

8. 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 appellant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal.

9. Since the Appellate Panel shall review the impugned judgment 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 judgment.

10. The appellant shall, along this line, concretize the appellate grounds for which he/she contests the judgment, specify which part of the judgment, evidence or the procedure is being contested and provide a clear line of arguments explaining the reasons for the complaints advanced.

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 appellant refers is not a valid ground for reviewing the Trial Judgment. Therefore, the Appellate

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Panel dismissed as ill-founded the unreasoned and unclear appellate complaints, in accordance with the established case law of the Appellate Panels[2].

III. COMPLAINTS ON GROUNDS OF ARTICLE 297 OF THE CPC BIH: ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

A. STANDARDS OF REVIEW

12. A judgment may, pursuant to Article 296 of the CPC BiH, be contested on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Article 297 of the CPC BiH.[3]

13. With respect to the gravity and importance of the procedure violations, there are violations which, if found to exist, create an irrefutable presumption that they have adversely affected the validity of the judgment (absolutely essential violations) and the violations where the Court has discretion to evaluate, on a case-to-case basis, whether a found procedure violation affected or could have affected the rendering of a proper judgment (relatively essential violations).

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[2] See ICTY: Appeals Chamber judgment in *Krajišnik*, par. 17: Appeals Chamber judgment in *Martić,* par. 15; Appeals Chamber judgment in *Strugar,* par. 17. Several panels of the Court of BiH followed this case law in their decisions; see *Trbić*, Second-Instance Judgment X-KRŽ-07/386 of 21 October 2010.

[3] Article 297. **Essential violations of criminal procedure provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the judgment who did not participate in the main trial or who was disqualified from trying the case by a final decision, b) if a judge who should have been disqualified participated in the main trial, c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition, was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language, d) if the right to defense was violated, e) if the public was unlawfully excluded from the main trial, f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority, g) if the Court reached a judgment and did not have subject matter jurisdiction or if the Court rejected the charges improperly due to a lack of subject matter jurisdiction, h) if, in its judgment the Court did not entirely resolve the content of the charge; i) if the judgment is based on evidence that may not be used as the basis of a judgment under the provisions of this Code, j) if the charge has been exceeded, k) if the operative part of the judgment was incomprehensible, internally contradictory or contradicted the grounds of the judgment or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code during the main trial or in rendering the judgment, and this affected or could have affected the rendering of a lawful and proper judgment.

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14. Absolutely essential violations of the CPC BiH have been specified in subparagraphs (a) through (k) of paragraph 1 of Article 297 of the CPC BiH.

15. If the Appellate Panel finds any of the substantial violations of the criminal procedure provisions, it shall, pursuant to Article 315(1)(a) of the CPC BiH, revoke the trial judgment, except in the cases provided for in Article 314(1) of the CPC BiH.[4]

16. Unlike absolute, relatively essential violations are not specified in the law, but rather exist if the Court, during the main trial or in the rendering of a judgment, did not apply or improperly applied a provision of the law, which affected or could have affected the rendering of a lawful and proper judgment.

17. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful and proper judgment, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful and proper judgment. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the appellant shows that it is if a substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful and proper judgment. That is, where the Appellate Panel is satisfied that a lawful and proper judgment was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC BiH was not violated.

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[4] Article 314. **Revision of First-Insstance Judgment:** (1) By honoring an appeal, the Panel of the Appellate Division shall render a judgment revising the judgment if the Panel deems that the decisive facts in the first-instance judgment have been correctly ascertained in the judgment of the first instance and that in view of the state of facts established, a different judgment must be rendered when the law is properly applied, according to the state of facts and in the case of violations as per Article 297(1)(f), (g) and (j) of this Code.

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B. FIRST GROUND: ARTICLE 297(1) OF THE CPC BIH – THE FIRST-INSTANCE JUDGMENT DID NOT VIOLATE ARTICLE 297(1)(K) OF THE CPC BIH[5]

1. Sections 6 and 7 of the enacting clause of the judgment – judgment incomprehensible in terms of Article 297(1)(k) of the CPC BiH

18. Defense counsel argued that it is clear from the facts in sections 6 and 7 of the enacting clause of the judgment that acts of perpetration have not been specified, as there is no reference to facts and circumstances showing what concrete acts the accused undertook to commit the criminal offense charged. According to the appeal, it is not clear from the factual account how the accused contributed to the commission of the criminal offense, i.e. which specific action of the accused resulted in a consequence, amounting to a violation of criminal procedure provisions.

19. In the response to the appeal, the Prosecutor submitted that the accounts of facts in relation to sections 6 and 7 of the enacting clause of the judgment clearly show the contribution of the accused who perpetrated the acts together with other members.

Appellate Panel's findings

20. The Appellate Panel finds that the arguments are ill-founded.

21. Having analyzed the factual descriptions of the charges, the Appellate Panel finds that the Trial Panel properly specified the acts of the accused and the other persons who undertook acts of perpetration together with the accused. It is true that their acts are described as a joint action, not specifying when a particular perpetrator hit the injured parties (sections 6 and 7) or forced the injured parties to a sexual intercourse or burned their genitals (section 7). However, their individual activities form the unity of action undertaken against the victims.

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[5] Article 297(1)(k) of the CPC BiH, in its relevant part, reads as follows: "The following constitute an essential violation of criminal procedure provisions: if the enacting clause is incomprehensible, internally contradictory or contradicts the grounds of the judgment or if the judgment has no grounds at all or if it does not cite reasons concerning the decisive facts."

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22. In making this finding, the Appellate Panel bears in mind the criminal code applicable to the case in question, as was rightly done by the Trial Panel, specifically Article 22 of the CC SFRY providing as follows: *"If several persons jointly commit a criminal act by participating in the act of commission or in some other way, each of them shall be punished as prescribed for the act*".

23. Consequently, the general prerequisite for co-perpetration as a joint commission of an act is a joint decision about the act: each perpetrator is responsible for the decision on the commission of the act, everyone carries out their act together with another, but the contribution itself is such that it constitutes an important part in the plan of implementation of the act as part of a joint decision on the act and the distribution of roles. The emphasis is on *joint commission of the act* through *joint participation* in the act of perpetration or *in some other way*.

24. Consequently, the Panel has found that he participated in the referenced acts of perpetration together with other persons or he committed the acts with those other persons in some other way, which is a contribution that can be subsumed under co-perpetration.

25. Bearing in mind the aforesaid, the efforts by the counsel for the accused Macić to use alleged deficiencies of objective requirements for co-perpetration on the part of the accused to reduce the issue of a causal connection between an act and a consequence to a missing description of conduct of individual co-perpetrators in the judgment proved to be unsuccessful. To wit, the enacting clause of the first-instance judgment gave a clear and detailed account of the relevant incidents under sections 6 and 7 of the enacting clause, finding, upon assessment of the evidence, beyond a reasonable doubt that the accused participated in those incidents, which is quite sufficient for the existence of guilt and the institution of co-perpetration in light of the referenced statutory provision.

26. It is therefore obvious that the provision of Article 22 of the CC SFRY does not require factual details suggesting a degree of contribution to be qualified as decisive on the part of each of the co-perpetrators; this is required by the CC BiH, but this code is not applicable to the case in question. Given the state of affairs, this Panel finds that the violation, groundlessly referred to in the appeal, did not occur, i.e. the enacting clause of the judgment is not incomprehensible because the Court, under the applicable statutory provision, was not required to state concrete acts of the accused to the point that a

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decisive contribution of each of the co-perpetrators, including the accused, would be established.

27. Taking that into consideration, this Panel concludes beyond doubt that the account of facts in the enacting clause of the judgment does not contain any deficiencies that would question the validity of the legal findings in the impugned judgment relating to the application of the institution of co-perpetration, as groundlessly claimed in the appeal. Therefore, the first-instance judgment is not in violation of criminal procedure provisions under Article 297(1)(k) of the CPC BiH, meaning that the enacting clause of the judgment is not incomprehensible.

2. Judgment does not cite reasons concerning the decisive facts in terms of Article 297(1)(k)

28. Defense counsel submits that the Trial Panel failed to describe the process of assessment of individual pieces of evidence regarded as relevant to the determination of responsibility of the accused for the acts charged in the enacting clause. In support of his arguments, defense counsel cited Article 290(7) and Article 281 of the CPC BiH.

29. Specifically, with regard to section 1 of the enacting clause of the judgment, it is alleged in the appeal that witness accounts differ in terms of the decisive fact of who were the soldiers who went to "walk around" Blace and that, on that circumstance, the Trial Panel merely paraphrased statements of particular witnesses for Prosecution and Defense without properly assessing them, which, according to defense counsel, amounted to a violation of Article 281 of the CPC BiH. In this connection, it is argued in the appeal that the Trial Panel failed to give weight to the respective statements of Šeho Macić, Nurko Fišić, Zajko Fišić and Mumin Fišić, i.e. it failed to show the witness assessment analysis, and the referenced statements needed to be assessed for the additional purpose of determining the credibility of the testimony of witness Salko Macić. With regard to section 2 of the enacting clause of the judgment, defense counsel concluded that the Trial Panel failed to adduce reasons for favoring the testimony of Prosecution witness Petar Petrović, in light of contradictions between his testimony and testimony of other witnesses. Defense counsel offered the same arguments in respect of Section 3 of the enacting clause of the judgment. With regard to Section 4 of the enacting clause of the judgment, defense counsel argued that an essential violation was committed considering that the Court failed

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to give weight to the examination of witness Dragutin Pažulj, amounting to a violation of Article 281 of the CPC BiH. Citing the same grounds, defense counsel took the view that there has been a violation in relation to section 5 of the enacting clause of the judgment as well, as the Court failed to indicate decisive facts on which it relied to prove the responsibility of the accused. With regard to sections 6 and 7 of the enacting clause of the judgment, in the appeal defense counsel, aside from the previously mentioned violation (see para. 18 of this judgment) for which the Appellate Panel made a finding (see para. 20-27 of this judgment), concluded that criminal procedure provisions were violated on the grounds that the Court failed to indicate decisive facts that were assessed when determining the responsibility of the accused for the participation in the incidents charged. Finally, with regard to Section 8 of the enacting clause of the judgment, defense counsel argued that the Court violated the provisions of criminal procedure by failing to give reasons for accepting the Prosecutor's withdrawal of witness Zdenko Ljolja at the trial (as this witness could have testified about his beating) and by accepting testimony of indirect witnesses.

30. In the response to the appeal, the Prosecutor maintained that the Trial Panel properly assessed the statements of all witnesses – injured parties, delivering the judgment on the basis of a scrupulous assessment of evidence.

Appellate Panel's finding

31. The Appellate Panel finds that the arguments are ill-founded.

32. *A prima faciae* analysis of the impugned judgment, as required per standards of review on essential violations, does not suggest the existence of the described essential violation. The Trial Panel fully complied with the provision of Article 290(7) of the CPC BiH, providing that a Panel has a duty to state *facts* on which it relied. To that end, it is important to note that this need not mean that when making findings on the decisive facts the judgment was required to address every single piece of evidence and how it related to the other evidence, as incorrectly alleged in the appeal; rather, the judgment listed and adduced contents of the evidence that had the prevailing importance in making the findings concerning the decisive facts. Consequently, in terms of the aspect of formal validity of the impugned judgment, the Appellate Panel finds that the Trial Panel adduced sufficient and altogether acceptable reasons in support of its views and factual findings by

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relying on relevant evidence corroborating the view of the Court in its entirety, to be discussed in more detail in the reasons below.

33. In the Appellate Panel's view, with regard to the incident described in more detail under section 1 of the enacting clause (attack on the civilian population in the village of Blace – murders of old women Ana Kuljanin, Danica Kuljanin, Cvijeta Kilibarda and Jelka Kilibarda), the impugned judgment presented the contents of relevant evidence, followed by proper factual findings. Specifically, with regard to the accounts of witnesses who testified about the relevant circumstance of movement of soldiers inside the village (who exactly were the soldiers who remained by the draw-well on the day in question and who were the ones who went to "walk around" Blace – relevant in terms of the murder of the old women), the Trial Panel has found that the witness accounts that one group went towards the houses were acceptable and consistent in decisive parts. Having analyzed the relevant portion of the reasons adduced in the impugned judgment, the Appellate Panel has found that the judgment, by employing a method of paraphrasing witness accounts, clearly showed why the Trial Panel found that the accused Macić was in the group that went towards the houses.[6] This Panel therefore finds that Defense's complaints that the first-instance judgment did not make a proper analysis of evidence with regard to this circumstance are ill-founded.

34. Having examined the portion of defense counsel's appeal pertaining to the charges under section 1 of the enacting clause of the judgment, the Appellate Panel has noted that there is an overlap of the complaints which in terms of their contents correspond to appeal grounds of essential violation of criminal procedure provisions and error of fact. In order to be methodical, the Panel divided the complaints into those two grounds for appeal, assessing the contents of each of them, and presenting them in this judgment in the order determined by the law and for consistency purposes.

35. In this connection, the Appellate Panel finds that with regard to the manner of assessment of evidence from the methodological point of view, the Trial Panel acted correctly in full compliance with the provision of Article 281(2) of the CPC BiH. Specifically, the Panel arrived at the conclusion presented in paragraph 187 of the impugned judgment following an analysis of the evidence with regard to the charge in question, correlating the

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respective testimony of witnesses Salko Macić, Mumin Fišić, Nurko Fišić, Šeho Macić, Hamdija Fišić and Zajko Fišić, and then inferring that that they constituted a consistent unity indicating that the accused Ibro Macić was in the group of soldiers that went to the house and that he, by firing from a rifle, took part in the murder of the old women, as described by witness Salko Macić.

36. With regard to the charges under sections 2-7 of the enacting clause of the judgment (inhuman treatment of Petar Petrović, torture of protected witness S1, inhuman treatment of Dragutin Pažulj, inhuman treatment of protected witness S, torture of protected witness A2, inhuman treatment of protected witnesses A1, A2, S and Ivica Đalto), defense counsel stressed that the Court did not make an analysis of evidence assessment and was in violation of Article 281 of the CPC BiH, but this Panel finds that those are ill-founded and blanket allegations by the Defense. Specifically, this Panel finds that all the cases involved a situation in which the key witnesses are injured parties who gave testimonies; the Trial Panel analyzed the testimonies and correlated them with the other evidence, concluding that the accused took part in the referenced charges. The Trial Panel explained in detail the reasons for accepting the witness accounts, i.e. the reasons for giving credence to them.

37. With regard to the complaints relating to section 8 of the enacting clause of the judgment, this Panel finds as follows. It is true that injured party Zdenko Ljoljo was not examined before the Trial Panel. However, according to the transcript of the trial hearing of 18 April 2014, the Prosecution withdrew the said witness-injured party, and as this is not an inquisitorial procedure, the Court is not required to decide whether it should accept the withdrawal of a piece of evidence by a party to the procedure. Namely, in the spirit of the accusatorial principle as the underlying principle in the institution and conduct of criminal procedure under national legislation, each party to the procedure disposes of its evidentiary motions, while a Court may ex officio order the presentation of some evidence, but solely for the purpose of clarifying certain issues. This in particular if the relevance of the offered evidence does not have a decisive effect on the establishment of a decisive fact, as properly noted by the Trial Panel in paragraph 324 of the impugned judgment, finding: *"With regard to the inhuman treatment of injured party Zdenko Ljoljo, despite the*

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[6] See paras. 146-150 of the impugned judgment.

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fact that this witness did not testify before the Court, numerous accounts of other witnesses have convinced the Panel that he was mistreated by the accused as stated in the enacting clause of the judgment."

38. This Panel finds that the impugned judgment is *prima facie* concentrated on a review and assessment of the presented evidence on which it relied to make its findings concerning the guilt of the accused, to be discussed in more detail in the section relating to Defense complaints on the grounds of erroneously or incompletely established facts.

39. Finally, it is important to note that the dissatisfaction of a party to the proceedings with a Trial Panel's finding need not mean that the Panel failed to make a proper analysis of the evidence that preceded that finding.

C. SECOND GROUND: ARTICLE 297(2) OF THE CPC BIH – THE FIRST-INSTANCE JUDGMENT DID NOT VIOLATE ARTICLE 297(2) OF THE CPC BIH

(a) It is argued in the appeal that the impugned judgment violated the principle of *in dubio pro reo*

40. According to defense counsel, Ibro Macić, who had the status of the accused in this case, is the person to whom the statutory provision on the principle of *in dubio pro reo* applied, and the burden of proving his guilt beyond any reasonable doubt rested on the Prosecution. However, in defense counsel's view, this statutory provision has been drastically violated to the accused's detriment.

Appellate Panel's findings

41. Notwithstanding the great efforts made in the appeal to undermine the conclusive findings in the first-instance judgment regarding the guilt of the accused Macić through the alleged violations, the Appellate Panel holds that in consideration of the premise of the rule of *in dubio pro reo* the aforementioned arguments do not indicate a doubt with respect to the existence of facts to the accused's detriment, constituting the characteristics of a criminal offense, or on which depends the application of certain provisions of the criminal code, in order for the Court to even begin considering the possibility contained in the second part of the premise, instructing the Court to decide the situation regarding the

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probability of existence of facts benefitting the accused with a judgment and in a manner that is the most favorable for the accused.

42. The principle of *in dubio pro reo* to which the appeal referred, as an expression of treatment in favor of an accused, comprises two rules. The first one relates to facts to the detriment of an accused. These facts – important, legally relevant facts – must be established with absolute certainty, which, in the Appellate Panel's view, is what the Trial Panel did upon a thorough analysis and assessment of the evidence presented at the trial and by applying the beyond reasonable doubt evidentiary standard. With regard to the application of the second rule from this principle in relation to the facts benefitting an accused, the Appellate Panel finds that in the case in question the Defense offered nothing to indicate that these facts should be regarded as probable.

43. The Appellate Panel, the same as the Trial Panel, took into consideration that in terms of general considerations regarding evidence assessment, the Prosecution bears the burden *(onus)* of proving the guilt of the accused. The Prosecution has proved all the key allegations in the charges beyond a reasonable doubt, with the decisive factual findings in the judgment, in terms of the quality of the Prosecution's evidence, not being based solely on circumstantial evidence but also on the multitude of direct evidence, in particular accounts of eyewitnesses (sections 1 and 8 of the enacting clause of the judgment) as well as witnesses – injured parties (sections 2-7 of the enacting clause of the judgment).

44. Even when the impugned judgment cites circumstantial evidence it does so by presenting evidence of a number of many different circumstances which, taken in combination, point to the existence of a particular fact on which the accused's guilt depends. Specifically, the Appellate Panel took into account the view that "*those circumstances would usually exist in combination only because that particular fact indeed existed.*"[7] Therefore, the Appellate, in light of the appeal arguments advanced, was not able to find that another conclusion is also reasonably open from the evidence, other than that reached by the Trial Panel, implying that a particular fact may not have existed.

[7] ICTY Appeals Chamber judgment in *Delalić*, para. 458.

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45. In making this finding, the Appellate Panel was mindful of the fact that the Trial Panel examined all the presented evidence, made an integral assessment of the evidence (each piece of evidence individually and in correlation with the other evidence), juxtaposed Defense and Prosecution evidence, and ruled on the guilt of the accused for the acts described in the enacting clause of the judgment on the basis of the established facts.

46. Based on the foregoing, the Appellate Panel holds that the appeal contentions that the actions of the Trial Panel brought about essential violations of criminal procedure provisions under Article 297 of the CPC BiH to the accused's detriment in terms of validity of the case from the procedural point of view are ill-founded, and have accordingly been dismissed in their entirety.

IV. GROUNDS FOR APPEAL UNDER ARTICLE 299 OF THE CPC BIH: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF REVIEW

47. The basis for any court judgment is a state of facts. The criminal code may be applied properly only on the basis of properly and fully established facts. In view of the limitation whereby the Appellate Panel reviews the judgment only insofar as it is contested by the appeal, as explicitly stipulated in Article 306 of the CPC BiH, this also defines the scope of review of the impugned judgment by the Appellate Panel if the facts are challenged by specific claims. Therefore, the Appellate Panel will not review the truthfulness of all the facts contained in the refuted part of the judgment.

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

49. 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 judgment, but only an error that 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.

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50. In determining whether or not 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 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.

51. 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 Judgment, 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."

52. The Constitutional Court, with regard to direct or circumstantial evidence, points out that argumentation on the basis of circumstantial evidence is not in itself contrary to the principle of a fair trial under Article 6(1) of the ECHR.[8] However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt, and must be tightly and logically interrelated, so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle, when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

53. In order to prove that an erroneous judgment was passed, the complainant is required to show that the allegedly erroneous and incomplete facts established by the Trial Panel rightly call into question the accused's guilt.[9] In order for the prosecutor to prove that an erroneous judgment was passed, he is required to show that after all the factual errors of the Trial Panel are taken into consideration, any reasonable doubt as to the accused's guilt is eliminated.[10]

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[8] *M.Š.*, AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits of 22 April 2005, para. 36.
[9] *Stupar et al.,* second-instance judgment of 9 September 2009, para. 328
[10] *Ibidem.*

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B. APPEAL BY THE DEFENSE FOR THE ACCUSED IBRO MACIĆ

54. As noted above, defense counsel submitted that the Trial Panel established the facts erroneously and incompletely on the grounds of an erroneous assessment of the evidence (individually and in combination with the other evidence). In view of the fact that defense counsel adduced reasons in support of this view through the individual charges under sections 1-8 of the enacting clause of the judgment, the Panel will address each of them in the text below.

1. Individual charges: section 1 of the enacting clause of the judgment (the murders of old women Ana Kuljanin, Danica Kuljanin, Cvijeta Kilibarda and Jelka Kilibarda)

55. In addition to the arguments stressed by the Defense in the part of the appeal pertaining to essential violations (primarily referring to the issue of disagreement among the witnesses about the soldiers who remained by the draw-well and those who went towards the houses), with regard to the charge under section 1 of the enacting clause of the judgment the appeal attempts to undermine the credibility of witness Salko Macić. Throughout the appeal (in relation to this section) the Defense points to deficiencies in the testimony of witness Salko Macić, arguing that it could not be credited as done in the impugned judgment.

56. Defense counsel further argued that the reasons adduced for the judgment do not show why the Panel gave credence to one piece of evidence and not to another. Along those lines, defense counsel maintained that the Trial Panel failed to establish a connection between the testimony of Šeho Macić and the other witnesses (testimony of Nurko Fišić, Hamdija Fišić and Zajko Fišić).

57. Moreover, defense counsel believes that it is important to point out that an unsubstantiated finding in the impugned judgment that "the shooting" heard by witnesses by the draw-well is related to the murder of the old women, in view of the fact that they stated that shots were coming from all sides and that one could not discern where the shooting was coming from.

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58. Further on in the appeal, defense counsel raised the issue of statement of Ibro Macić that was examined by an expert in document examination, arguing that the expert's report has been analyzed erroneously.

59. In particular, defense counsel raised the issue of rifle used by the accused, with a special reference to the statement of witness Nurko Fišić that was changed at the trial.

60. Finally, defense counsel contested the judgment on the grounds that the Panel failed to explain the reasons for not considering the testimony of the accused Ibro Macić in reference to the events in Blace.

Appellate Panel's findings

61. The Appellate Panel finds that the arguments are ill-founded.

62. Specifically, with regard to the concurrence of witness testimony on the subject of separation of the soldiers (those who remained by the draw-well and those who went towards the houses), the Panel has already presented arguments in the part containing the reasons on essential violations. However, in terms of the established facts, the following needs to be pointed out. The finding in paragraph 147 of the impugned judgment clearly states that the testimony of Šeho Macić indicates that Ibro Macić did not remain by the draw-well, while the testimony of Nurko Fišić indicates that Ibro Macić was in a group that went towards Donje Blace, with witnesses Hamdija Fišić and Zajko Fišić concurring. Consequently, with regard to the presence and movement of the accused on the day in question, this Panel too has no doubt that he joined the group of soldiers that went towards the houses, and the efforts in the appeal pointing to the disagreement among the witnesses about the others who remained with or separated from the soldiers who remained by the draw-well are completely irrelevant to this issue.

63. With regard to witness Salko Macić who directly incriminated the accused Ibro Macić, Defense made futile attempts to undermine his credibility by citing a series of contradictions. This Panel finds that the Trial Panel was in the best situation to assess this witness's testimony and that it did so with special consideration, whereas the referenced and irrelevant contradictions may result from the fact that, when giving the testimony, the witness – as was found by the Trial Panel in paragraph 183 of the impugned judgment –

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had the right not to incriminate himself, leading to what appeared to be certain contradictions.

64. In light of the above, this Panel finds that it is important at this juncture to address the complaints relating to the issue of statements of Ibro Macić and Salko Macić given to Konjic HVO SIS /Croatian Defense Council Security and Information Service/ as members of Mitko Pirkić's unit. According to Salko Macić, he and Ibro Macić signed written statements indicating that they had found some women and some old women and killed them, which ensues from the tendered documentary evidence (Statement of Ibro Macić – enclosed with the Document Examiner's Report – T-8 and Statement of Salko Macić O-16). In contrast to the contentions in the appeal, the statement of Salko Macić was assessed in connection with his trial testimony when he omitted saying that he himself took part in the shooting. In the statement Salko Macić wrote in his own hand that *"Mitko Pirkić assigned us a task to mop up the Raketnica canyon the best way we could. We set out on 13 June and we mopped up the entire terrain during the night; we did not leave a single chicken behind. From there we set out to Blace village; there we found some women and some old women that we personally, Kolumbo's team, killed..."*[1]. It is true that at the trial the witness did not mention his participation in the acts charged, but the Panel, acknowledging the witness's right against self-incrimination, accepted portions of the statement relevant to the participation of the accused Ibro Macić. To wit, the statements are in agreement in the part relating to the general events on the day in question, also corroborated by other evidence presented.

65. With regard to the statement of Ibro Macić, in contrast to the appeal allegations, this Panel upholds the Trial Panel's view that the document examiner concluded that it is likely that the statement was indeed signed by Ibro Macić. Upon a review of the transcript[11] of the trial hearing at which the document examiner Esad Bilić gave his testimony, this Panel has found that the Defense applied a fragmentary and blanket approach to the testimony, citing portions of the testimony as suited the Defense. According to the expert's testimony, there are two ways in this process: evaluation of similarities or differences, and an expert is free to choose either of the two. As the expert in this case opted for an evaluation of similarities, and determined that the handwriting likely belonged to Ibro Macić, the

[1] Defense exhibit O-16.

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argument as to what would have happened if he had opted for an evaluation of the differences appears to be unfounded. The expert had a leeway when composing his report and he had no reason to be biased or make baseless accusations against the accused. Consequently, the Trial Panel was right to accept the expert's report and correlate the statement of Ibro Macić with the other evidence (in particular, the statement of Salko Macić) and his testimony, finding him responsible for the acts described in detail in section 1 of the enacting clause of the judgment.

66. In this respect, this Panel fully upholds the view taken in paragraph 187 of the impugned judgment:

> "When the testimony of Salko Macić (who said that Ibro Macić opened fire in the direction of the old women) and the testimony of Mumin Fišić and Nurko Fišić respectively (who, in contrast to other witnesses, described in detail what Ibro Macić told them about the murders at the time) are correlated and then combined with the consistent testimony of witnesses Šeho Macić, Hamdija Fišić and Zajko Fišić that upon return from the houses someone from the group of Ibro Macić said 'come over here, there are girls', that the persons who were killed were old women and that that there had been shooting before that and that the soldiers who had remained to eat their daily ration were wondering why shots were being fired[12], they, in the Panel's view, constitute a consistent unity leading to the conclusion that the accused Ibro Macić was in a group of soldiers that went to the house and that he, by firing from a rifle, took part in the murder of the old women, as described by witness Salko Macić."

67. In contrast to the appeal allegations that in light of the above attempted to argue that the respective testimonies of Mumin Fišić and Nurko Fišić were assessed erroneously, noting in particular that the Trial Panel accepted Nurko Fišić's investigative statement and not the testimony changed at the trial, this Panel finds the following. A review of the Record of Interview of Witness Nurko Fišić T20 0 KTRZ 0001870 11 of 17 October 2011 (given on the premises of the Prosecutor's Office of BiH) shows that the witness gave a very convincing account of the circumstances about which he was asked in this statement of his, taken on record. To that end, the Appellate Panel points to the

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[11] Transcript of the trial hearing of 18 April 2014.
[12] Testimony of witness Hamdija Fišić of 24 September 2013.

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following part of the record, showing to this Panel beyond doubt that it is relevant, and that the Panel was right to give credence to this statement and not the trial testimony:

> "However, given that I never got into trouble with the law in my life, nor was I ever questioned by the police about anything, the interview with SIPA officers had a major impact on me and I started reflecting on that incident on a daily basis, trying to remember all the details related to it. In particular, I went to the area of Blace a few days ago with other participants of that incident and, having seen that area again, I remembered the incident almost entirely. As I said, I saw that area and almost all the participants of that incident were present there. While spending two or three hours in Blace, I was watching myself and the other participants, reflecting on where each of us was at the moment when the incident occurred."

68. In this Panel's view, taking into account the aforesaid, the Trial Panel properly found in paragraph 186 that the witness Nurko Fišić's explanation for changing the investigative statement is not a convincing argument, and that it was evident that at the trial he decided not to reveal the facts that he knew and said during the investigation in order to help the accused Macić in that way.

69. Although the appeal paid special attention to the issue of rifle used by the accused Macić in an attempt to point to a flawed connection between the act of perpetration and its consequence (the murder), the Appellate Panel finds that this is a blanket and unfounded argument. Namely, Salko Macić – who directly incriminated Ibro Macić and whose testimony was accepted by the Trial Panel as relevant – stated that he was not sure what rifle the accused Macić had, but he believed that it was an M48 (a *'tandžara'*). Along those lines, defense counsel argued that if that was the weapon, then the account of the incident was wrong considering that the sound of firing from a firearm described by witnesses as "bum, bum, bum" and shaking off of kerchiefs of the old women suggest automatic gunfire not possible with the said rifle. This Panel finds that it is pointless to discuss this issue. Whether it was a "bum, bum, bum" or a "dum, dum, dum and done" (the latter is alleged in paragraph 175 of the impugned judgment) is not relevant to the Panel, for either represents the usual/colloquial way of describing a shooting, without any intention of suggesting the type of weapon involved. In that respect, in the Panel's view, the appeal allegations attempting to link the said description to the weapon used appear to be unsuccessful. Furthermore, as it ensues from the testimony of Nurko Fišić: *"You know, shots were also fired from the Rakitnica when we went, and then, I cannot recall exactly,*

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they, how the shooting was heard, we just heard shots, bursts, single shots, I don't know"[13], it is clear that everything that the witnesses heard that day was described as 'a shooting', and the Defense's attempts to portray the witness's confusion about the shootings that occurred as a flaw in proving the murder of the old women also appear to be void of necessary evidentiary and logical basis.

70. On this subject, the appeal arguments that the shooting that was heard by the soldiers near the draw-well is connected to the murder of the old women appear to be unfounded as well. Namely, it is true that the witnesses stated that at that moment shots were coming from all sides, but the Court evaluates each piece of evidence independently and in combination with the other evidence, so if it was established beyond doubt on the basis of the other evidence that the old women were murdered at that moment, the finding that the shooting heard by the draw-well can be connected to the said murder appears to be well-founded.

71. In contrast to the appeal allegations that the trial judgment also made an omission by not giving weight to/not citing the testimony of the accused Macić who testified in his defense with regard to events in Blace, the Appellate Panel finds that the Trial Panel is not required to comment on each and every piece of evidence presented[14]; the fact this was the accused's testimony does not make it different from any other testimony considering that if an accused decided to give a testimony, he/she is advised of all the rights and consequences of giving a testimony in the capacity as a witness. This Panel, however, notes that paragraph 87 of the impugned judgment, while discussing other incidents, does refer to the testimony of Ibro Macić in the capacity as a witness, and it may be inferred therefrom that the Trial Panel assessed the testimony as a piece of evidence but clearly did not find anything of relevance that would result in a different decision relative to the circumstances of the incident under section 1 of the enacting clause of the judgment. In that connection, this Panel reviewed the transcript of the trial hearing of 7 November 2014 and inferred therefrom that the accused's allegations, either on their own or in combination

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[13] Transcript of the trial hearing of 17 September 2013.

[14] The Appeals Chamber in *Kvočka* recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record. (judgment of the Appeals Chamber in *Kvočka et al.*, par. 23-25).

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with the other Defense evidence, are unsuccessful in challenging the Prosecution's evidence on which the decision regarding the guilt of the accused is based.

72. *Vice versa* in relation to appeal allegations regarding the number of old women who were murdered, this Panel points to paragraph 170[15] of the impugned judgment, concluding that the Trial Panel's finding is correct in its entirety and accepting it accordingly.

73. In contrast to the appeal allegations, the Appellate Panel has found that the accused did possess the intent (i.e. the element of awareness) to murder the old women, indubitably ensuing from all the acts that were perpetrated by the accused on the occasion in question. Specifically, he came to the house together with other armed persons of like mind, opened fire at defenseless old women who were sitting in the house, thus murdering them in a particularly cruel manner without any provocation. The accused said in his Statement that *on 13 June 1992 members of Mirsad Fišić's detachment torched everything and killed seven women...* Consequently, the accused acted with direct intent, he was aware of the consequences of the perpetrated acts and he desired them, and he participated in all that with another member of ARBiH.

74. Therefore, relying on the established facts, this Panel concludes beyond doubt that the accused Ibro Macić was a co-perpetrator[16], i.e. he murdered civilians – old women Ana Kuljanin, Danica Kuljanin, Cvijeta Kilibarda and Jelka Kilibarda, thereby committing the criminal offense of War Crime against the Civilian Population under Article 142(1) of the CC SFRY.

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[15] "Besides, the obvious discrepancies in terms of the potential number of persons killed on the occasion in question, in line with the presented evidence, suggest that the old women who are the only victims named in the facts of the Indictment were not the only ones who were murdered. Specifically, Prosecution Exhibits T-19 and T-16 indicate that Jelka Golubović (her body was found not far from the house of Milutin Kuljanin), Manojlo Golubović and his wife Spasenija, Milica Kilibarda and others were also killed in Blace on the occasion in question – all of them persons in an advanced age. However, as these murders are not covered by the acts charged in the Indictment, the Panel was not concerned with establishing what exactly happened to those individuals."

[16] Paragraph 133 of the impugned judgment: "With regard to the facts of the Indictment, the Panel omitted the name of the accused Osman Brkan (acquitted for the same acts by a final judgment) from section 1 of the enacting clause of the judgment, adding that the accused was not the only person who murdered the old women on the occasion in question, and accordingly adjusting the factual findings to the contents and assessment of the evidence presented at the trial."

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2. Individual charges: section 2 of the enacting clause of the judgment (inhuman treatment of Petar Petrović)

75. With regard to section 2 of the enacting clause of the judgment, it is argued in the appeal that the Court failed to give weight to the testimony of witness Petar Petrović in its entirety or link it to the other documentary evidence and testimony of other witnesses. Along those lines, the appeal pointed to varied witness testimony regarding the physical characteristics of the accused. Defense counsel contended that the Court should have given weight to the fact that the accused Ibro Macić arrived in Musala not sooner than the beginning of May 1993 accompanied by Edhem Žilić, while witness Petrović was adamant that he met the accused Macić on 19 April 1993.

Appellate Panel's findings

76. The Appellate Panel finds that the arguments are ill-founded.

77. As properly concluded by the Trial Panel in paragraph 205 of the impugned judgment, all the witnesses have observed within the limits of their perception and conveyed to the best of their ability what they remembered about the face and body of the accused.

78. To wit, injured party Petar Petrović testified about the charge described in detail in the enacting clause of the judgment. The injured party described the accused's physical appearance at the relevant time: Macić wore a black uniform, he had a bracelet with rivets around his arm, his look was intimidating, he had black eyebrows and black hair, and was about 170-160 cm tall (para 198). As argued in the appeal, the witness stated that at that period the accused was thinner when compared to his present-day look, but this Panel finds that this allegation is not in opposition to the description given by witnesses A1 and A2: they stated that "Maca" from Musala had exceptionally *broad shoulders and strong arms, a large neck joined with the shoulders*. Namely, the discrepancies in witness accounts do not suggest descriptions of two entirely different persons, as all the witnesses clearly stated on several occasions that the person in question was Ibro Macić aka Maca, while some witnesses even recognized him in the courtroom. According to his account, witness Petrović spent a great deal of time in Musala and saw the accused on several occasions, he heard from other injured parties that his name was Ibro Macić and he identified him as the person who beat him up at the relevant time. Witnesses S1 and

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Bruno Boras too confirmed that. In the Appellate Panel's view, all the witnesses essentially confirmed that at the time the accused was a young man who had bright eyes and a distinctive look, black eyebrows, dark hair and prominent cheekbones, while the other discrepancies are a result of the situation explained in the preceding paragraph.

79. In this respect, the Appellate Panel notes that possible variations in witness accounts are solely the result of different human perception, which is understandable particularly taking into consideration that all the witnesses referred to in the appeal are also the injured parties and that the remaining sections of the enacting clause of the judgment pertain to them. Moreover, certain variations are understandable as those persons were in a state of fear and uncertainty, making it logical for them to experience and perceive the situation in a different manner. The Appellate Panel observes that, in terms of the accounts of witnesses-injured parties, defense counsel alleged varying descriptions of the physical characteristics of the accused in relation to other sections of the enacting clause of the judgment as well, but the Panel will not address this issue again in light of the aforementioned finding regarding this matter.

80. With regard to appeal arguments referring to witness Petrović's contention that he met the accused in the second half of April (19 April 1993), with that not being possible because the accused arrived in Musala in the month of May (also found by the Trial Panel), this Panel points out that the Trial Panel, acting within its right to the extent not exceeding the charge, adjusted the factual account in the enacting clause to what was established at the trial, finding that the incident described in section 2 of the enacting clause of the judgment – inhuman treatment of Petar Petrović – occurred sometime in May 1993.[17] That being said, the complaints in the appeal in this regard are not supported by appropriate arguments considering that the only relevant point that needed to be determined was that the accused was in Musala *at the time of the relevant incident.* Furthermore, it was established beyond doubt that he subjected Petar Petrović to inhuman treatment, which ensues from his testimony as well as the testimony of witnesses S1[18] and Bruno Boras respectively.[19]

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[17] This ensues from the questions put by the Panel judges during the examination of witness Petar Petrović (transcript of the trial hearing of 15 November 2013).

[18] Transcript of the trial hearing of 15 November 2013: "Defense counsel: Let me just ask you one more thing: did anything happen to Petar Petrović during your stay there?

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3. Individual charges: section 3 of the enacting clause of the judgment (torture of protected witness S1)

81. With regard to section 3 of the enacting clause of the judgment, it is argued in the appeal that the Trial Panel assessed the testimony of witness-injured party S1 erroneously, not giving weight to the fact that this witness did not mention a tattoo on the accused's arm in any of the statements given prior to the statement to the Prosecutor's Office (on two occasions in Konjic and in the Ministry of Security on 3 April 2012).

82. Defense also contested the identification of the accused in the courtroom by witness-injured party S1.

Appellate Panel's findings

83. The Appellate Panel finds that the arguments are ill-founded.

84. With regard to Defense's efforts to undermine the credibility of witness S1 by pointing to alleged flaws in the description of the accused (the fact that the said witness mentioned the accused's tattoo no sooner than during his second or third interview), the Appellate Panel finds that this carries no weight in terms of reliability of the witness's testimony. Namely, with the passage of time, and taking into account that in each interview the injured parties may re-live the experienced traumas, it stands to reason that they are unable to recall all the details. It is therefore justified for the persons conducting the interviews to ask follow-up questions to help the persons being interviewed remember all the relevant facts, as was the case here with the tattoo.

85. The testimony of witness S1 has not been called into question by any other evidence; rather, this Panel finds that the testimony is acceptable and convincing, concurring with the Trial Panel. In addition, this Panel points to paragraph 220 of the impugned judgment, finding that witness Petar Petrović stated that some persons fared a

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Witness: Well, yes.
Defense counsel: What?
Witness: He was hit.
Defense counsel: Who, when did that happen?
Witness: I do not know when that happened exactly: he was carrying, he was carrying something, a sandwich or something..."

[19] Transcript of the trial hearing of 21 February 2014.

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lot worse than him (for example, Zdenko Ljoljo and S1), suggesting corroboration of the testimony of witness S1.

86. As far as the Defense's complaint regarding the identification of the accused in the courtroom is concerned, the Appellate Panel finds that this identification does not constitute an evidentiary action within the meaning of Article 85(3) and (4) of the CPC BiH and that it was weighed in combination with witness testimony and other evidence according to the principle of free evaluation of evidence. The said identification did not therefore have a decisive importance or a probative value as evidence presented at the trial, weighed by a Panel when making a ruling concerning decisive facts and the guilt of accused person.

4. Individual charges: section 4 of the enacting clause of the judgment (inhuman treatment of Dragutin Pažulj)

87. With regard to the incident under section 4 of the enacting clause of the judgment, it is alleged in the appeal that the Trial Panel should have given weight to the part of the testimony of the witness reading that on the night when a man came for the witness and led him out of the room it was very difficult for the witness to orientate himself considering that it was dark, that there were no lights and that the only thing that lit up the room was the moonlight.

88. Defense counsel contended that the Trial Panel's allegation that the witness saw 'Maca' who was facing him stands in opposition to the witness's testimony as the witness stated that he only saw a truncheon and that he recognized 'Maca' by his voice.

Appellate Panel's findings

89. The Appellate Panel finds that the arguments are ill-founded.

90. In contrast to Defense's insistence in the appeal that the Trial Panel established the facts erroneously and assessed the witness's testimony erroneously, this Panel finds that the allegations in the impugned judgment in relation to this section are correct in their entirety, accepting the finding of the Trial Panel in paragraph 233 of the impugned judgment.

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91. Namely, the following is an extract from the testimony of injured party Dragutin Pažulj at the trial hearing held on 7 February 2014:

“**Prosecutor:** Who was in that room?

Witness: Maca was in that room.

Prosecutor: Was he alone in that room?

Witness: Now I cannot claim who, whether there was anyone else with him.

Prosecutor: Did you see another person?

Witness: I saw him, as moonlight, moonlight penetrated and lit him up.

Prosecutor: Are you sure that it was him whom you saw on that occasion?

Witness: I’ll tell you what, when, when he spoke to me, that was, you know. A truncheon in his hand, he was the only one who carried it in that camp, the only one. You know, the only one. And then when he started...”

...

“**Defense counsel:** Standing, all right, thank you. And please tell me this: was he facing you or was he with his back to you?

Witness: He was facing me.

Defense counsel: Now tell me: when answering a Prosecutor’s question you said that, that you thought it was Maca because he was the only one who carried a stick.

Witness: That is correct.

Defense counsel: Is that the only reason why you believe that that person may have been Maca?

Witness: Let me tell you...

Defense counsel: I am asking you.

Witness: I knew who it was as soon as he spoke to me and as soon as I saw the stick. Because once you get to know a person’s voice you cannot, you cannot, er, get it out of your mind.

Defense counsel: Very well.

Witness: And at that time, in that fear, everything, it’s the easiest thing to remember.”

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92. Consequently, the portions of the transcripts cited above clearly indicate that Defense allegations are groundless, unsuccessfully referring to alleged erroneous findings of the Trial Panel.

5. Individual charges: section 5 of the enacting clause of the judgment (inhuman treatment of protected witness S)

93. By correlating the testimony of witnesses S, A1 and A2 respectively, it is argued in the appeal that the Trial Panel's finding regarding the guilt of the accused for the acts under this section of the enacting clause of the judgment is erroneous. The appeal's argument is that witness S could not have learned from witnesses A1 and A2 that he had been beaten by Ibro Macić.

Appellate Panel's findings

94. The Appellate Panel finds that the arguments are ill-founded.

95. In contrast to Defense's appeal arguments, this Panel concludes that the findings presented by the Trial Panel in the reasoning for this section of the enacting clause of the judgment are correct. Along those lines, the Appellate Panel pointed out that the Trial Panel noted that the respective testimony of witnesses S, A1 and A2 differ in terms of when and who learned from witness S that the guard who had beaten him was 'Maca'. However, the Trial Panel was right to conclude that this circumstance is not of decisive importance because witness S was sure that 'Maca' was the person who ill-treated and beat him on that particular occasion and on some other occasions as well, identifying him as Ibro Macić on the photo album that was an integral part of the record of witness interview before the Prosecutor's Office of BiH as well as in the courtroom (see paragraph 242 of the impugned judgment).

96. Furthermore, this Panel stressed that the Trial Panel properly assessed that witness S' description of the accused matches the ones given by witnesses S1, Dragutin Pažulj and Petar Petrović (certain discrepancies negligible, see para 78 of this judgment), indicating that it is justified to lend credibility to witness S with regard to the factual allegations in section 5 of the enacting clause of the judgment.

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6. Individual charges: section 6 of the enacting clause of the judgment (torture of protected witness A2)

97. In view of the fact that the appeal arguments relative to sections 2 and 5 of the enacting clause of the judgment are reiterated in relation to section 6 of the enacting clause of the judgment, this Panel refers to paragraphs 75 and 93 of this judgment.

7. Individual charges: section 7 of the enacting clause of the judgment (inhuman treatment of witnesses-injured parties A1, A2, S and Ivica Đalto)

98. In the context of section 7 of the enacting clause of the judgment, it is maintained in the appeal that the Panel failed to give weight to the testimony of witness S in combination with the testimony of witness A1 (the latter stating that Miralem Macić would visit Musala), that in the reasons for the judgment the Panel failed to give weight to the statement of witness A1 given on record and that the Panel failed to indicate the grounds for giving credence to the testimony of witness A1 given before the Court of BiH over the statement given on record on 10 August 2011. Aside from a series of contradictions in relation to the statement of witness A1 referred to in the appeal, it is further alleged in the appeal that the Panel failed to give weight to the testimony of witness Edhem Žilić reading that Ibro Macić was not in Musala in July.

Appellate Panel's findings

99. The Appellate Panel finds that the arguments are ill-founded.

100. In contrast to appeal allegations, this Panel finds that the Trial Panel properly weighed the witness's testimony independently and in combination with the other evidence. In particular, it is important to point out that the Trial Panel, as it ensues from paragraph 274 of the impugned judgment according to this Panel, was in a situation to gain the impression on the credibility of the testimony of A1 who cried during his testimony when giving his account of the horrors that he had experienced.

101. Furthermore, the appeal contains an entirely groundless claim that the Trial Panel failed to give weight to the investigative statement of witness A1 given on record or offer reasons for not doing so. Namely, this Panel finds that paragraph 275 of the impugned

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judgment clearly states that the witness explained that during the investigation he was referring to Miralem Macić, but not in the context of the incidents of mistreatment covered by section 7 of the enacting clause of the judgment, so in paragraph 288[20] of the impugned judgment the Trial Panel concluded and explained the reasons for accepting that explanation.

102. With regard to Edhem Žilić's claims that allegedly Ibro Macić was not in Musala during the incident referred to in section 7 of the enacting clause of the judgment, this Panel finds that the Trial Panel properly noted in paragraph 105 of the impugned judgment that this witness was interested in helping the accused in view of the possibility of self-incrimination; therefore, it was not possible to assess this witness's testimony as credible and lend credence to it with regard to the aforementioned circumstances.

8. Individual charges: section 8 of the enacting clause of the judgment (inhuman treatment of injured parties Zdenko Ljolja, Krunoslav Trlin, Igor Dragić and Goran Nikšić)

103. In view of the fact that the issues of essential violation and erroneously and incompletely established facts in relation to section 8 overlap in the appeal to a great extent, this Panel finds that paragraph 37 contains proper reasons addressing those complaints.

V. GROUNDS FOR APPEAL UNDER ARTICLE 298 – VIOLATION OF THE CRIMINAL CODE

104. With respect to this ground for appeal, the Appellate Panel observes that defense counsel did not elaborate on it in the appeal but merely stated in the introductory part of the appeal that the Trial Panel: "…established the facts erroneously and incompletely and *applied the substantive law erroneously*…".

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[20] "Although defense counsel made efforts during the cross examination of witness A1 to point out that the same witness mentioned Miralem Macić during the investigation, the Panel accepted the explanation that the witness did mention Miralem Macić showing up in Musala (which also follows from the contents of the record), but that that person never hit him. The witness pointed out that the person whom he knew from back then as 'Maca' and referred to in the context of the charges under section 7 of the enacting clause of the judgment is none other than the accused Ibro Macić."

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105. In that connection, this Panel, considering that there are no specific complaints on this ground, will not address the allegations in more detail but merely conclude at this point that they are not well-founded, i.e. the Trial Panel properly applied the substantive law to the properly and fully established facts.

VI. GROUNDS FOR APPEAL UNDER ARTICLE 300 OF THE CPC BIH – DECISION ON THE SENTENCE

A. STANDARDS OF REVIEW

106. Prior to addressing specific appeal arguments, 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.

107. 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. 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.

108. 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.

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B. SUBMISSIONS OF THE PROSECUTOR'S OFFICE OF BIH AND DEFENSE

109. The Prosecutor submitted that the sentence of imprisonment for a term of 10 (ten) years was not proportionate to the gravity of the committed crime, the circumstances under which the crime was committed, the degree of criminal responsibility of the accused or the gravity of the ensuing consequences. In particular, the imposed sentence did not give any satisfaction to the victims or their families that to this day do not know the locations of the bodies of their loved ones. For those reasons, the Prosecutor petitioned that the Trial Judgment be revised in terms of the imposed sentence and that a lengthier sentence be imposed on the accused.

110. The Defense too did not elaborate this ground in the appeal, other than noting the following: "Furthermore, the Panel, owing to an erroneous assessment of evidence (individually and in correspondence with the other evidence), established the facts erroneously and incompletely and applied the substantive law erroneously, thereby acting in violation of provisions of the CPC BiH, which resulted in the delivered judgment on the sentence." However, bearing in mind that this statement does point to Defense's stance on the issue of sentence, being mindful of the principle of extended effect of the appeal, this Panel found that it was necessary to review the judgment from that aspect as well.

C. APPELLATE PANEL'S FINDINGS

111. The Appellate Panel finds that the submissions in both appeals are unfounded.

112. Having considered the decision on the sentence, proceeding from the appeal arguments, the Appellate Panel, within the scope of circumstances bearing on the magnitude of punishment (aggravating and extenuating circumstances), found that the Trial Panel considered and reasoned the degree of criminal responsibility of the accused taking into account the fact that he acted as a direct perpetrator and co-perpetrator and that he knowingly perpetrated and contributed to the perpetration of the criminal acts described in the enacting clause of the judgment. Moreover, the Trial Panel properly considered the motives for commission of the crime, the degree of danger and injury to the protected object, the circumstances under which the crime was committed and the accused's conduct after the fact.

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113. In addition, the Trial Panel, when determining the degree of criminal responsibility of the accused, took into consideration the report by Prof. Abdulah Kučukalić, expert in neuropsychiatry, suggesting that at the time of commission of the crime the accused had a significantly diminished mental capacity, making him eligible for a lesser sentence. Notwithstanding the aforementioned, the Trial Panel properly found – and this Panel concurs with that finding – that a sentence below the statutory minimum would be inadequate and disproportionate to the committed crime and its consequences, contradicting the very purpose of punishment. Besides, as concluded in the impugned judgment as well, the acts of murder, torture and inhuman treatment perpetrated by the accused constitute extremely unscrupulous, cruel, humiliating and insulting actions indicating the absence of the least degree of compassion and mercy on the part of the accused, with the victims experiencing the consequences to this day, which undoubtedly is an aggravating circumstance.

114. Regarding the extenuating circumstances, this Panel concurs with the Trial Panel that the accused was young at the time (22 years old), that he is a family man and that he observed proper decorum in court.

115. Based on the foregoing, this Panel concludes that the Trial Panel, in contrast to Prosecutor's insistence that a heavier punishment be imposed and Defense's insistence that a more lenient punishment be imposed or that the accused be acquitted of criminal responsibility, adopted an adequate decision on the punishment, properly weighing the aggravating and extenuating circumstances alike, as well as the participation and role of the accused in the commission of the crime. The punishment is proportionate to the gravity of the crime and it will meet the purpose of punishment laid down in Article 33 of the CC SFRY.

116. For these reasons, pursuant to Article 310(1) in conjunction with Article 313 of the CPC BiH, the Court ruled as stated in the enacting clause of this judgment.

RECORD-TAKER	**PRESIDING JUDGE**
Legal adviser	**Meddžida Kreso**
Medina Džerahović	

LEGAL REMEDY: No appeal is allowed against this judgment.

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