

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case number: S1 1 K 008241 16 Krž 7

Delivered on: 6 October 2016

Before the Appellate Panel composed of Judges: Dr. Dragomir Vukoje, Presiding
Tihomir Lukes, Reporting judge
Mirza Jusufović, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Ramiz Avdović *et al.*

SECOND INSTANCE JUDGMENT

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

Mr. Dževad Muratbegović

Counsel for the accused Ramiz Avdović:

Mr. Mirza Kovač and Ms. Indira Karahodžić, Attorneys

Counsel for the accused Vintila Iulian Nicolae:

Mr. Vlado Adamović and Mr. Emir Kapidžić, Attorneys

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Number: S1 1 K 008241 16 Krž 7

Sarajevo, 6 October 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Panel of the Appellate Division of Section I for War Crimes, composed of judge Dr. Dragomir Vukoje, as the Panel Presiding and judges Tihomir Lukes and Mirza Jusufović, as members of the Panel, with the participation of Legal Officer Ena Granić Čizmo as the Record-taker, in the criminal matter against the accused Ramiz Avdović *et al.*, for the criminal offense of War Crimes against Civilians in violation of Article 142 of the Criminal Code of the Socialistic Federative Republic of Yugoslavia, in connection with Article 22 of the same Code, deciding upon the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina, Mr. Mirza Kovač, Counsel for the accused Ramiz Avdović, and Mr. Vlado Adamović and Mr. Emir Kapidžić, Counsel for the accused Vintila Iulian Nicolae, from the Judgment of the Court of Bosnia and Herzegovina, number S1 1 K 008241 12 Krl of 26 February 2016, after the open session of the Appellate Panel held in the presence of Mr. Dževad Muratbegović, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the accused Ramiz Avdović and Vintila Iulian Nicolae and their respective attorneys¹, pursuant to Article 310 of the Criminal Procedure Code of Bosnia and Herzegovina, in connection with Article 313 of the same Code, on 6 October 2016, rendered the following:

J U D G M E N T

The appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and Counsel for the accused Ramiz Avdović and Vintila Iulian Nicolae are hereby **dismissed as ill-founded** and the Judgment of the Court of Bosnia and Herzegovina, number S1 1 K 008241 12 Krl of 26 February 2016, is **upheld**.

¹Attending Counsel for the accused Ramiz Avdović were Mr. Mirza Kovač and Ms. Indira Karahodžić, while attending Counsel for the accused Vintila Iulian Nicolae was Mr. Vlado Adamović, while Mr. Emir Kapidžić did not attend the session.

Reasoning

1. The Judgment of the Court of Bosnia and Herzegovina (the Court of BiH), number S1 1 K 008241 12 Krl of 26 February 2016, found the accused Ramiz Avdović and Vintila Iulin Nicolae guilty of committing, by the acts described in the enacting clause of the convicting part of the contested Judgment, the criminal offenses as follows: the accused Ramiz Avdović under Section 1 of the enacting clause of the Judgment committed the criminal offense of War Crimes against Civilians (inhumane treatment by omission to act) under Article 142 of the Criminal Code of the Socialistic Federative Republic of Yugoslavia (CC SFRY), as read with Article 22 and Article 30(2) of the CC SFRY, and under Section 2 of the enacting clause of the Judgment, the criminal offense of War Crimes against Civilians (inhumane treatment) under Article 142 of the CC SFRY, and the accused Vintila Iulian Nicolae, under Sections 3 and 4 of the enacting clause of the Judgment, committed the criminal offense of War Crimes against Civilians (inhumane treatment) under Article 142 of the CC SFRY. Pursuant to the foregoing, applying Articles 33, 38, 41, 42 and 43 of the CC SFRY, the Trial Panel sentenced the accused Avdović to imprisonment for a term of 3 (three) years, towards which sentence the time the Accused spent in custody was credited pursuant to Article 50 of the CC SFRY, running from 20 October 2011 to 17 May 2012, and the accused Vintila Iulian Nicolae to imprisonment for a term of 2 (two) years.

2. Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH), the accused Ramiz Avdović and Vintila Iulian Nicolae were completely relieved of the obligation to reimburse the costs of the criminal proceedings, which were to be paid from within the budget appropriations. Pursuant to Article 198(2) of the CPC BiH, the injured parties were instructed to pursue their claims under property law.

3. Pursuant to Article 284(c) of the CPC BiH, the same Judgment acquitted the accused Ramiz Avdović and Vintila Iulian Nicolae of the charges that, by the acts described in the enacting clause of the acquitting part of the Judgment, they would have committed the following criminal offenses: the accused Ramiz Avdović, by the acts described in Sections 1 and 2 of the acquitting part of the Judgment, the criminal offense of War Crimes against Civilians under Article 142 of the CC SFRY, and under Sections 3, 4 and 5 the criminal offense of War Crimes against Civilians under Article 142 of the CC SFRY, as read with Article 22 of the same Code, and the accused Vintila Iulian Nicolae, under Section

6 of the acquitting part of the Judgment, the criminal offense of War Crimes against Civilians under Article 142 of the CC SFRY.

4. In relation to the acquittal, the accused were pursuant to Article 189(1) of the CPC BiH completely relieved of the obligation to reimburse the costs of the criminal proceedings, which were to be paid from within the budget appropriations of the Court. Pursuant to Article 198(3) of the CPC BiH, the injured parties were instructed that they may pursue their claims under property law in a civil action.

5. Pursuant to Article 283(b) of the CPC BiH, the Judgment dismissed the charges that, by the acts described in this part of the Judgment, the accused Ramiz Avdović would have committed, under Count 1 of the Indictment, the criminal offense of War Crimes against Civilians under Article 173(1)(e) of the Criminal Code of Bosnia and Herzegovina (CC BiH), by the acts described in Counts 2-c, 2h, 2-i, 2-l, 2-o, 2-r, the criminal offense of War Crimes against Civilians under Article 173(1)(c) of the same Code, and by the acts described in Counts 3-a, 3-č, 3-d and 3-đ the criminal offense of War Crimes against Civilians under Article 173(1)(f) of the CC BiH, all as read with Article 180(1) of the same Code.

6. In relation to the part of the Judgment dismissing the charges, the Accused were, pursuant to Article 189(1) of the CPC BiH, completely relieved of the obligation to reimburse the costs of the criminal proceedings, which will be paid from within the budget appropriations, and the injured parties were, pursuant to Article 198(3) of the CPC BiH, instructed to pursue their claims under property law in a civil action.

7. The referenced Judgment was timely appealed by the Prosecutor's Office of Bosnia and Herzegovina (the Prosecutor's Office of BiH/Prosecution), as well as Counsel for the accused Ramiz Avdović and Vintila Iulian Nicolae.

8. The Prosecutor's Office of BiH filed the appeal on the ground of sentencing and moved the Panel of the Appellate Division of the Court of BiH to grant the appeal by revising the contested Judgment in the convicting part of the enacting clause of the Judgment by imposing on the accused Ramiz Avdović aka "Daidža" and Vintila Iulian Nicolae for the committed criminal offense of War Crimes against Civilians under Article 142 of the CC SFRY, as read with Article 22 of the CC SFRY, a sentence of imprisonment without applying the sentence reduction provisions.

9. Counsel for the accused Ramiz Avdović, Mr. Mirza Kovač, filed the appeal on the grounds of essential violations of the criminal procedure provisions, violation of the criminal code, incorrectly and incompletely established state of facts and the sentencing. Counsel also proposed that the complete case record, along with the appeal, be transferred to the Appellate Division Panel of the Court of BiH for a decision. Counsel moved the Panel to grant the appeal, revoke the Trial Judgment in whole, or revise the Judgment it by acquitting the Accused of the criminal responsibility due to the lack of elements of the criminal offense on the part of the Accused.

10. Counsel for the accused Vintila Iulian Nicolae, Mr. Vlado Adamović and Mr. Emir Kapidžić, filed the appeal on the grounds of essential violation of the criminal procedure provisions, violation of the criminal code, the incorrectly established state of facts and the sentencing. Counsel moved the Court to review the contested Judgment and acquit the Accused of the charges, or to revoke the contested Judgment and hold a hearing for retrial and a new decision, or to revise the contested Judgment with regard to sentencing by imposing a more lenient sentence.

11. The Prosecutor's Office of BiH submitted its response to the two filed appeals and moved the Court to dismiss them as ill-founded.

12. Pursuant to Article 304 of the CPC BiH, on 6 October 2016, the Appellate Panel held a session which was attended by the Prosecutor of the Prosecutor's Office of BiH, Mr. Dževad Muratbegović, the accused Ramiz Avdović and his Attorneys, Mr. Mirza Kovač and Ms. Indira Karahodžić, as well as the accused Vintila Iulian Nicolae and his Counsel, Mr. Vlado Adamović.

13. During the open session, the Prosecutor briefly presented the substance of his appeal, and fully stood by the reasons and the proposals presented in the appeal.

14. The Defense teams for the Accused also presented the substance of their respective appeals, and stood by the reasons and the proposals presented therein, whilst the Accused completely stood by the submissions of their respective attorneys.

15. In commenting on the appeals filed by the adverse party, both the Prosecution and the Defense teams for the Accused proposed that the appeals be dismissed as ill-founded.

16. Pursuant to Article 306 of the CPC BiH, the Appellate Panel reviewed the contested

Judgment within the advanced appellate arguments and complaints, examined the case record and decided as stated in the enacting clause of the Judgment for the reasons that follow:

I. CONVICTING PART OF THE JUDGMENT²

A. APPELLATE GROUND CONCERNING ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. The appeals filed by Counsel for the Accused

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

The appeal filed by Counsel for the accused Vintila Iulian Nicolae

17. Counsel argued that the right to a defense was violated by the Court's refusal to accept Kerim Lučarević's testimony.

18. The Defense's theory along this line was based on the fact that the Court did not caution the witness of his obligation to testify, that is, it did not explain to the witness that he can refuse to testify only about certain questions if the responses to such questions will expose him to criminal prosecution, but that he cannot refuse giving evidence in advance on all or particular questions.

19. According to the Appellate Panel, the referenced complaint is ill-founded.

² Considering that no appeal was filed in relation to both the acquitting and the dismissing parts of the contested Judgment, the contested Judgment became final immediately after the expiry of the deadline set up for filing an appeal.

The Panel has also observed that the appeal filed by the Defense Attorneys for the accused Vintila Iulian Nicolae comprises two parts, namely the introductory general part and the concrete complaints elaborating on and specifying the appeal in compliance with the procedural law requirements. Along this line, the Appellate Panel will further bellow respond to the specified and concrete appellate complaints, where Counsel provided specified parts of the complaints referred to in the appeal introduction.

20. In reaching this conclusion, the Appellate Panel took into account the fact that the issue of this witness's examination was sufficiently discussed during the first instance proceedings, as indicated in paras. 99-103 of the contested Judgment. The raising of issue of the right to a defense at this point is ill-founded because the record of the hearing, at which this issue was discussed, clearly shows that, at the time, effective was the Indictment whose factual description also included a JCE (joint criminal enterprise), with regard to which the Defense emphasized its wish to examine the witness about the JCE nature. However, there is no need to do so any more, considering that the JCE was removed from the factual description of the subsequently submitted Amended Indictment.

(b) Essential violation of the criminal procedure provisions under Article 297(1)(h) of the CPC BiH – the Judgment did not resolve the subject of charges

21. The appeal stated that the charges against Vintila Iulian Nicolae under Count 2 of the Indictment of 4 January 2013 were not resolved, namely that he: *significantly contributed and facilitated the functioning of the system of abuse*, as well the charges against Ramiz Avdović under Count 2-d), 2-dž) and 2-đ) that, as the guard commander, he had control over the guards, including over Vintila Iulian Nicolae ... and did not prevent ... the commission of the acts mentioned in the referenced Counts.

22. The Appellate Panel has held that the presented complaints are ill-founded.

23. The Appellate Panel has analyzed Counsel's complaint and concluded that the Court fully resolved the subject of charges but that the Defense disregarded the fact that the Amended Indictment of 9 October 2015 altered the general underlying elements of the criminal offense by specifying them for each Accused individually prior to indicating the concrete acts underlying the crime committed by each Accused individually.

(c) Essential violation of the criminal procedure provisions under Article 297(1)(j) of the CPC BiH – if the Judgment exceeded the charges

The appeal filed by Counsel for the accused Vintila Iulian Nicolae

24. Counsel submitted that the charges were exceeded because the Court essentially altered the factual description in relation to Count 9 of the Indictment by convicting the accused Vintila Iulian Nicolae of giving a *strong blow in the injured party's left ribs area*

rather than of *strongly punching his liver area*.

25. The Appellate Panel has held that the referenced complaint is ill-founded.

26. The Appellate Panel has held that a judgment can only concern the person accused and the offense which is the subject of charges contained in a confirmed indictment, or indictment amended or supplemented at the main trial. It is clear from the foregoing that there must be an identity between the judgment and the indictment, as apparent from the fact that the Court decides only on the charges filed against the accused. Thus, the subjective identity means that the judgment concerns the accused person, while the objective identity is manifested through the compliance between the factual description of the indictment and the enacting clause of the judgment.

27. In the concrete case, however, the Court did not exceed the scope of the indictment considering that it found the accused persons, including Vintila Iulian Nicolae, guilty of the criminal offense whose required elements in whole were contained in the Indictment. In this regard, the Appellate Panel recalls that, when it comes to the identity between the judgment and the indictment, it means the identity of the acts charged against the Accused, that is, of the mere factual description rather than of individual factual specifications made by the Court, which are generally based on the tendered evidence. Therefore, the fact that the Trial Panel specified that the Accused's acts occurred in the way that he gave a *strong blow in the injured party's left ribs area*, rather than *in the liver area* does not mean that any violation was made, as the Defense persistent efforts presented.

28. In reaching such a conclusion, the Appellate Panel has also relied on the Trial Panel's proper position presented in para. 440 of the contested Judgment. The referenced paragraph stated that *the Panel made certain changes in the factual description of the enacting clause of the Judgment, taking into account that it was still the same offense, that is, the same event with all of its essential elements underlying the criminal offense, whereby the objective identity between the Indictment and the Judgment was preserved*. Therefore, by the referenced change, the Court did not, in any way, bring the Accused to a less favorable position, and did not act in favor of the Prosecution during the evidentiary procedure, considering that it was anyway proved beyond a reasonable doubt that the Accused's treatment of Željko Kljajić was criminal in nature. The Court rather specified the precise part of the injured party's body which was hit, and the referenced act still remains

within the domain of inhuman treatment, as indicated in the Indictment itself.

29. In view of the foregoing, the Appellate Panel considers as ill-founded the appellate theory of the Defense for the accused Vintile Iuliana Nicolae, pursuant to which the Trial Panel could only render a convicting decision to the detriment of the Accused by intervening in the factual description of the enacting clause of the Judgment and stating that the criminal offense at issue occurred in the manner that the Accused *punched* the injured party Kljajić *strongly in his left ribs*.

30. This Panel took into account the factual finding that the Trial Panel had no dilemmas with regard to the Accused's identification by witness Željko Kljajić, who had identified the Accused in the courtroom with no hesitation, and that the Defense did not contest this identification. Therefore, with such a state of facts, it is irrelevant to deal with a possible application of the principle of *in dubio pro reo* just in order to discuss the issue of precise area of the injured party's body which was hit and the resulting severe bodily pain.

31. Ultimately, the injured party emphasized that he had protected his right side of the body because of his impaired liver. This means that his liver had already been damaged from before, rather than by the referenced blows he sustained, and that, at the referenced moment, Vintila hit him in his left body side, wherefore the factual description had to be harmonized with the established state of facts (see para. 405 of the contested Judgment).

32. In view of the foregoing, the efforts of the appeal filed by the Defense of the accused Vintila Iuliana Nicolae to reduce the problem of causal nexus through the alleged inconsistencies in the factual parts of the judgment's identity and the indictment deficiencies, by the application of the principle of *in dubio pro reo*, proved to be quite unusable for dealing with this issue.

(d) Essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH – the enacting clause of the Judgment is incomprehensible and internally contradictory

The appeal filed by Counsel for the accused Ramiz Avdović

33. Counsel submitted that the Judgment is incomprehensible and internally contradictory because there is no piece of evidence in the case record proving the Accused's *de facto* function of a security commander. In developing his theory, Counsel

referred to the ICTY's case law.

34. The Appellate Panel has held that the advanced complaints are ill-founded.

35. This Panel has primarily held that Counsel's complaint formulation is too arbitrary and that therefore it does not meet the requirements prescribed for a court's decision review pursuant to the standards of review. However, the Appellate Panel will conclude that the *prima facie* analysis of the contested Judgment, as required pursuant to the judgment standards of review on the grounds of essential violations, does not indicate that the referenced essential violation indeed exists. From the aspect of formal proper nature of the contested Judgment, the Appellate Panel concluded that the Trial Panel presented sufficient and completely acceptable reasons for its views and the findings of fact based on the relevant evidence corroborating comprehensively the Trial Panel's position. To this effect, and relying on the fact that any further explanation would become the appellate ground of incorrectly or incompletely established state of facts, the Panel will at this point only note, contrary to the Defense's assertions that there is no piece of evidence proving the accused Avdović's *de facto* function, that paras. 242-287 of the contested Judgment sufficiently explained the reasons for its finding that the accused Avdović had indeed performed the *de facto* function of the security commander and provided its review of a number of the testimonies of the witnesses examined in this regard, as well as to the documentary evidence and the expert witnesses' testimonies.

B. APPELLATE GROUND OF INCORRECTLY AND INCOMPLETELY ESTABLISHED STATE OF FACTS

The appeal filed by Counsel for the accused Ramiz Avdović

(a) Section 1 of the enacting clause of the Judgment - the accused Avdović as a de facto Security Commander

36. With regard to Section 1 of the enacting clause of the Judgment, Counsel based its view of the incorrectly established state of facts exclusively on the alleged non-existence of the accused Avdović's *de facto* control over the guards. Counsel primarily submitted that the conclusion which can be drawn from the information offered in the lists and other documents concerning the unique organizational military police unit which was under

Besim Muderizović's command is that there was no internal organization, namely that there was no lower-level organization and that it is impossible to explain the actions taken by Besim Muderizović's personnel and disregard Besim Muderizović himself.

37. In support of his foregoing theory, that the accused did not have *de facto* authority, Counsel referred to the testimonies of witnesses Dževad Topić, Tihomir Ivković, Senad Rožajac, and Zlatan Crnković. Counsel also added that there was neither any chain of command nor command posts, except for the warden, his deputy and the guards. Counsel ultimately concluded that the Court did not properly establish if Ramiz Avdović had any command responsibility and role in the detention facility functioning, namely that the Prosecution did not prove that the prison guards were under Avdović's effective control.

38. The Defense's assertion, that there is no command responsibility on the part of the accused Avdović, is also based on the testimony of the Defense's expert witness who provided his military analysis and opinion. The expert witness concluded that, pursuant to the unique principle of command, the holder of the command responsibility in the military prison within the Viktor Bubanj barracks was only Besim Muderizović and no other person subordinated to him in the referenced prison.

39. The Appellate Panel has concluded that the foregoing complaints are ill-founded.

40. The Appellate Panel has primarily noted that the key fact which had to be proved is that the Accused had effective control, regardless of whether his powers were *de iure* or *de facto*. The ICTY has defined such effective control as "*the material ability to prevent and punish the commission of these offenses*"³. According to this Panel, this control was proved in the contested Judgment beyond a reasonable doubt. The accused Avdović's Defense also tried to contest the referenced objection concerning effective control, that is, the function of the *de facto* security commander, through the complaint concerning the essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH. Along this line, the Defense claimed that the Judgment is contradictory and that there is no evidence proving the referenced fact. The Appellate Panel has already responded to the foregoing by also referring to the proper analysis presented in paras. 242-287 of the contested Judgment. Accordingly, the Appellate Panel has concluded that the Accused's

³ Appeals Judgment in *Čelebići*, para. 197.

responsibility was proved based on the properly and completely established state of facts concerning his capacity.

41. Having concluded, contrary to the Defense's appellate complaints, that the state of facts in this regard was established properly and completely, the Appellate Panel noted that the state of facts transpires from the witnesses' testimonies comprehensively presented in the contested Judgment's part concerning the conclusions about the accused Avdović⁴. The Appellate Panel has held that it is irrelevant to repeat the analysis of the above mentioned testimonies considering that the Defense's appeal did not question it. The appeal rather tried to contest, by highlighting the testimonies of a couple of witnesses who allegedly had not seen the accused Avdović performing the function of guard commander, the statements of many witnesses, who had from their own perception of the events identified the Accused as the person who had indeed held a certain function.

42. In reviewing the contested Judgment within the advanced complaint, the Appellate Panel particularly noticed witness Radivoje Škobo's testimony. This witness stated that Ramiz had asked for his name and how Boško's was related to him. When the witness responded to him that Boško is his brother, the Accused told the corporal to *return him back, that he would not go to work*, which points to an undoubtful conclusion that the Accused nevertheless had certain power, which can be also based on the commentary of indirect evidence proving the effective control in the *Čelebići* case, which reads as follows: "*Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which (the accused) exercised, and thus of his authority*"⁵.

43. Ultimately, it is impossible to develop the Defense's theory on the unique organizational military police unit under Besim Muderizović's command by emphasizing that there was no lower level of organization and no chain of command, by which the Defense tries to avoid the Accused's responsibility as a *lower-rank superior*, since, in doing so, the Defense disregards the key fact, which is that the exactly Besim Muderizović had given to the Accused the *de facto* title and position which enabled him to give orders to the guards. This is exactly the basis for the conclusion that the Accused indeed had effective control, which existed regardless of the (non)-existent organizational structure

⁴Among others: Zlatan Crnković, Mustafa Kečo, Dragomir Pejović, Fadil Jahić, Ekrem Krkalić, Maleša Bogdanović, Tihomir Ivković, Ljubomir Drakul, Strahinja Živak and Ignjat Elčić.

⁵ Appeals Judgment in *Čelebići*, para. 213.

which did or did not include a lower-level organization. The key fact is the existence of the Accused's effective control, and its existence is independent from any organizational structure.

(a) Section 2 of the enacting clause of the Judgment - inhuman treatment accorded to Ljubomir Drakul

44. Since Ljubomir Drakul's testimony was neither concrete nor resolute, the Defense submitted that the Trial Judgment arbitrarily accepted his testimony with no concretization of the Accused's acts, and that it is very certain that this witness described the injuries he sustained on the ŽIŠ premises as if he had sustained them in the Viktor Bubanj barracks.

45. According to the Defense's appeal, apart from the fabricated treatment of witness Ljubomir Drakul by the accused Avdović and the witness's unreliable statement, there is no medical documentation or any other piece of evidence of subjective nature. Counsel also submitted that the Prosecution witnesses' statements, that the Accused had not taken the prisoners to a toilette or to have a bath, are contrary to witness Ljubomir Drakul's statement that the accused Avdović had beaten him with a stick while taking him to the toilette or to have a bath.

46. The Appellate Panel has held that the advanced complaints are ill-founded.

47. The Appellate Panel concluded, on the basis of para. 395 of the contested Judgment, that witness Ljubomir Drakul's testimony is unquestionable. This paragraph shows that the Trial Panel also properly found that the witness had no intention of charging the Accused with the acts he did not commit, considering that the witness stated that *'the others had equally participated in that, and that he cannot say that, at the time, he (the accused) acted against him as the biggest bogie.'*

48. In addition, contrary to the Defense's oversights, the Appellate Panel found the basis for the properly established state of facts also in the Trial Panel's proper position that, even though the Trial Panel acquitted the accused Avdović of the charges for the acts concerning the treatment of the injured parties Željko Kljajić and Dragomir Pejović, these witnesses' statements should nevertheless be taken into account in relation to the fact that the Accused did not hesitate to use physical force against the prisoners. This is so because the Accused was not acquitted of the charges related to the foregoing acts because they were not proved, but rather because these acts did not reach the extent

necessary for inhumane treatment. However, this Panel has also held that nevertheless the referenced acts point to the overall situation and the Accused's conduct.

49. That the identification of the Accused by witness-injured party Ljubomir Drakul is unquestionable is also confirmed by the fact that the witness remembered the Accused because he had addressed him by " ... ", and also added that "my people were killed in ... , those were most likely yours".

The appeal filed by Counsel for the accused Vintila Iulian Nicolae

(a) Section 3 of the enacting clause of the Judgment – inhuman treatment accorded to Željko Kljajić

50. By submitting that there is grounded suspicion that the injured party Kljajić mistakenly identified the Accused, Counsel mentioned a number of the Prosecution witnesses whose testimonies contradict witness Kljajić's testimony. In addition, Counsel highlighted that most witnesses remembered the Accused's name because it is characteristic and distinct from all other names, and that, logically, the injured party Kljajić had also remembered his name. The Defense ultimately concluded that the injured party Kljajić could have obviously mistaken the accused Vintila for Kemo Dautović or any other guard.

51. According to the Appellate Panel, the foregoing complaint is ill-founded.

52. The Panel has along this line primarily observed that, also during the trial proceedings, the Defense's theory was developed on the basis of a potential mistaken identity situation, in relation to which the Trial Panel provided a comprehensive reasoning, which is also upheld by this Panel.

53. Even though the state of facts established for this Count of the Indictment is based exclusively on the testimony of witness-injured party Kljajić, the Appellate Panel has concluded that it did not bring into doubt any fact which could have affected the rendering of a different decision considering that the referenced witness had no dilemmas whatsoever concerning the Accused's identification, and obviously no intent of exaggerating the experienced incident considering that he realistically and objectively spoke about the other incidents too, including the treatment accorded to Velibor Lalović and Kosta.

54. As also found by the Trial Panel, particularly indicative assertion confirming

that this witness is still affected by the survived incidents is the one when the witness stated that he *has consequences, a painful experience, and what hurts him most is that he has experienced something that he should not have experienced, and that he would now invite Vintila to have a drink with him and to ask him about the reasons for which he (Vintilla) had to act as he had acted.*

55. Also, in relation to the humiliating treatment accorded to the injured party Kljajić, when he had to clean the toilette with his bare hands, and in relation to the Defense's assertion that this was prisoners' ordinary duty, the Appellate Panel has upheld the Trial Panel's position, as well as the witness's statement, that *it might have been the system, but not the manner.*

(b) Section 4 of the enacting clause of the Judgment – inhuman treatment accorded to Slobodan Gutalj

56. By submitting that the Trial Panel established a completely erroneous description of the manner of commission of the acts against the injured party Slobodan Gutalj, Counsel also added that it can be objectively established, from the Defense's Exhibit O2-53, that the cell's door was constructed in such a way that Vintila Iulian could not at all physically grab its iron bars with his hands, lift his body up from the floor and thus kick the injured party-witness. Being of the opinion that Slobodan Gutalj's testimony is contradictory and unreliable, the Defense also submitted that the injured party erred in the Accused's identification, as well as that it is obvious, considering the witnesses' testimonies mentioned in the appeal, that the injured party Gutalj could confuse the Accused for Fahro, Kemo or any other guard.

57. The Appellate Panel has held that the advanced complaints are ill-founded.

58. Even though the Trial Judgment also noted that witness Gutalj was to a certain extent confused in responding to the questions posed, the Appellate Panel has upheld the Trial Panel's position that the witness's confusion is primarily the result of his way of expression and reproduction, or the presentation of his memories of the referenced incident still traumatic for him, rather than of his wish and intent to charge the Accused with something which he did not do.

59. To this effect, also indicative for this Panel is that the witness primarily identified the Accused as a (prison kitchen) chef, whose function the Accused had undoubtedly

performed prior to being transferred to the guard service, as the tendered evidence showed. This particular fact was significant for the witness in distinguishing the Accused from the other guards. Therefore, the Accused's identification by the witness as the person who actually undertook the charged acts against him is undoubtful.

60. Despite the Defense's efforts to exculpate the Accused from the responsibility for the acts taken against the injured party Gutalj through the alleged objective physical impossibility to do so in the described manner, the Appellate Panel concluded that the referenced incident was not brought into question by the foregoing, considering that the Panel credited the witness-injured party. In this regard, the foregoing was obviously an irrelevant fact to the Trial Panel too, as it was also mentioned during the proceedings before the Trial Panel; the Trial Panel did not comment on it in the contested Judgment, and it was not obligated to do so considering that it is not obligated to present reasons for all facts, but only for the facts of decisive importance for rendering a final decision.

61. Ultimately, it is important to emphasize that, in determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at the 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.

C. APPELLATE GROUND OF CRIMINAL CODE VIOLATION

The appeal filed by Counsel for the accused Ramiz Avdović

62. The Appellate has observed that Counsel's appeal did not elaborate on the substance of this appellate ground, but rather only stated that the Trial Panel: "... incorrectly and incompletely established the state of facts and *misapplied the substantive law ...*".

63. Considering that there are no concrete objections on this ground, the Appellate Panel will not deal with it in more detail. It will rather just conclude that the referenced objections are ill-founded, namely that the Trial Panel properly applied the substantive law to the properly and correctly established state of facts.

(a) Essential elements of the criminal offense of War Crimes against Civilians

The appeal filed by Counsel for the accused Vintila Iulian Nicolae

64. According to the Defense, the Court did not reliably determine the parties to the conflict, the parties between which the conflict was going on and whether the conflict was international or internal in nature.

65. Counsel also submitted that the Court erroneously adjudicated that there is a nexus between the perpetrator's acts and the war or armed conflict. Along this line, the Defense stated that it cannot be concluded, based on the evidence tendered at the main trial, that the acts of commission of which Vintila was convicted are closely connected with the armed conflict, and that there is neither subjective capacity nor awareness so as to qualify the Accused's acts as the criminal offense of War Crimes against Civilians.

66. Counsel for the accused Vintila Iulian Nicolae also sees a violation of the criminal code in the alleged fact that the Court drew an erroneous conclusion about the victims-injured parties' status and accordingly rendered an unreasonable decision. The appeal stated that most injured parties were prisoners against whom regular criminal proceedings had been conducted. Counsel also stated that there is no piece of evidence proving the accused Vintila's intent or awareness of any connection between his acts and the protected persons' status and the state of war.

67. Further in his appellate complaints under the referenced ground, Counsel submitted that the Court did not reliably establish the existence of torture in relation to the original Indictment or the existence of inhuman treatment regarding the conclusion that the accused Vintila gave a blow in the injured party Kljaić's ribs. In this context, the appeal highlighted that there is no objective criterion pursuant to which the referenced blow could be singled out and treated as an act of inhuman treatment. Pursuant to the same principle, and only in relation to the existence of inhuman treatment, Counsel also objected to the conclusion that the accused Vintila had ordered the injured party Kljaić to collect human feces from the toilet with his bare hands.

68. The Defense ultimately submitted that the fact that the circumstances in which the injured party Slobodan Gutalj had been are serious in and out of themselves, but that there is no evidence proving that the Accused's acts had caused any serious mental or

bodily pain, proving that they were of such intensity that they reached the extent required to qualify them as inhuman treatment of prisoners.

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

70. The Panel has primarily held that, with regard to the proving of the essential elements of the criminal offense of War Crimes against Civilians under Article 142 CC SFRY, the accused Vintila's Defense disregards the fact that the issue of the parties to the conflict and the issue of the conflict character are not the elements of this offense in which case its non-establishment could lead to the non-existence of the offense. The Appellate Panel has along this line pointed to para. 145 of the contested Judgment, which, *inter alia*, properly found that "*clearly, the defining of the nature or character of the armed conflict is not set up as a requirement for the existence of the referenced criminal offense, because the issue of character determination or non-international character of the conflict is not a substantive element of any criminal offense referred to in Article 142 CC SFRY*". Further in para. 146, the Judgment stated that "*in the concrete case it is sufficient to establish the existence of awareness of the conflict on the part of the accused – without the required knowledge about its character*".

71. Contrary to the efforts of the Accused's Counsel to avoid/disregard the referenced charges through the alleged lack of nexus between the committed offense and the armed conflict, the Appellate Panel has concluded that, pursuant to certain factors relative to the finding whether an offense was connected to a sufficient extent with the armed conflict, it was properly found that the correlation of the Accused's position-guard in the military detention unit within the District Military Court in Sarajevo and the fact that the victims were not combatants and their membership of the opposing party, showed that the Accused's acts were directly connected with the armed conflict existence. The examined witnesses and the documentary evidence support such accused's position. Also, the fact, that the accused Vintila knew that those persons were civilians and ethnic ..., was established on the basis of both witness Zlatan Crnković's testimony and the fact that the protected witness B was also deployed to work in the kitchen along with the Accused. It is clear on the basis of the foregoing that the Accused could not but be aware that the prisoners were ethnic Therefore, considering the Accused's unquestionable capacity and identity, this Panel has concluded that the requirement of *nexus* between the act and commission of the criminal offense was also satisfied, which the Defense unsuccessfully tried to contest. It is clear that the Accused, as a member of the TO RBiH and

subsequently of the military police of the Armed Forces of the R BiH, indeed committed the charged acts, from which the existence of causal *nexus* between the armed conflict and the commission of crime ensues. This *nexus* is at least certainly apparent from the fact that the armed conflict to a significant extent affected the Accused's ability to commit crime, that is, his decision to commit it.

72. The Appellate Panel has primarily noted that Counsel's objection regarding the status of civilian persons is general, too arbitrary. Counsel does not refer to concrete persons in relation to whom he presents the reasons for which he possibly considered them non-civilians, as required for the underlying element of this criminal offense. Counsel should have therefore provided adequate arguments for each of these persons. Counsel rather generally indicated that the referenced persons were detained on a grounded suspicion that they had committed a crime. On the other hand, paras. 154-197 of the contested Judgment provided a comprehensive review of the witnesses' names and their testimonies, from which the civilian status of the referenced persons ensues beyond a doubt.

73. Therefore, pursuant to such appellate complaint, the Panel will generally conclude that the status of civilian persons was not brought into question and that, regardless of the possible reason for which they were detained, the key fact is that at the moment when the Accused treated them in the referenced manner, these persons were disarmed, took no part in any combat operation, wherefore they were undoubtedly civilians for the Accused, as also properly found in para. 197 of the contested Judgment. Considering the foregoing fact, the witnesses-injured parties enjoyed protection under Article 3 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949⁶ already during their first contact with the Accused. This is a decisive fact of which the Accused was aware and the contested Judgment provided valid reasons in relation to it. Article 3 of the Convention strictly defines the category of protected persons. Pursuant to the referenced Article, protected persons are persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed '*hors de combat*' by sickness, wounds, detention, or any other cause. Therefore, not only that one article protects several categories of persons, but these persons also

⁶Common Article 3 of the Geneva Conventions, the so called Convention in a nut-shell; this article is common to all the four 1949 Geneva Conventions.

have an equal status.⁷ It is obvious in the concrete case that the persons in question were the category of persons "deprived of liberty". The Accused had reason to know this considering the circumstances in whole, and he also had reason to know that they enjoyed the appropriate protection regardless of the reasons for which they were deprived of liberty, as also properly found in the Trial Judgment.⁸

74. Despite Counsel's efforts to minimize the criminalization of the accused Vintila's acts by defending his theory with the arguments by which he attempted to present that they do not satisfy the elements of inhuman treatment against both injured parties, Željko Kljajić and Slobodan Gutalj, this Panel has no doubts into the properly established fact that the Accused indeed undertook the acts against the referenced injured parties which, in their entirety, certainly amount to inhuman treatment. Thus, with regard to the injured party Željko Kljajić, the Appellate Panel concluded, as well as the Trial Panel, that the Accused's acts undoubtedly inflicted on the injured party severe bodily pain and suffering, including his humiliation. Thus, contrary to the Defense's efforts to diminish the Accused's acts by presenting that they could not have amounted to torture, considering that they left no consequences, as apparent from the fact that the injured party was able bodied after being released from the prison, the Appellate Panel has noted that the position taken by the ICTY in its case law is 'that for the existence of inhuman treatment, the suffering inflicted on the victim by such act need not be permanent, it is rather sufficient that they are realistic and serious'.

75. With regard to reaching the threshold of inhumane treatment against Slobodan Gutalj, the Appellate Panel has concluded, contrary to the appellate allegations attempting to diminish the severity of the acts taken against the injured party by indicating that *prior to those two-three blows in his back* he had experienced a much more serious torture, that exactly such injured party's condition, in fact, even contributed to the fact that the

⁷See *Prosecutor v. Duško Tadić*, case no. IT-94-1-T, Opinion and Judgment, 7 May 1997, para. 616. ("Even if they were members of the armed forces ... or otherwise engaging in hostile acts prior to capture, such persons would be considered 'members of armed forces' who are 'placed *hors de combat*' by detention." Consequently, these persons enjoy the protection of those rules of customary international humanitarian law applicable to armed conflicts, as contained in Article 3 of the Statute.

⁸ See *Prosecutor v. Pavle Strugar*, case no. IT-01-42-A, Appeals Chamber Judgment, 17 July 2008, foot note 460 (... if the victim is found to be detained by an adverse party at the time of the alleged offense against him, his status as either a civilian or combatant would no longer be relevant, because a detained person cannot, by definition, directly participate in hostilities. Accordingly, an attack against such person would automatically be unlawful.")

referenced acts directed against him satisfied the element of inhuman treatment. The Panel has supported the foregoing view with the ECtHR's case law. Starting from the prohibition against inhuman treatment under Article 3 of the ECHR, the European Court has taken the position that *the abuse must reach the minimum level of gravity, but that its evaluation is relative, in nature, and depends on the circumstances pertaining to the case, such as the length of such treatment, its physical and mental consequences, and in certain cases, the victim's gender, age and health condition*. Therefore, the overall context had to be viewed in the concrete case, and the condition of the injured party Gutalj evaluated, as the Trial Panel properly did.

D. APPELLATE GROUND OF SENTENCING

1. The appeal filed by the Prosecutor's Office of BiH

76. The Prosecution argued that it was not justified to apply the provisions on the reduction of punishment under Article 42 of the CC SFRY, considering that no particularly extenuating circumstances existed in relation to the accused Ramiz Avdović aka Daidža and Vintila Iulianu Nicolae which would justify the imposition of a sentence below the statutory minimum.

77. The Prosecution also argued that the fact that the Accused had no prior convictions, their correct conduct before the Court, and the period of time elapsed since the crime commission are not particularly extenuating circumstances justifying the application of the punishment reduction provisions.

2. The appeal filed by Counsel for the accused Ramiz Avdović

78. Counsel submitted that, considering the erroneous omissions, namely the improperly established state of facts and the resulting sanction imposed, also questionable is the degree of criminal responsibility, which, as a subjective element on the part of the perpetrator at the moment of omission, according to the contested Judgment, the perpetrator of the crime had no intent to commit.

3. The appeal filed by Counsel for the accused Vintila Iulian Nicolae

79. Apart from submitting that the imposed sentence is unlawful, Counsel considers that

it is still too stringent, referring to the circumstances of the accused's life after the alleged act commission, and that it should have been drastically reduced. Counsel ultimately argued that a sentence not exceeding one year in prison should have been imposed in this case.

4. Conclusion of the Appellate Panel

80. The Appellate Panel has held that the appellate complaints advanced in the three foregoing appeals are ill-founded.

81. In considering the sentencing decision contested by the appellate complaints, the Appellate Panel has concluded, in relation to the circumstances affecting the type and length of sentence (aggravating and extenuating circumstances), that the Trial Panel had evaluated and explained the degree of guilt of each Accused being mindful of the magnitude of sentence prescribed for the crime at issue, as well as of the gravity of the committed offenses. The Appellate Panel has held that, considering the nature of the acts taken and their consequences, the offenses do not fall in the category of the gravest criminal offenses of the kind.

82. In view of the foregoing, the Panel has concluded, contrary to the Prosecution's appeal insisting on the imposition of a more stringent sentence and the Defense's insisting on the imposition of a less stringent sentence or complete acquittal of criminal responsibility, that the Trial Panel issued an adequate sentencing decision, and properly evaluated the aggravating and the extenuating circumstances, the participation and role of the Accused in the crime commission, that the referenced sentence is proportionate with the gravity of the criminal offense, and that it will achieve the purpose of punishment laid down in Article 33 of the CC SFRY.

83. The Trial Panel evaluated all the extenuating circumstances related to the two Accused and found no aggravating circumstances. Thus, the Trial Panel properly found that, in their entirety, these circumstances constituted particularly extenuating circumstances and imposed on the accused Ramiz Avdović a sentence of imprisonment for a term of 3 (three) years, and on the accused Vintila Iulian Nicolae the sentence of imprisonment for a term of 2 (two) years, below the statutory prescribed minimum, proportionate with the gravity of the offense and the degree of guilt, by which the purpose of punishment, both special and general deterrence, will certainly be achieved.

84. Ultimately, in relation to the degree of criminal activity directly affecting the sentence, in view of the complaint of Counsel for the accused Vintila, the Appellate Panel has held that the imposed sentence is adequate, even considering that the charged act against Slobodan Gotalj was repeated only two-three times, as a result of which he sustained no damages.

85. In view of the foregoing, and pursuant to Article 310(1) as read with Article 313 of the CPC BiH, it was decided as stated in the enacting clause herein.

RECORD-TAKER

Ena Granić Čizmo

PANEL PRESIDENT

JUDGE

Dr. Dragomir Vukoje

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