

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine Суд Босна и Херцеговина

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Case No. S1 1 K 016600 16 Krž 3

Judgment issued on: 28 April 2016

Written copy of the Judgment sent out on: 27 June 2016

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Before the Appellate Panel composed of Judges:

Miloš Babić, Presiding

Mirko Božović, member

Tihomir Lukes, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the accused GLIGOR BEGOVIĆ

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## SECOND INSTANCE JUDGMENT

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

Mr. Miroslav Janjić

**Counsel for the Accused:**

Mr. Aleksandar Majkalović

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**No. S1 1 K 016600 16 Krž 3**  
**Sarajevo, 28 April 2016**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Appellate Division Panel, composed of Judge Dr. Miloš Babić, as the Panel Presiding, and Mirko Božović and Tihomir Lukes, as members of the Panel, with the participation of legal advisor-assistant Nedim Muminović, as the record-taker, in the criminal matter concerning the accused Gligor Begović charged with the criminal offense of War Crimes against Prisoners of War in violation of Article 144 of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY) and the criminal offense of War Crimes against the Civilian Population 142 of the CC SFRY, all as read with Article 22 of the same Code, upon the appeal filed by Mr. Aleksandar Majkalović, Defense Attorney for the Accused Gligor Begović, of 11 February 2016, from the Judgment of the Court of BiH, No. S1 1 K 016600 14 Kri of 11 December 2015, at the session held on 28 April 2016, in the presence of the accused Gligor Begović, his Defense Attorney Aleksandar Majkalović and the Prosecutor of the Prosecutor's Office of BiH, Mr. Vladimir Simović (replacing Miroslav Janjić), on 28 April 2016 issued the following:

**J U D G M E N T**

**Granting, in prat, the appeal filed by Defense Attorney** for the accused Gligor Begović, Mr. Aleksandar Majkalović, of 11 February 2016, and **r e v i s i n g** the Trial Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 016600 14 Kri of 11 December 2015:

**and sentencing** the accused Gligor Begović **to imprisonment for a term of 10 (ten) years** for the criminal offense of War Crimes against the Civilian Population under Article 142(1) of the CC SFRY, as read with Article 22 of the same Code, of which the Trial Judgment found him guilty on the basis of the same legal regulation and the application of Articles 33, 34, 38 and 41 of the CC SFRY.

The Trial Judgment shall remain unrevised in its remaining part.

## Reasoning

### I. PROCEDURAL HISTORY

1. The Judgment of the Court of BiH, No. S1 1 K 016600 14 Kri of 11 December 2015, found the accused Gligor Begović guilty of committing, by the acts described in the contested Judgment enactment clause (Counts 1, 2, 3, 4, 5, 6, 8, 10, 12, 13, 15, 16, 18, 19, 21 and 23 of the Amended Indictment), the criminal offense of Crimes against the Civilian Population under Article 142(1) of the Criminal Code of the Socialist Federative Republic of Yugoslavia (CC SFRY), which was adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the CC SFRY, as read with Article 22 of the same Code. Therefore, on the basis of the same regulation and the application of Articles 33, 34, 38 and 41 of the CC SFRY, the Trial Panel sentenced the accused to imprisonment for a term of thirteen (13) years.
2. Pursuant to Article 188(4) of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of both the criminal proceedings and the scheduled amount, which shall be paid from within the Court's budget appropriations.
3. Pursuant to Article 198(2) and (3) of the CPC BiH, the injured parties were instructed to file claims under property law in a civil action.
4. Pursuant to Article 284(1)(c) of the CPC BiH, the accused Gligor Begović is acquitted of the charges described in the contested Judgment enactment clause, that by the acts described in Counts 7, 9, 11, 14 and 17 of the Amended Indictment, he would have committed the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC SFRY, and that by the acts described under Counts 20 and 22 of the Amended Indictment, he would have committed the criminal offense of War Crimes against the Civilian Population under Articles 142 of the CC SFRY.
5. Pursuant to Article 189(1) of the CPC BiH, the accused shall be relieved of the obligation to reimburse both the costs of criminal proceedings and the scheduled

amount, which shall be, in whole, paid from within the Court's budget appropriations.

6. Pursuant to Article 198(3) of the CPC BiH, the injured parties were instructed to pursue their claims under property law in a civil action.
7. Pursuant to Article 283(b) of the CPC BiH, also dismissed were the charges against the accused Gligor Begović described in the operative part of the dismissing part of the contested Judgment (Counts 1, 1a and 23 of the original Indictment) that by the acts described in Counts 1 and 1a) of the Indictment he would have committed the criminal offense of War Crimes against Prisoners of War under Article 144 of the CC SFRY, and by the acts described under Count 23, the criminal offense of War Crimes against the Civilians under Article 142 of the CC SFRY.
8. Pursuant to Article 189(1) of the CPC BiH, the accused shall be relieved of the obligation to reimburse the costs of criminal proceedings, which will be paid from within the Court's budget appropriations.
9. Pursuant to Article 198(3) of the CPC BiH, all injured parties were instructed to pursue their claims under property law in a civil action.

## **II – DEFENSE'S APPEAL**

10. The Judgment was timely appealed by Mr. Aleksandar Majkalović, Defense Attorney for the accused Gligor Begović, 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, with a motion that the Appellate Panel of the Court of BiH grant the appeal, revoke the contested Judgment in its convicting part for the existence of absolutely essential violations of the criminal procedure, uphold the Judgment in its acquitting part, and order a hearing before the Appellate Panel of the Court of BiH, or that the Appellate Panel grant the Defense's arguments concerning the misapplication of substantive law to the correctly established state of facts, and revise the contested Judgment by acquitting the accused Begović of the charges.

11. The Prosecutor's Office of BiH submitted no response to the appeal within the statutory deadline.

## **VII – THE PANEL'S SESSION**

12. On 28 April 2016, the Appellate Division Panel held a public session, pursuant to Article 304 of the CPC BiH, at which the Accused's Counsel orally presented his appeal and submitted that he fully stood by his appellate arguments. The Accused also supported Counsel's arguments. The Prosecution did not submit any written response to the appeal, but rather the Prosecutor orally presented his response and moved the Court to dismiss the appeal as ill-founded in whole.

## **VIII – GENERAL CONSIDERATIONS**

13. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal.
14. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.
15. Mere arbitrary indication of the appellate grounds and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers is not a valid ground for reviewing the Trial Judgment. Therefore, the Appellate Panel will *prima facie* dismiss as ill-founded the unreasoned and unclear appellate complaints.

## **IX. APPEAL FILED BY COUNSEL FOR THE ACCUSED**

### **1. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(1) OF THE CPC BiH**

#### **(i) General considerations**

16. A Judgment may, pursuant to Article 297 of the CPC BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure, which is always established in the cases specified in Paragraph 1 of the referenced Article.
17. A substantial violation of provisions of criminal procedure is also established when the Trial Panel during the trial or in reaching the judgment failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of lawful and correct judgment.
18. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the Appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. That is, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.
19. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the judgment. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning

the decisive facts.<sup>1</sup> The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the judgment formally contains all necessary elements for a well-reasoned and comprehensible judgment.

20. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Judgment. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Judgment.
21. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Judgment where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Judgment and should raise alleged errors of fact under Article 299.

(ii) Defense's appellate grievances

22. Counsel for the accused Gligor Begović submitted in his appeal that the Trial Panel erroneously indicated, in the contested Judgment, the case number (S1 1K 009588 12 Kri), which is related to the case conducted against the accused Zemir Kovačević, wherefore the Panel should have rendered an original judgment rather than just minimally edit a judgment rendered in some other case. Counsel also added that the drafting of the appeal was harder because the Judgment does not contain clearly indicated paragraphs.
23. Counsel's appeal indicated that, in the contested Judgment enactment clause, the Trial Panel presented the facts which are substantially distinct from the facts provided in the amended Indictment, namely that the Court amended the Indictment by indicating other facts. In this context, it was stated that the Prosecution of BiH did not

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<sup>1</sup> See, e.g., *Nenad Tanasković*, X-KRŽ-06/165 (Ct. of BiH), Appeal Judgment, 26 March 2008, p. 7-9. All references to page numbers in the Decisions of the Court of BiH's relate to English translations thereof.

rectify the deficient Indictment, but rather the Trial Panel, and thereby made an absolutely substantial violation of the criminal procedure provisions under Article 297(1)(j) of the CPC BiH and Article 297(2) of the CPC BiH, as read with Article 280(1) of the CPC BiH.

24. The appeal further indicated that the Trial Panel misapplied Article 4 of the Law on Transfer of Cases and thereby made an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH for the conclusion, drawn based on the established facts that, there was indeed an armed conflict in the Municipality of Bijeljina. Also, the Defense submitted that the same fact cannot be accepted as established because it is a paragraph from among the legal conclusions, wherefore the burden of proof was transferred to the defense.
25. The Defense indicated in its appeal that the reasoning of the First-instance Judgment contradicts the Judgment enactment clause and that therefore a substantial violation of the criminal procedure provisions was made. The defense indicated that the Judgment reasoning must be clear, understandable and complete, and that the accused served a compulsory military service at the critical time, which is not an ordinary membership in the VRS. In such a way, the Defense contested that the accused was a member of any military formation, while the Trial Panel made no distinction between a conscript serving a compulsory military service and a soldier, and does not explain these circumstances in any way whatsoever, which is an eliminatory element of the criminal offense charged against the accused.
26. The appeal further indicated that the Prosecution witnesses were contaminated because of the contents of the articles published at the BIRN portal and Radio Justice, as well as because of the conversations among the witnesses.
27. The appeal contested the lawfulness of the accused's identification by the witnesses, which was not done in compliance with Article 85(3) and (4) of the CPC BiH. According to the defense, the law provides for a mandatory method of presentation of several persons to the witness, along with the wanted person. In this context, the defense submitted that the witnesses' information about the accused were indirect and arbitrary.
28. The defense further contested the status of the injured persons by subsuming it under an essential violation of the criminal procedure provisions under Article



297(1)(k) of the CPC BiH. According to the defense, this is so because the finding that the injured parties were civilians is contrary to the Prosecution's and the Defense's documentary evidence. In addition, the defense submitted that the Trial Panel made an omission with regard to the decision on the injured party's status by referring to the testimony of the witnesses with no concrete educational background enabling them to make any distinctions between prisoners of war and civilians. Also, the appeal stated that certain witnesses mentioned a group of prisoners named "specials" which comprised Fadil Alihodžić, Alija Gušalić, and N.M., while some of them mentioned nicknames Beret 1, Beret 2, etc.; that the Prosecution did not prove the referenced nicknames; and that the Panel did not explain these nicknames even though they sounded as an association to a military formation membership. The appeal further referred to the statements of the examined witnesses, whose status the Prosecution did not even prove, as well as to the Defense's documentary evidence (Exhibit O-22 and Exhibit O-23), showing that the Batković detention center was, in fact, a camp for prisoners of war.

29. The Defense submitted in the appeal that the fact that a state of war was declared in the territory of BiH does not mean that an armed conflict also existed in the Bijeljina territory. The Defense further stated that, at the time when the state of imminent war danger was declared, the Batković camp was located in the Republika Srpska territory, which neither accepted nor recognized the decisions of the R BiH Presidency. In addition, the defense submitted that it is necessary to prove the existence of an armed conflict for any territory as a scene where an event took place. The defense therefore believes that the Court omitted to correlate each piece of evidence, or to correlate the Indictment allegations with the elements of crimes, as a result of which the right to obtain a reasoned judgment and the right to a fair trial were violated.
30. Counsel submitted that Sections 10, 11, 15, 16, 18, 19, 21 and 23 of the Judgment of conviction are not corroborated with the other witnesses' statements, but are based on the statements of a single witness only, whereby an essential violation of the criminal procedure provisions under Article 297(1)(k) as read with Article 290(7) of the CPC BiH was made.

(iii) Conclusions of the Appellate Panel

31. The Panel concludes that the foregoing appellate grievances are ill-founded.
32. With regard to the complaint that the Judgment indicated a wrong case number, despite the established fact that the pages of the contested Judgment (lower left corner) indeed contain the incorrect case number, the Panel concludes that this is not a substantial violation of the criminal procedure provisions because it was just a technical error which neither affected, in any way whatsoever, the proper nature of the proceedings nor aggravated the accused's procedural position, nor made the Judgment incomprehensible in terms of examination of its lawful and proper nature. In addition, there was no adjustment of the judgment rendered in the other case because the cases at issue are completely different, and there is no connection whatsoever between them, either in terms of the accused or the prosecuted events. Also ill-founded is the complaint that the appeal drafting was made difficult for the lacking paragraphs indication because the Court is not bound to indicate paragraphs. Therefore, it cannot be said that the Defense was in any way prevented from examining the appeal, wherefore these grievances are also dismissed as ill-founded.
33. With regard to the appellate complaint that the charges were exceeded, the Appellate Panel notes that the Trial Judgment did not bring into question the existence of subjective and objective identity between the Amended Indictment and the Judgment. Contrary to Counsel's complaints, the Trial Panel made in its Judgment certain interventions in the factual description related to the Indictment, by omitting certain parts uncorroborated with appropriate evidence, that is, the changes in the factual description made pursuant to the results of the conducted evidentiary proceedings. Such Trial Panel's interventions in the factual description are in favor of the accused, namely they did not aggravate his position to an extent where it could be said that the charges were exceeded to the prejudice of the accused. In this regard, the Appellate Panel concludes that the Trial Panel did not exceed the scope of the Amended Indictment. Therefore, this Panel concludes that the same act committed in the past, or the same factual incident from the past, specifically its essential parts, is now being prosecuted. The Trial Judgment enactment clause does not exceed the scope of the incident's factual description as presented in the Amended Indictment, but rather the intervention (comparison between the Judgment enactment clause and the Amended Indictment) comes down to changing or omitting certain allegations,

non-compliant with the evidentiary proceedings results. The foregoing does not affect the very essence of the state of facts, all the more because the Trial Judgment did not state any aggravating elements which would aggravate the accused's position. Thus, the Defense's complaint, that the Indictment was exceeded and thus a substantial violation of the procedure under Article 297(1)(j) made, is dismissed as ill-founded.

34. Contrary to the Defense's complaint that based on an adjudicated fact the Trial Panel found that the armed conflict indeed existed, the Appellate Panel notes that, in the context of proving the existence of an armed conflict, the Trial Panel was primarily led by both the Prosecution's and the Defense's tendered evidence, testimonial and documentary, which consistently accepted that an armed conflict existed in both the Municipality of Bijeljina and the wider BiH territory, as also uncontested by the Defense. Thus, having analyzed the contested Trial Judgment, the Appellate Panel concluded that the Trial Panel's finding that an armed conflict indeed existed at the critical time was based on the tendered evidence rather than on an adjudicated fact, as unjustifiably indicated in the Defense's appeal.
35. In addition, the Defense unjustifiably submitted that the adjudicated fact is not acceptable because it contains legal conclusions considering that, in deciding whether to accept the fact the Trial Panel took into account not only Article 4 of the law on Transfer of Cases but also the relevant ICTY's case law from *Prosecutor v. Momčilo Krajišnik*, also taking into account the accused's right to a defense. By accepting the established fact as proved, the Trial Panel primarily ensured the judicial efficiency and economy, while protecting the accused's right to a fair trial. In terms of the accused's rights, and pursuant to Article 6(2) of the CPC BiH, the Defense was fully enabled to confront with its evidence the established fact accepted as proved in the proceedings before the Court. Ultimately, it should be noted that the Court took into account that it cannot base its convicting judgment exclusively, or to a decisive extent, on evidence or the facts, in the concrete case, which were not directly presented at the main trial. Thus, there was neither any essential violation of the procedure under Article 297(2) of the CPC BiH (relatively essential violation of the criminal procedure provisions), nor was the burden of proof transferred to the defense, as unjustifiably indicated in the appeal.

36. As to the accused's membership in a military formation, the Panel notes that the Trial Panel properly found that, at the critical time, the accused was a member of the VRS, as it ensues from the Prosecution's documentary evidence tendered in the case record. It is also indisputable for this Panel that, both before the war outbreak and at the critical time, the accused was formally serving his compulsory military service. This does not mean, in and out of itself, that at the time the accused was not a member of the VRS. On the contrary, the documentary evidence (Exhibits T-7, T-8 and T-9)<sup>2</sup> shows that the accused was a member of the VRS at the time, while Exhibit T-9 shows that, at the critical time, the accused served his military service in Bijeljina, as a place where the criminal acts charged against the accused had taken place. Therefore, notwithstanding that, at the critical time, the accused was indeed serving a compulsory military service, it does not mean that he was not a member of a military formation, considering that the serving of a compulsory military service is certainly related to a formation existence. In the concrete case, it is obvious that, despite serving his compulsory military service, the accused was, in fact, integrated in a military formation in which he both served the compulsory military service and performed certain tasks assigned to him, and thus accepted the status of a valid member of the military formation. This upholds the Prosecution's theory that, at the critical time, the accused was indeed a member of the VRS.
37. This Panel considers as arbitrary the Defense's submissions that the testimonies of the Prosecution witnesses are contaminated, particularly that the articles published at the BIRN and Radio Justice web-portal are the cause of their contamination. In this context, it should be noted that the hearings held during the trial proceedings were mostly open for the public, and that there were no restrictions for media representatives to attend them, and subsequently inform the public of the contents of the hearings. Therefore, the existence of reports from the hearings cannot be correlated with contamination of the witness's testimony considering that the witnesses testified about the events at issue exclusively on the basis of their own observations, rather than on the information obtained through the media. Also ill-founded are the complaints regarding the contamination of the testimonies due to the

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<sup>2</sup> T – 7 Document of the Department for Veterans and Disabled Persons Protection, No. 02/7-832-1-83/14 of 30 June 2014.

T – 8 Certificate of the RS Department for Veterans and Disabled Persons Protection, No. 02/7-835-3-339/14 of 30 June 2014 issued to the name of Gligor Begović.

conversations among the witnesses because they mostly spoke about their own experiences, and to a lesser extent about the events concerning other persons. Even the existence of certain conversations among the witnesses, who partook in the same events, is quite expectable considering the gravity of the crimes, and the fact that those persons had known each other from before. It should be pointed out, however, that the referenced witnesses gave their statements identifying the accused and about the events by testifying each in his/her own manner, and did not use an “identical form” of giving evidence, that is, even though they testified about the same persons and the same events, certain discrepancies are obvious due to certain subjective and objective circumstances, which supports the conclusion that the witnesses were credible. Otherwise, had the witnesses given identical statements regarding the accused and the events they testified about, it would have to a much greater extent caused doubts that there was an agreement among the witnesses-injured parties related to the contents of their testimonies to the prejudice of the accused, which did not take place in the present case.

38. With regard to the witnesses’ identification of the accused during the trial, the Appellate Panel holds that it was an identification of the accused by the witnesses who directly gave evidence at the main trial, wherefore it cannot be said that the requirements under Article 85 of the CPC BiH were not satisfied. Considering that most witnesses were certain in the accused’s identity, this fact was not of decisive importance for the accused’s identification in the courtroom. However, the mere act of identification in the courtroom forms part of the hearing record, and is justified when the witnesses are describing the perpetrator’s act, and confirm after direct identification of the accused that, in fact, he/she is the same person they have described. It is further important to note that, before they identified the accused, the referenced witnesses had provided a detailed description of the accused’s physical appearance at the critical time (height, hair color and length, age, etc.). This certainly indicates that the witnesses had an opportunity to describe the accused, as clear as possible, prior to his direct identification in the courtroom. Exactly such a procedure, where the witnesses were enabled to first describe the accused, and thereupon identify him in the courtroom, significantly strengthens the probative value of identification procedure, in terms of determination of the perpetrator’s identity. Thus,

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T – 9 Personal record for Gligor Begović.

it is quite justified that, once he has provided a comprehensive description of the accused, the witness is asked if he could identify him in the courtroom. Otherwise, the issue of identification of the accused as a perpetrator of the crime by the witness-injured party could remain unresolved, that is, by correlating the accused's description and his identification in the courtroom in quite a clear and reliable manner the accused's identity as an actor in the crime is being established. In this context, it should be noted that the testimonies of the witnesses examined with regard to the accused's description are mostly consistent (except for certain quite justified discrepancies in the manner of perception and interpretation) regarding the accused's age and physical appearance. In addition, there were witnesses who could not identify the accused in the courtroom, which corroborates the fact that the witnesses made no efforts to charge anybody on some arbitrary grounds.

39. As to the injured persons' status, the Appellate Panel holds, contrary to the appellate complaints, that the Trial Panel made a comprehensive analysis of the imprisoned persons' status, and provided a detailed and adequate explanation that they had a civilian status, which was based on their own statements. Along this line, it is important to note that the witnesses-injured parties were asked detailed questions regarding the manner in which they had been arrested, and brought to the Batković camp, from which the Panel draw the conclusion that they were civilians. In relation to witness N.M., there is no dispute that he was captured at the frontline, after being injured and placed *hors de combat* prior to the capture. Therefore, it cannot be stated that his status was that of prisoner of a war. The fact that certain witnesses mentioned a group of prisoners named "special forces" or the nicknames "Beret 1", "Beret 2", etc. need not mean that this very status relates to the terminology, or the existence of any military formations. There is no dispute for either this Panel, or the Trial Panel, that the injured parties in the present case had the civilian status, which need not mean that other persons imprisoned at the Batković camp had the same status. This Panel was, however, focused exclusively on the contents of the Indictment wherefore it did not address the issue of status of other persons also imprisoned at the referenced facility. As to the Exhibits referred to by the Defense (O-22 and O-23)<sup>3</sup>, which mentioned the issue of establishment of the war prisoners

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<sup>3</sup> O-22-Order issued by the Command of the East- Bosnian Corps, No. 11/2-879 of 2 July 1992.  
O-23- Order issued by the Command of the East- Bosnian Corps, No. 02/5-33 of 17 June 1992.

camp, this Panel still upholds the Trial Panel's position, which established the prisoners' status on the basis of the witnesses' testimony, which again showed that they had the civilian status, and which the Defense's evidence could not contest. Thus, in the view of the witnesses' testimonies, it can be concluded that, obviously, the actions at issue were taken contrary to the acts to which the Defense referred, and that the Defense's evidence was not corroborated with any other evidence which would indicate that the referenced facility was used exclusively for the interment of prisoners of war.

40. Further with regard to the existence of an armed conflict, this Panel holds that the Trial Panel provided an adequate explanation of the assessment of evidence concerning the existence of an armed conflict in the BiH territory, including in the territory where the Batković camp was located. Contrary to the Defense's complaint that the decisions of the BiH Presidency were not applicable in the Republika Srpska territory, this Panel concludes that the issue of the regulations' application in a territory is irrelevant in these proceedings. On the contrary, the Decisions of the R BiH Presidency indicate that the armed conflict indeed existed, which is why this evidence was presented during the hearing. Thus, it is quite irrelevant whether the referenced Decisions were recognized by the opposite party to the conflict, because their tendering was essentially aimed at proving that the conflict in the BiH territory indeed existed, which was correlated with the establishment of the A RBiH<sup>4</sup> and the VSR BiH<sup>5</sup> (subsequently the VRS), which is also linked to the existence of the armed conflict, which obviously existed at the critical time. Also contrary to the Defense's allegations, the Trial Panel did not base the finding on the existent armed conflict exclusively on the referenced documentary evidence, but also on the testimony of the examined witnesses, who confirmed that, at the critical time, there was indeed a state of war, or an armed conflict, in the Bijeljina municipality (where the Batković camp was located). Therefore, this complaint was also dismissed as ill-founded.
41. With regard to the complaint that a large number of Sections of the convicting Judgment is based solely on a single witness testimony, the Panel holds that the Judgment was mostly based on the testimony of the witnesses-injured parties, but

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<sup>4</sup> T - 5 Decree with the Force of Law concerning the Armed Forces of the Republic of Bosnia and Herzegovina, published in the Official Gazette of the R BiH, No. 4/92 of 20 May 1992.

also on the testimony of other witnesses who had been in a similar manner physically and mentally ill-treated by the accused. In addition, these witnesses' statements were significantly also corroborated by the statement of the accused, who did not deny that he had beaten prisoners, even though he spoke about the beatings without specifying the names of the persons he had beaten. Also, in relation to the complaint that the Judgment is based solely on a single witness testimony, it should be noted that, in evaluating the evidence pursuant to Article 15 of the CPC BiH, the Court is not bound by the formal statutory rules. It is noteworthy that these witnesses were examined by both the Prosecution and the Defense, and that the Trial Panel could create its own opinion on these witnesses' credibility. In other words, the Trial Panel was able to watch, at first hand, the witnesses' behavior at the main trial while responding to the Prosecutor's and the Defense's questions. The Panel correlated these statements with the other witness's statements, particularly the accused's statement, credited them and accordingly provided a reasonable and logical explanation. Therefore, the defense's allegation that the judgment cannot be based on a single witness's testimony is ill-founded. In the concrete case, the testimony of the witnesses-injured parties contain many details, consistent with both the other witnesses' testimonies and the testimony given by the accused in the capacity of a witness, which fit in the factual framework of the event in the manner as described in the Amended Indictment. Therefore, the Court had no doubts into these witnesses' statements concerning the description of the acts undertaken by the accused. Had the witnesses-injured parties had any intent to charge the accused or anybody else on arbitrary grounds, they could have stated that they had also in detail seen the ill-treatment of other persons. However, the mere manner in which the witnesses gave evidence tells a lot about the witnesses, their objectivity and credibility since they testified in the same manner as they had seen the critical events. Thus, this complaint is also dismissed as ill-founded.

42. In view of the foregoing, the Appellate Panel considers as ill-founded the Defense's complaints that essential violations of the criminal code provisions were made, particularly essential violations under Article 297(1)(k), as read with Article 290(7), on which the Defense's appeal most insisted. This is so because, in reviewing the

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<sup>5</sup> T – 6 Decision to Establish the Army of the Serb Republic of Bosnia and Herzegovina, published in the Official Gazette of the Serb People in BiH, No.6/92 of 12-17 May 1992.



contested Judgment in relation to the appellate grievances, the Appellate Panel concluded that there are no deficiencies in either the Judgment enactment clause or its reasoning which would prevent the examination of its lawful and proper quality. Therefore, the Appellate Panel concludes that the Trial Panel provided a comprehensive and adequate reasoning of the first-instance Judgment, namely that it presented all the reasons that led the Panel to render a judgment of conviction, along with its position concerning the facts and the evidence presented by the parties during the proceedings. Therefore, the Appellate Panel also dismissed the referenced complaints as ill-founded.

## **2. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC BIH: VIOLATIONS OF THE CRIMINAL CODE**

### **B. STANDARDS OF REVIEW**

#### **(i) General considerations**

43. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim, and explain how the error affects the decision resulting in its unlawfulness.
44. Where an error of law arises from the application in the Judgment of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.
45. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Judgment in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

(ii) Defense's appellate grievances

46. The Defense submitted that the persons mentioned in the first-instance Judgment could not have been characterized as civilians but rather as prisoners of war. In terms of the civilian status, the Defense's view is that this is an improper legal qualification, which resulted in a number of errors of absolute nature. In relation to the referenced violation, the Defense referred to both the national and international case law related to the determination of status of the captured persons, indicating that, at the moment of the crime commission, it is necessary to determine a victim's civilian or non-civilian status. According to the appeal, all the foregoing resulted in the misapplication of substantive law, or in a violation of the criminal code.

(iii) Conclusions of the Appellate Panel

47. In relation to the referenced grievance, the Panel notes that the issue of victims' civilian status was already elaborated on in the present Judgment, but that it will also be addressed in more detail in this chapter, since it is one of the essential elements of the criminal offense of which the accused was found guilty.

48. In relation to the status of captured persons, the contested Judgment found the following: *"On the basis of tendered evidence, particularly the testimony of the Prosecution witnesses-injured parties N.M., M.Š., A.B., Ejub Smajić, Edin Ibrahimović, Mirsad Buljugić, A.H., M.B., Mehmedalija Mešković, witness A, Sabrija Mehmedović, Hasib Đananović, Husejin Halilović, and the testimony of the accused Gligor Begović, this Panel found, beyond a doubt, that all the persons against whom the acts of commission were taken, enjoyed protection under the quoted common Article 3 of the Geneva Conventions of 12 August 1949, that is, on the basis of evaluation of tendered evidence the Panel found that all injured parties, whose full names are individually indicated in both Counts of the Indictment and the Sections of the convicting part of the Judgment, are categorized as protected persons and had the status of civilians, or persons taking no active part in the hostilities.*

*In view of the foregoing, the Panel concludes that, in the concrete case, the civilian status of direct victims of the incriminating acts had been determined beyond a doubt at the time when the accused was undertaking the prohibited acts.”<sup>6</sup>*

49. The Appellate Panel carefully evaluated the evidence concerning the status of persons, that is, the statements of the injured parties who were arrested and imprisoned at the Batković camp in order to establish if the Trial Panel’s findings were proper, within the defense’s appellate grounds.
50. It can be concluded from the testimony of the examined witnesses-injured parties that they are persons who were not, in any manner, affiliated to any military formations, and who took no active part in combats. In addition, most witnesses stated that they had been arrested at their homes, or while trying to enter BiH (witnesses A.H. and Hasim Đananović were arrested at the Rača Border Crossing). Only witness N.M. was arrested after being wounded at the frontline. Common Article 3 of the Geneva Conventions, however, concludes that the protected category of the population are all persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and/or those placed *hors de combat* by sickness, wounds, detention or any other cause. It follows from the foregoing that witness N.M. definitely falls in the category of persons *placed hors de combat by sickness and wounds*, so his status is unquestionable. Therefore, the appellate grievance that the criminal code was violated is also ill-founded.
51. Even though the existence of the armed conflict is undisputable, and despite the then existent category of prisoners known as “special forces” or persons nicknamed as “Berets”, this Panel also concludes that it was not proved that the referenced terminology concerned the injured parties in the present case, despite the two referenced facts, which can indicate that a person has the status of a war prisoner. Correlating the referenced fact and a series of other circumstances related to each injured party individually, which were also evaluated by the Trial Panel, the Appellate Panel did not find, contrary to Counsel’s complaint, that the persons in question in the concrete case were prisoners of war. The Panel reiterates that the Trial Panel focused on the status of injured parties, who had had the civilian status, as indisputably proved in the present case. The issue of status of other persons

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<sup>6</sup> First-Instance Judgment, p. 46.

imprisoned at the Batković camp, who might actually have a non-civilian status, is irrelevant to the present case, wherefore the Panel will not address it in more detail.

52. Thus, the Panel considers as proper the Trial Panel's finding that the referenced persons, or the witnesses-injured parties, took no active part in the hostilities and therefore were persons enjoying protection under Article 3 of the 1949 Geneva Conventions.

### **3. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS**

(i) General considerations

53. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.
54. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.
55. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.
56. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

57. Article 299 of the CPC BiH provides that a verdict may be contested because the state of facts has been incorrectly or incompletely established. Decisive facts are being proved directly through evidence, or indirectly from other facts (indicia or control facts). Only the facts contained in the judgment can be viewed as existent, while regardless of the existent decisive facts, a judgment must always provide reasons for their existence. Otherwise, there will be no established state of facts (incompletely established facts). If a decisive fact was not proved in the manner as it indeed existed in the reality of an event, there is an incompletely established state of facts.
58. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.<sup>7</sup> However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and 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.
59. The Appellate Panel will provide an evaluation as to whether the state of facts has been incorrectly established in relation to the facts and findings contested in the defense's appeal. As already indicated, for such an evaluation, the Panel should apply a standard pursuant to which all appellate grievances will be addressed and evaluate whether a decisive fact ensues from the tendered evidence.

(ii) The Defense's appellate grievances

60. Counsel indicated in the appeal that the decisive facts were erroneously established by the Court. Contrary to the Judgment findings, Counsel submitted that the accused did not admit any Count of the Amended Indictment. In this context, Counsel submitted that the accused stated that he had indeed participated in certain acts of

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<sup>7</sup> M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits of 22 April 2005, para. 36.

physical violence, but not that he took part in any concrete event described in the Amended Indictment, or the contested Judgment. The appeal noted that, during the examination of the accused as a witness, Counsel attempted to present the accused with Counts of the Amended Indictment for his comments, but the Trial Panel's decision prevented him from doing so, wherefore the accused had no opportunity to admit the commission of any acts. Along this line, the appeal comprehensively presented the accused's statement, and particularly highlighted the accused's denial that he had taken part in any sexual abuse.

61. With regard to sexual abuse, the Defense submitted that there is only one circle of witnesses, namely witnesses N.M., Ejub Smajić and A.B., but that there is no other witness who heard that these events had taken place or gave any related evidence. Also, the defense submitted that these three witnesses mentioned sexual abuse no sooner than in 2014, during the investigation conducted against the accused. The appeal also indicated that N.M. mentioned the names of persons who had passed away, and Ejub Smajić's name, while witness Ejub Smajić mentioned N.M., Alija Gušalić (passed away) and Mirsad Kuralić (unfit to give evidence). In addition, the defense indicated that these witnesses' testimonies contradict both each other and the Indictment. In this context, the defense refers to the testimony of witness A.B., who stated that the accused had not been present during the sexual abuse. It was further stated that the Judgment reasoning concerning one witness only, which does not corroborate the testimony of other witnesses, is an attempt to dismiss the evidence which contradicts the accused's conviction without any reasoning.
62. The appeal indicates that the testimony of witness Ejub Smajić with regard to Section 4 of the Judgment of conviction is unconvincing and abundant with exaggerations and the subsequently obtained information. The appeal also pointed to the lack of medical consequences which should have existed. Also, the defense submitted that witness N.M. cannot be credited, neither can the testimony of other witnesses, who were not concrete in relation to the events concerning N.M..
63. With regard to Count 5 of the Amended Indictment, the defense submitted that one of the witnesses stated that the accused ... Ejub Smajić, but that the case record does not contain any medical evidence based on which any conclusion about the meaning of this Indictment allegation could be made. Also, the defense submitted that the

finding that the accused had beaten this witness for 15 times is also ill-founded since there is no evidence corroborating it.

64. When it comes to Count 6 of the Amended Indictment concerning Zulfo Hadžiomerović's murder, Counsel submitted that this person's death was arbitrarily determined, and that the facts of both his life and imprisonment at the Batković camp were not proved. Along this line, Counsel indicated that it does not suffice to only present circumstantial and unlawful evidence. The defense further claims that N.M. is a single eye-witness to this event, but that he could not have seen the accused and Zoran Zarić beating Zulfo Hadžiomerović due to visual obstacles, and that there should have been other eye-witnesses. The defense also submitted that no member of the referenced person's family, who could have testified about the fact of his life or possible imprisonment at the Batković camp, was examined; that no piece of evidence was tendered proving that the referenced person went missing; and that no case record was tendered in relation to extra judicial proceedings proclaiming this person's death.
65. When it comes to Count 8 of the Amended Indictment, related to Ferid Zečević's and Husein Čurčić's murder, the Defense indicated that the Trial Panel mentioned 10 April 1992 (the date of death of Husein Čurčić) in correlation with the date when the persons who proclaimed him dead had seen him alive for the last time. Such an option is not excluded, but a judgment of conviction against the accused should not have been rendered based on such evidence. Also, the Defense submitted that no member of the deceased person's family was examined with regard to the fact of his life or imprisonment at Batković, and that no piece of evidence proving that this person went missing was tendered. The appeal further indicated that no relatives of the killed persons, who could have provided more comprehensive information about the time and cause of death, were examined. The defense further indicated the discrepancies in the testimony of witnesses N.M. and E.S. with regard to the time of death of these persons after being ill-treated, and also referred to Mehmedalija Mešković's statement. This witness stated that the accused Begović did not participate in the beating of Ferid Zečević. In addition, the defense submitted that witness Deronjić had seen the accused beating Ferid Zečević, but that this was uncorroborated with any other evidence; while witness Ferhatbegović stated that he had not seen who was beating these persons, but rather heard that someone was beating them.

66. Regarding Count 10 of the Amended Indictment, the defense's appeal pointed to witness Ibrahimović's statement that he was beaten by Gligor, but that he could not identify the accused in the courtroom; and that, in relation to this Count, there is no piece of evidence, other than that of uncertain witness Ibrahimović. According to the defense, this witness should have been seen by some of the other witnesses.
67. Further with regard to Count 12 of the Amended Indictment, the defense against submitted that the Judgment is based solely on the uncorroborated Mirsad Buljugić's testimony, which is contradictory in and out of itself. In this context, the Defense indicated that this witness testified that the accused had forced Džemal Smajlović to beat him, while his previous statements showed that the accused had to obey Špajzer and Piklić, and that, at the hearing, this witness did not state that he knew that the accused had ordered Špajzer to hit him (the witness) with an ax. Also, regarding the contradicting nature of this witness's testimony, the defense also stated that the Trial Panel did not credit this witness's statement that he was hit with a stick while riding a bicycle, because this witness had given three different statements. Similarly, witness Buljugić testified that the accused told him that all members of his family had been brutally killed in Goražde, whereas his father, mother and brother actually survived and lived through the end of the war.
68. As to Count 15 of the Amended Indictment, the defense submitted that, in his statement, which was obtained from the Intelligence and Security Agency (OSA), Mehmedalija Mešković stated that Piklić was giving orders to Gligor to beat prisoners because they had been stealing around the town on their way to perform forced labor, while at the main trial he testified that the accused had even been forced to do what he did, and that the accused had to do it, which is in accordance with his earlier statement. The same witness testified that soldier Darko told him that the accused's father, mother and sister had been brutally killed in a village near Foča.
69. The defense also contested Count 16 of the Amended Indictment because, in describing the accused, Witness A did not mention the accused's long hair, and because the manner in which he described him does not match the way the accused looked like at the time when the incident took place.
70. As to Count 18 of the Amended Indictment, the defense submitted that, at the main trial, witness Sabrija Mehmedović confirmed that the events in the Batković camp affected his mental health; that he has been suffering from PTSP, with which he was



diagnosed in 1994; and that in 2005 he fell from the height of 10 meters. The Defense therefore asked if the witness was fit to give evidence, and if he remembered the events in the camp. When asked whether his health condition affects his memories, the witness responded “*probably*”. Counsel also submitted that this witness also stated that his client did not have long hair. Pursuant to the appeal, this witness has no information about the sexual abuse charged against the accused.

71. With regard to Count 19 of the Amended Indictment, the defense submitted that witness Džananović did not state that the accused had beaten him along with other guards, but rather the group from Šekovići, which also included his client.
72. According to the appellate complaints concerning Count 21 of the Amended Indictment, witness Husein Halilović stated that he could not identify the accused, thus it cannot be determined with certainty who had actually ill-treated this witness. In addition, this witness did not speak about the period covered by the Indictment, but that all the events took place in 1991. Characteristically for this Count, it was not corroborated with any medical documentation whatsoever.
73. With regard to Count 23 of the Amended Indictment, the defense also submitted that witness Dževad Duraković’s testimony is not corroborated with any other evidence, because more persons should have seen this event.
74. Ultimately, Counsel submitted that the First-Instance Judgment is based on speculations and guesswork, rather than on evidence, and that the Court should have acquitted the accused of the referenced charges by applying the principle of *in dubio pro reo*.

(iii) Conclusions of the Appellate Panel

75. As to the appellate grievances contesting the First-Instance Judgment finding that the accused admitted, in part, the commission of the crimes charged against him, the Appellate Panel notes that the referenced findings are proper. Even though the accused did not concretely admit the (commission of) acts charged against him under the Amended Indictment, he generally spoke about the events that took place at the Batković camp, claiming that he personally participated in the beating of prisoners, which can be considered as an indication that he also participated in the concrete acts charged against him under the Amended Indictment. On the other hand, as

indicated above, the statements of the witnesses-injured parties clearly prove the events in which the accused took part, which the Defense was not able to contest. In this regard, the accused's statement that he personally took part in certain acts of beating prisoners is an indication of his participation in the concrete acts of which he was found guilty which, correlated with the statements of other witnesses-injured parties-victims of his conduct and eye-witnesses to the events, at least corroborate the witness's statement that the referenced crimes had indeed taken place. His statement simply further corroborates the injured parties' statements that they were ill-treated by the accused at the camp. In other words, the tendered evidence and the indicia form such a solid and closed circle of established facts which justifies, in whole, the conclusion that the accused personally took part in the incriminating acts in the manner as described in the first-instance Judgment. In this context, after a comprehensive analysis of both the accused's trial testimony and the other evidence, viewed in correlation, the Trial Panel found beyond a doubt, in its judgment, that the accused indeed acted in the manner as determined in the enactment clause of the convicting part of the Judgment, and thereby satisfied, objectively and subjectively, all legal elements of the criminal offense of which he was convicted. Therefore, the Trial Panel justifiably accepted as credible the accused's statement given in the capacity of a witness in the part where he generally spoke about his participation in the beatings of prisoners, and correlated it with the other tendered evidence, or the testimony of the witnesses-injured parties who testified about the accused's concrete participation in ill-treatments. This undoubtedly points to the proper nature of the Trial Panel's finding that the accused personally is the perpetrator of the crime of which he is convicted under the first-instance Judgment. Contrary to the appellate complaints, the accused's general reference to the witnesses' ill-treatment, with no indication of any concrete acts of ill-treatment and his denial of sexual abuses, were obviously aimed at diminishing his responsibility for the acts charged against him. Therefore, the Court justifiably accepted the accused's statement only in part.

76. With regard to the appellate complaint, that the defense was prevented from examining the accused as a result of which the accused could not admit the commission of crime, the Appellate Panel notes that the accused's statement obviously shows that he was indeed beating other prisoners, and that the Panel just indicated that the Counts of the Indictment need not be read since the parties to the proceedings were aware of them. The fact, however, that the accused did not directly

comment on the Indictment Counts does not mean that he did not have an opportunity to admit the commission of acts, considering that he unequivocally stated that he had taken part in the ill-treatment of civilians. The foregoing corroborated the Prosecution's theory that civilians were ill-treated by the accused.

77. The Appellate Panel holds that the appellate complaint that only one circle of witnesses exists in relation to sexual abuse (N.M., Ejub Smajić and A.B.) is incorrect considering that the Judgment draws its findings about sexual abuse not only from the referenced witnesses' testimonies, but also from the testimony of witnesses M.Š., Dževad Duraković, H.A., Witness A, Mirsad Buljugić, Mehmedalija Mešković, Avdo Topčić, B.M. and Džafer Deronjić, who gave evidence about the sexual abuse of prisoners. In this context, also ill-founded are the complaints that the eye-witnesses to these events were the persons/victims of such treatment, or persons unfit to give evidence, because, obviously, there were other persons who gave evidence about the events at issue. Notwithstanding that Counsel's appeal indicated that there are contradictions in the witnesses' testimony, this Panel holds that Counsel did not concretely indicate any contradiction, but rather focused just on the statement of witness A.B., who did not confirm the other witnesses' testimonies. The Panel also analyzed the foregoing and found that other witnesses had no reasons to falsely charge anyone. Therefore, the statement of witness A.B., who did not confirm the allegations of sexual abuse of other witnesses, neither diminishes nor brings into doubt, in any manner whatsoever, the statements of other witnesses affected by the accused's referenced acts. It is important to note that the Panel was able to observe these witnesses while they were giving evidence, and monitor their behavior, and was therefore able to draw its conclusion on the witnesses' credibility. In addition, the fact that these witnesses have not spoken about sexual abuse for a long period of time cannot bring into question the authenticity of their testimony, considering that such circumstances are very difficult and traumatic, and often create in these persons the feelings of shame, wherefore they are not willing to talk about it before other persons, including official persons. Also, the elapsed period of time often affects these persons in the manner that they start speaking about what they have experienced. However, since this issue was not raised during the examination of these witnesses, the Appellate Panel will not provide any comprehensive response to the referenced complaint, considering that the Trial Panel provided a comprehensive analysis of these witnesses' testimonies, and found that they constitute a credible

ground for rendering a first-instance judgment. Similarly, the fact that witness B.M. stated that the accused Begović was not present during the sexual abuse of prisoners does not mean that he was not present when other witnesses were sexually abused. This is so because witness B.M. stated that he was personally subjected to such abuse for three times, while in relation to others, he stated *...and to this one, and that one, it happened even more often ...*<sup>8</sup>

78. Considering the complaints advanced with regard to Counts 4 and 5 of the Amended Indictment, concerning the beatings of N.M. and Ejub Smajić, this Panel notes that the Trial Panel based its findings concerning the effects of the treatment of those persons exclusively on their testimony and the testimony of other eye-witnesses indicated in the Judgment. The fact that no medical documentation concerning the degree of the victim's injuries was not tendered does not mean that the consequences of these persons' beatings do not exist at all, since not only the referenced witnesses but other witnesses also described the manner in which they had been treated as well as their still present effects. Certainly, the existence of such documentation would be useful, but this does not reduce the value of the statements of the witnesses-injured parties that they had suffered severe bodily and mental pain. However, the Court cannot on its own determine the type and extent of their injuries as it lacks the professional expertise required for determination of these important facts. The Trial Panel therefore corrected the factual description, which is also upheld by this Panel. The Prosecutor's omission to tender as evidence any medical documentation, or forensic expert findings, does not diminish the fact that these witnesses were indeed beaten during their imprisonment at the camp.
79. With regard to the existence of medical documentation concerning the extent of the injured parties' injuries, the Appellate Panel also indicates, as a general principle, that the application of concrete formula does not lead to proper findings. Article 15 of the CPC BiH (Free Evaluation of Evidence) is a manifestation of the old principle of *testimonia panneranda sunt, non numeranda* (evidence is evaluated, not counted). This principle highlights the consideration of the value, gravity and quality of evidence, rather than its quantity, multiplicity or nature. Therefore, in determining the existence or non-existence of facts, the Trial Panel is entitled to completely refer to

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<sup>8</sup> Transcript of 14 April 2014, p. 17.

testimonials (evidence in the form of a witness testimony). Accordingly, the lack of documentary evidence or medical documentation concerning the effects of physical ill-treatment of prisoners does not diminish the weight of other evidence which points to the accused as a perpetrator of the crime at issue. Concretely, the Trial Panel found the accused guilty on the basis of the testimony of the injured parties, the accused's statement that he participated in the beatings, and the statements of other eye-witnesses, who confirmed the existence of ill-treatment at the camp. The referenced crimes took place during the wartime, when the injured parties did not receive any medical aid, wherefore it could be hardly expected that each witness is in possession of the documentation concerning all tortures he had survived.

80. According to the Panel, the defense's complaint that N.M.'s statements are not corroborated with other witnesses' statements is also ill-founded considering that these testimonies are corroborated with the testimony of witnesses Ejub Smajić, Dževad Duraković, Džafer Deronjić and Witness A, who had eye-witnessed the ill-treatment of N.M., while witnesses N.M. and A testified about the ill-treatment of witness Ejub Smajić. The referenced testimonies are consistent with the testimony of the witnesses-injured parties, wherefore it cannot be stated that these testimonies are not corroborated.
81. Contrary to the appellate grievance that the Court arbitrarily determined the state of facts regarding Zulfo Hadžiomerović's death, the Appellate Panel holds that the court's conclusion regarding the death is based not solely on witness N.M.'s testimony, but also on the testimony of witnesses Avdo Topčić and A.B., which were quite sufficient for the finding that the referenced person died due to the effects of the beating, and even that this person existed. This is because any insisting that members of the referenced person's family possibly give evidence about the fact, that the deceased person indeed lived and existed, would significantly delay the proceedings. This was not necessary because there are witnesses who testified that this person was beaten as well as that he existed (they stated that the person in question was an older person with the letter "U" tattooed on his hand). Also, the accused personally confirmed that there was an older person among the prisoners.
82. As to the appellate complaint concerning Ferid Zečević's and Husein Čurtić's murder, the Appellate Panel again indicates that these person's death is also corroborated with the testimony of the witnesses indicated in the first-instance Judgment with

regard to this Count. With regard to witness Mešković's and witness Ferhatbegović's statement, the truth is that these witnesses did not see the accused beating the dead persons (witness Mešković stated that the accused did not participate in the beating of Ferid Zečević, while witness Ferhatbegović stated that he did not see who was beating these persons). This does not mean that the accused did not indeed take part in those beatings as there is also other evidence confirming the accused's participation therein (e.g. witness Džefer Deronjić stated that the accused beat Ferid Zečević). Therefore, the defense arbitrarily submitted that there are no witnesses confirming the allegations about the referenced persons' death. In addition, certain discrepancies in the testimony of witness N.M. and witness I.S. with regard to the moment of death of these persons are irrelevant considering that it is indisputable for the Trial Panel, as well as for the Appellate Panel, that these persons' death is a result of the beatings. Also, it is quite justifiable that these witnesses cannot state specifically the precise moment of these persons' death considering the period of time elapsed between the critical event and their trial testimony before the court, and quite expectedly the process of forgetting certain details. As already stated above, where there is a sufficient quantity of evidence (in this case witnesses), other evidence need not be tendered in relation to the fact of life and death of the referenced persons, considering that the testimony of these witnesses is quite sufficient for drawing the related conclusion, while any further insistence on summoning these persons' family members would cause unjustifiable delays of the proceedings.

83. As to the appellate grievance that certain sections of the convicting Judgment are based on a single witness's statements, the Appellate Panel highlights that the Trial Panel was able to convict the accused on the basis of the injured party's testimony. "*Evidence that is lawful, authentic and credible may be considered sufficient to convict the accused, even where its source is a single witness.*"<sup>9</sup> In its decision, upheld in certain relevant parts by the Appellate Panel, the Trial Panel in *Mejakić* convicted the accused solely on the bases of the injured party's testimony, and thus confirmed that "*realistically there is no reason not to give credence to the witness testimony in those cases when the witness testified about an event as a sole eye witness of the event [...] and the congruence of decisive facts in that witness*

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<sup>9</sup> *Mejakić et al.*, X-KR/06/200, Second-Instance Judgment, 16 February 2009, para. 47.

*testimony with other witness testimonies with reference to the same events.*<sup>10</sup> The ICTY has also upheld the lawfulness of the conviction of the person charged with grave breaches of international law, on the basis of a single witness's testimony. The Trial Chamber in *Tadić*, which was the first Chamber to address this matter, found that although witness Hase Ičić “*was the only witness who testified in support of these charges, the quality of that testimony is sufficient to credit the allegations.*”<sup>11</sup>

84. In view of the foregoing, the judgment of conviction is quite justifiably mostly based on the testimony of injured parties. The Trial Panel evaluated, with due attention, these witnesses' reliability in the light of their testimony coherence and consistency with the testimony of other witnesses who spoke about the physical ill-treatment of prisoners at the camp, including the accused's statement that he too used to beat prisoners. In addition, one should not disregard that certain ill-treatments took place within a very small group of men. Considering the traumatic nature of the mere event survived by the injured parties, only these victims are positioned to identify the perpetrator and give evidence about the circumstances related to the beatings.
85. The Appellate Panel also holds as irrelevant certain inconsistencies in the witnesses' testimonials indicated in the appeal, particularly those concerning the accused's appearance, hair length, etc. Specifically, it is reasonable to expect from the persons-survivors of such traumatic experiences that they do not remember slight details related to the accused's physical appearance, particularly that all injured parties describe him in the same manner. Also, it is unreasonable to expect the witnesses to remember each element of the complex and traumatic development of the event. In fact, the inconsistencies may, under certain circumstances, point to truthfulness and to the fact that no influence was exerted on the witnesses. Therefore, the Panel gave no particular weight to the inconsistencies in the injured parties' testimonies. What is

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<sup>10</sup> *Mejakić et al.*, X-KR/06/200, First-Instance Judgment, 30. May 2008, p. 189 (The Trial Panel also held that “[T]his is particularly true in case of those events that occurred in locations where there could not have been more than one person at the time, such as e.g. beatings during visits to the sanitary facilities or during interrogations.”). The relevant part of the Judgment was upheld in the Second-Instance Judgment in *Mejakić et al.*, X-KR/06/200, 16 February 2009, paras. 45 – 47.

<sup>11</sup> *Tadić* (Trial Chamber), 7 May 1997, para 260. Also, see paras 536-539. Quite apart from the Rules, it is not correct to say that in present day civil law systems corroboration remains a general requirement. The determinative powers of a civil law judge are best described by reference to the principle of free evaluation of the evidence: in short, the power inherent in the judge as a finder of fact to decide solely on the basis of his or her personal intimate conviction. This wide discretionary power is subject to a limited number of restrictions. However, the principle reflected in the Latin maxim *unus testis, nullus testis*, which requires testimonial corroboration of a single witness's evidence as to a fact in issue, is in almost all modern continental legal systems no longer a feature.

of crucial importance is that these witnesses are consistent with regard to the decisive facts, namely that the accused took part in the physical and mental ill-treatment of prisoners.

86. In relation to the defense's complaint pointing to the contradictions in witness Mirsad Buljugić's evidence, the Appellate Panel holds that the Trial Panel properly evaluated this witness's testimony, and accepted as true only the part where the witness was specific, while it did not credit its other parts (that he was hit by the accused while riding the bicycle). This is so considering that this witness did not provide a convincing description of this incident as he did in the remaining part of his evidence, namely the witness mentioned the disputable incident and the accused's participation after the Prosecutor had remained him of it. The Panel therefore, quite justifiably credited this witness's testimony just in part. In any case, the Panel viewed the referenced testimony in whole, and provided quite justifiable and acceptable reasons for partly crediting this witness's testimony.
87. As to the defense's referral to the statements given by witnesses Mirsad Buljugić and Mehmedalija Mešković before their testimony before the court, the Panel notes that the Witness Examination Records concerning the referenced witnesses were not tendered as evidence, wherefore the Panel was not able to examine the contradictions at issue. Thus, the above complaint is also dismissed as ill-founded.
88. With regard to the complaint concerning witness Sabrija Mehmedović's health condition, the Appellate Panel indicates that this witness gave a clear and convincing evidence about the critical event, while his health problems do not minimize his ability to keep the incident in his memory, or his ability to interpret everything that he had experienced while being imprisoned at the Batković camp. It should be noted that, if the defense had any doubts in this witness's ability to give evidence, it could have proposed that this witness be subjected to an expert evaluation in order to have his fitness to give evidence determined, which was not done either. Therefore, this complaint is also dismissed as ill-founded.
89. In view of the foregoing, the Appellate Panel concludes that the Trial Panel could find that the only reasonable conclusion which could be drawn from the evidence is that the accused committed the criminal acts charged against him. The defense's allegation of incorrectly and incompletely established state of facts is dismissed as ill-founded.



## 4. SENTENCING

### (i) General considerations

90. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.
91. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.
92. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.
93. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.
94. 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.
95. 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.

(ii) Defense's appellate grievances

96. The defense submitted that the Court took into account, as extenuating circumstances, the facts that the accused has no prior convictions, that he is a family man and father of three minors. Also, the defense submitted that the Court did not take into account, as extenuating circumstances, the tragic wartime circumstances or the accused's young age, him being only age 19 at the time, which is why the defense believes his acts should have been evaluated in the context of the circumstances where he acted as a very young, inexperienced and untrained person at the time when he assumed the duty of a guard.

(iii) Conclusions of the Appellate Panel

97. According to the Appellate Panel, Counsel's appeal justifiably indicated that, in fashioning the sentence, the Trial Panel did not sufficiently take into account the particularly extenuating circumstances. In this context, the Appellate Panel holds that the Trial Panel did not sufficiently take into account the accused's personal situation, namely that he is a father of three minor children and that he has no prior convictions.

98. In addition, the Trial Panel did not take into account, to a sufficient extent, the circumstances related to the accused's personality, namely that he had just turned age 19 at the time of the crime commission, and that he admitted, in part, the commission of the act. The Appellate Panel therefore decided to revise the first-instance Judgment with regard to the sentencing, and thus imposed on the accused a prison sentence for a term of 10 years.

99. Ultimately, the Appellate Panel notes that, in fashioning the sentence, the Court should take into account that the purpose of punishment is the achieving of a legitimate objective – the serving of justice as a universal principle. Therefore, in any concrete situation, the Court shall also consider if the referenced purpose of punishing will be achieved by the accused's punishment or the selection of appropriate type and length of punishment.

100. The Panel concludes that the sentence of imprisonment for a term of 10 years will achieve exactly the general purpose of punishment by deterring the accused from committing any new crimes in the future, and that it will affect his resocialization, as well as deter others from committing criminal offenses. In addition, this Panel concludes that the imposed sentence adequately reflects the condemnation of the criminal offense by the community.

101. For the foregoing reasons, pursuant to Article 313 and Article 314 of the CPC BiH, the Appellate Panel rendered the decision as stated in the Judgment enactment clause.

**Record-taker:**

**PANEL PRESIDENT**

**Legal advisor-assistant**

**JUDGE**

**Nedim Muminović**

**Dr. Miloš Babić**

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