**Bosna i Hercegovina** **Босна и Херцеговина**

**Sud Bosne i Hercegovine**

**Суд Босна и Херцеговина**

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**Case No. S1 1 K 016488 17 Krž**

**Date: 12 July 2017**

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**Before Appellate Division Panel composed of:**

**Judge Tihomir Lukes, presiding**

**Judge Dragomir Vukoje, PhD, reporting judge**

**Judge Senadin Begtašević, Panel member**

**PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

**v.**

**the accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović**

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# SECOND-INSTANCE JUDGMENT

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

**Zorica Đurđević**

**Counsel for the accused Ekrem Ibračević: attorney Sanjin Bandović**

**Counsel for the accused Faruk Smajlović: attorney Emir Suljagić**

**Counsel for the accused Sejdalija Ćović: attorney Ismet Beganović**

**Number: S1 1 K 016488 17 Krž**
**Sarajevo, 12 July 2017**

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

The Court of Bosnia and Herzegovina, sitting a Panel of the Appellate Division of Section I for War Crimes composed of Judge Tihomir Lukes, as the presiding judge, and judges Dragomir Vukoje, PhD, and Senadin Begtašević, as the Panel members, with the participation of legal officer Ena Granić Čizmo as the record-taker, in the criminal case against the accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović for the criminal offense of War Crimes against Civilians in violation of Article 173, paragraph 1, subparagraphs (c) and (e), in conjunction with Article 180, paragraph 1, of the Criminal Code of Bosnia and Herzegovina, having deliberated on the respective appeals of the Prosecutor's Office of Bosnia and Herzegovina and attorney Sanjin Bandović, PhD, as counsel for the accused Ekrem Ibračević against Judgment of the Court of Bosnia and Herzegovina S1 1 K 016488 14 Kri dated 28 October 2016, having held a session in the presence of Prosecutor of the Prosecutor's Office of BiH Zorica Đurđević, the accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović and their respective counsel Sanjin Bandović and Ismet Beganović, with the exception of attorney Emir Suljagić as counsel for the accused Faruk Smajlović, pursuant to Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina and Article 315, paragraph 1, subparagraph (a) thereof, on 12 July 2017 delivered the following:

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

**The appeal filed by** counsel for the accused Ekrem Ibračević **is granted**, **the convicting part** of Judgment of the Court of Bosnia and Herzegovina S1 1 K 016488 14 Kri dated 28 October 2016 **is revoked** and a trial before a Panel of the Appellate Division of the Court of Bosnia and Herzegovina is ordered. The appeal filed by the Prosecutor's Office of Bosnia and Herzegovina with reference to the acquitting part **is dismissed as ill-founded**, and Judgment of the Court of Bosnia and Herzegovina S1 1 K 016488 14 Kri dated 28 October 2016 **is upheld** in that part.

## R E A S O N I N G

# I. PROCEDURAL HISTORY

### A. FIRST-INSTANCE JUDGMENT

1. By Judgment of the Court of Bosnia and Herzegovina (Court of BiH) S1 1 K 016488 14 Kri of 28 October 2016, the accused Ekrem Ibračević was found guilty that he, by the acts described in the convicting part of the enacting clause of the impugned judgment, committed the criminal offense of War Crime against the Civilian Population in violation of Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) adopted pursuant to the Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY, in conjunction with Article 22 of the Code. Consequently, the Trial Panel, by applying the cited statutory provisions as well as Articles 33, 38, 41, 42 and 43 of the CC SFRY, sentenced the accused to 3 years' imprisonment.

2. In contrast, pursuant to Article 284(c) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), the accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović were acquitted of the charge that they, by the acts described in the acquitting part of the enacting clause of the impugned judgment, committed: the accused Ekrem Ibračević, the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) and (e) of the Criminal Code of Bosnia and Herzegovina (CC BiH), the accused Faruk Smajlović and Sejdalija Ćović, the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c) of the CC BiH, all in conjunction with Article 180(1) thereof.

3. Pursuant to Article 188(4) and Article 189(1) of the CPC BiH, the accused Ekrem Ibračević was relieved of the duty to reimburse costs of the criminal proceedings, while the accused Smajlović and Ćović were relieved of the duty to reimburse the costs pursuant to Article 189(1) of the same Code.

4. Pursuant to Article 198(2) and (3) of the CPC BiH, the injured parties are instructed to take civil action to pursue their claims under property law.

## B. APPEALS AND RESPONSES THERETO

5. The Prosecutor's Office of Bosnia and Herzegovina (Prosecutor's Office of BiH/Prosecution), as well as attorney Sanjin Bandović as counsel for the accused Ekrem Ibračević appealed the referenced judgment.

6. Prosecution filed the appeal on the grounds of erroneously and incompletely established facts and the decision on the sentence, petitioning a Panel of the Appellate Division of the Court of BiH to revoke the acquitting part of the impugned judgment in its entirety, partially revoke the convicting part in relation to section 1 of the enacting clause (Count 1-b of the Indictment), and order a trial. Alternatively, if the impugned judgment is not revoked, the decision on the sentence should be altered by imposing a harsher prison sentence than the one imposed by the Trial Panel.

7. Attorney Sanjin Bandović, counsel for the accused Ekrem Ibračević, filed the appeal on the grounds of essential violations of provisions of criminal procedure, erroneously and incompletely established facts and the decision on the sentence, petitioning that the Trial Judgment be revised pursuant to Article 314(1) of the CPC BiH if the Panel deems that the decisive facts have been correctly ascertained in the first-instance judgment and that in view of the state of facts established, a different judgment must be rendered if the law is properly applied, according to the state of facts and in the case of violations as per Article 297(1)(f) and (j). Counsel further petitioned the Panel to issue a decision revoking the Trial Judgment pursuant to Article 315(1)(a) of the CPC BiH and ordering a trial; alternatively, the Panel should review the referenced judgment insofar as it is contested by the appeal, issue a decision revoking the Trial Judgment, order a trial and rule that the accused is acquitted of the charge.

8. Counsels for the accused Ibračević, Smajlović and Ćović submitted respective responses to Prosecution's Appeal, while Prosecution submitted a response to the Appeal filed by counsel for the accused Ibračević. Each party petitioned that the opposing party's appeal be dismissed as ill-founded.

9. At a session of the Appellate Panel held on 12 July 2017, pursuant to Article 304 of the CPC BiH, Prosecutor and counsel for the accused Ekrem Ibračević briefly presented their respective arguments, followed by a brief presentation of the responses from all the

parties to the proceedings. Attorney Emir Suljagić, counsel for the accused Faruk Smajlović, was absent despite being duly informed and the Panel, in light of counsel's notice dated 20 June 2017, took into account the counsel's written response to the appeal.

10. Having reviewed the impugned judgment insofar as it was contested by the appeals, pursuant to Article 306 of the CPC BiH, the Appellate Panel has ruled as stated in the enacting clause above for the following reasons:

## II. GENERAL CONSIDERATIONS

11. 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.

12. 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.

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

14. 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 dismissed as ill-founded the unreasoned and unclear appellate complaints, in line with the established case law of Appeals Chambers/Appellate Panels[1].

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

## III. CONVICTING PART OF THE IMPUGNED JUDGMENT

15. First, the Appellate Panel examined the Trial Judgment in connection with essential violations of criminal procedure provisions alleged in the appeal by counsel for the accused Ekrem Ibračević considering that they take precedence over any other appellate ground and that, if they exist, the impugned judgment, according to Article 315(1)(a) of the CPC BiH, must be revoked, meaning that there would be no purpose in examining the other appellate grounds.

### A. ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(1)(J) AND (K) OF THE CPC BIH

#### 1. Appeal of counsel for the accused Ekrem Ibračević

16. Defense counsel argued that there is no correspondence between the Indictment and the Trial Judgment in view of the fact that the Court, in relation to the factual account in the Indictment, made interventions and modified the first-instance decision in a way that the operative part of the judgment includes as follows: an amendment to relevant circumstances in the description of the offense; a specification of an incomplete description; a change with regard to co-perpetrators not required in the factual account; an unnecessary adjustment of the description of the criminal offense from the Amended Indictment; the inclusion of relevant but not explanatory or specific circumstances and the omission of vague and incomplete circumstances; the accused Ibračević was found guilty of some of the acts from the integral description of the criminal offense in the Indictment and that those acts contain elements of the criminal offense; in the enacting clause of the judgment the Trial Panel denoted a larger criminal quantity of the offense that the one identified in the Indictment.

17. According to the appeal, in the enacting clause of the judgment the Court adduced facts that are substantially different from the facts contained in the Indictment of the Prosecutor's Office of BiH, i.e. the Court altered legally relevant facts in the enacting clause of the judgment and thereby violated the objective identity of the Indictment.

18. Citing an essential violation of criminal procedure provisions referred to in

paragraph 1(k) of Article 297 of the CPC BiH, defense counsel argued that the deficiencies of the Trial Judgment in terms of incomprehensibility of the enacting clause of the judgment are reflected in the fact that the factual account of the offense in the enacting clause of the judgment does not contain everything that is required to identify the offense charging the accused. Furthermore, in the part of the appeal in which defense counsel reasons the issue of incomprehensibility of the enacting clause of the judgment amounting to an essential violation of criminal procedure provisions on this ground as well, he, citing relevant case law, maintains that an enacting clause of a judgment is incomprehensible and there is an essential violation of criminal procedure provisions if the factual description of an act in the enacting clause of a judgment finding an accused guilty of inciting a particular crime does not contain a clear indication of acts of the accused wherefrom it ensues that those acts, considering the circumstances surrounding a particular case, served the purpose of creating or reinforcing a resolution on the part of another person to commit a crime, as well as facts and circumstances wherefrom it ensued that the accused was aware of the act to which he incited another and that he desired or agreed to the commission of that act.

## 2. Appellate Panel's finding

19. The Appellate Panel finds that the complaints are well-founded.

20. It is alleged in the appeal that the impugned judgment brought about various forms of essential violations of criminal procedure provisions. The existence of but one of the violations under paragraph 1 of Article 297 of the CPC BiH constitutes a sufficient ground to revoke the judgment, considering that they are absolutely essential violations that, by their nature, prevent a review of legality and validity of the impugned judgment. The Appellate Panel finds that the appeal contains a legitimate argument about an essential violation of criminal procedure provisions under subparagraphs (j) and (k) of paragraph 1 of the cited article. In this respect, this Panel indicates that it brought together the appellate grounds under subparagraphs (j) and (k) of the CPC BiH in terms of the deficiencies found in the enacting clause of the impugned judgment, as their overlapping resulted in a single consequence. By intervening in the factual description of section 1 of the enacting clause of the impugned judgment, the Trial Panel first violated the objective correspondence between the judgment and the indictment, after which such an intervention rendered the

enacting clause of the impugned judgment incomprehensible.

21. According to Count I b) of the Indictment the accused Ekrem Ibračević was charged as follows:

> "By exercising supervision over the detention conditions, Ekrem Ibračević organized and furthered inhumane conditions under which detainees were held in "Rapatnica" and "Luke" detention facilities: the detainees were held without sufficient quantities of food and water, without proper medical assistance and in cases when detainees sustained serious bodily injuries in the "Rapatnica" detention facility without proper daylight, with a single red light bulb, the detainees were deprived of basic hygienic needs, bathing, shaving, haircut, they slept on a floor, without beds, bedlinen, blankets. Some detainees - Pero Đukić, Drago Đukić, Lazar Stanišić and Blažan Todić - were detained in two different 3x3m premises of the Rapatnica MZ /Local Commune/ - basements, in which coal, construction tools and materials were stored, with no windows and with an iron door, while in the "Luke" detention facility they were held on the ground-floor premises, on a gravelly surface, without toilet facilities, without enough daylight."

Whereas in section 1 of the enacting clause of the impugned judgment (corresponding to the quoted count of the Indictment) he was found guilty as follows:

> "… (he) furthered inhumane conditions under which detainees Lazar Stanišić, Pero Đukić, Drago Đukić and Blažan Todić were held in "Rapatnica" detention facility; they were detained in two different 3x3m premises of the MZ Rapatnica - basements, in which coal, construction tools and materials were stored, with no windows and with an iron door;"

22. A *prima facie* analysis of the aforementioned wording confirms the validity of the argument made by counsel for the accused Ekrem Ibračević that the Trial Panel's interventions resulted in a change of relevant factual circumstances in the description of the offense, and that the accused was found guilty of some of the acts from the overall description in the Indictment and that those acts contained elements of the criminal offense. In this connection, as part of the aforesaid, the validity of the argument concerning the incomprehensibility of the enacting clause of the judgment is also indisputable, considering that following the intervention the factual account of the offense in the enacting clause of the judgment does not contain everything that is required to fully identify the offense charging the accused.

23. Specifically, this Panel finds that the Trial Panel, by omitting the part *"by exercising supervision over the detention conditions"* and by retaining the act *"furthered inhumane*

*conditions",* disrupted the unity of act of perpetration of the offense charged. Even if one were to accept the reduced factual account, the Trial Panel was required to indicate why that act on its own is to be regarded as criminal conduct underlying the crime, as qualified in the Indictment. This has also rendered the enacting clause of the judgment incomprehensible as it raised the issue of manner in which Ekrem Ibračević furthered the detention conditions and resulted in the Appellate Panel being denied a complete factual account to be subjected to a further review, including the factual aspect of the case.

24. In this respect, the Panel finds that the Trial Panel violated the identity of the judgment and the charge by the very intervention that omitted the description of the whole situation and conditions in which the detainees were held (not enough water, sanitary conditions, no proper medical assistance, no beds, no daylight...), making a general statement that the premises (with the dimensions 3x3) had an iron door and were used for storing coal, thereby losing all the essential elements of the offense and ultimately leading to incomprehensibility as it raises the issue of the kind of charge in question.

25. Consequently, the Appellate Panel concludes that the Trial Panel should not have made interventions in the factual account by eliminating the parts of the factual account that are this relevant. Namely, as it is found in paragraph 178 of the impugned judgment that the omitted parts do not constitute a separate criminal offense, so does this Panel take the view that the remaining part cannot exist as an independent charge either. The factual account as given in the Indictment for Count I b can exist on its own, convicting or acquitting, with possible corrections in terms of precision, but not with the omission that is as important as the one done by the Trial Panel.

26. With regard to this section of the enacting clause of the judgment, the Prosecutor's Office of BiH filed the appeal on the grounds of erroneously and incompletely established facts, and it is clear that such actions of the Trial Panel had direct repercussions on the very factual aspect of the case. The Appellate Panel will bear this in mind after a hearing is held before this Panel, considering that the established essential violation of criminal procedure provisions precludes an analysis of the facts.

27. In this connection, this Panel finds that the Defense's Appeal was also aimed at the remaining sections of the convicting part of the enacting clause of the judgment on all the grounds, but this Panel has found that the essential violation in section 1 of the enacting

clause of the judgment results in revoking of the entire convicting part of the enacting clause of the judgment considering that those sections cannot be separated. Namely, at this procedural moment, in light of the committed essential violations, it is impossible for the Appellate Panel to decide whether the proving of the integral factual description under section 1 would also have consequences on the other sections of the convicting part. For that reason, the Panel will address this issue after the trial is held and the violations corrected.

## IV. ACQUITTING PART OF THE IMPUGNED JUDGMENT

### A. GROUND FOR APPEAL UNDER ARTICLE 299 OF THE CPC BIH: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

#### 1. Appeal of the Prosecutor's Office of BiH

(a) Section I a) of the acquitting part of the enacting clause of the judgment (Count I a) of the Indictment)

28. Prosecution submits that facts have been erroneously established with regard to this section of the acquitting part of the enacting clause of the Trial Judgment, and that the Panel did not scrupulously enough weigh the testimony of witnesses-injured parties, other witnesses, the guards or witnesses who had knowledge of the detention facilities in "Rapatnica" and "Luke" from other sources, as well as documentary evidence. It is argued in the appeal that the accused Ibračević was found guilty of furthering inhumane conditions for the detainees in "Rapatnica", in the so-called Ćumurana; it therefore remains unclear why the Trial Panel concluded that he did not further the unlawful detention of those persons in the said facility. In this respect, the appeal referred to exhibits T-103, T-151 and, in particular, T-29 and T-64 showing the identification of the accused Ekrem Ibračević as 'Kapetan' /Captain/, and the appeal linked this to the testimony of witnesses who spoke about a person whom they addressed as "kapetan". In this connection, the appeal elaborated in particular on the evidence allegedly suggesting that it was none other than the accused Ibračević who found and selected the buildings that would serve as detention facilities, knowing that they did not meet even the minimum conditions. Furthermore, the

Prosecution, pointing to the competences of the accused Ibračević, commented on the accused's participation in an unlawful transfer of detained persons to Tuzla, a matter discussed by the accused himself in his interview during the investigation. Arguing that the responsibility of the accused Ibračević for the unlawful deprivation of liberty and imprisonment in "Rapatnica" and "Luke" detention facilities cannot be ruled out, the appeal stressed the testimony of witness Elvedin Ćudić who said that persons of Serb ethnicity were apprehended by the Military Police and interrogated under the patronage of Military Security, that the orders regarding those persons who were brought in were issued by the security organ (i.e. Ekrem Ibračević), and that their subsequent fate, detention, release and other (sic!). The testimony of this witness is consistent with the testimony of witness Ismet Imširović to the extent that the location and organization of detention was determined by security organ Ekrem Ibračević. According to appeal arguments, both witnesses also spoke about Mustafa Ćović, member of the Military Police, who was recruited by Ibračević for his needs and who had unlimited authority. Furthermore, the appeal cited testimonies of many other witnesses that, according to the analysis conducted by Prosecution, supported the Prosecution's thesis. Finally, Prosecution arrived at the conclusion regarding the responsibility of the accused Ibračević for the unlawful imprisonment of civilians at "Rapatnica" and "Luke" detention facilities.

(b) <u>Section 2 a) of the acquitting part of the enacting clause of the judgment (Count II b) of the Indictment)</u>

29. With regard to this count of the Indictment, it is the view of Prosecution that the Trial Panel did not comprehensively, scrupulously and sufficiently weigh the events that occurred in "Rapatnica", the actual and effective role of the accused at that period or the testimony of witnesses who spoke about those facts, or the admitted documentary evidence. The Prosecution submits that the evidence presented in relation to the status of the accused suggests that the accused Ekrem Ibračević empowered Mustafa Ćović – and that that was approved by Faruk Smajlović as the leader of the Military Police platoon – how to conduct the interrogations of the detained persons and undertake any other action in relation to those persons. In support of its contentions, Prosecution alleged that many witnesses – injured parties testified about being interrogated by "Muće" and lined up in Rapatnica, physically mistreated and threatened, noting in particular that Ismet Imširović said that "Muće" had unlimited authority in the detention facility. Prosecution also

corroborated its allegations by citing allegations from the convicting part of the impugned judgment, obviously inferring that the acts for which the conviction has been rendered should indicate identical conduct in the acts for which the acquittal has been rendered. Finally, Prosecution argues that a scrupulous assessment of the evidence as well as an analysis of the cited facts and circumstances would have determined that even when they were not together Mustafa Ćović undertook the described acts solely under the supervision of Ekrem Ibračević. With regard to Faruk Smajlović, Prosecution asserts that he, as the leader of the Military Police squad responsible for providing security at the detention facilities, knew or had reason to know about the incriminating conduct of Mustafa Ćović, but he condoned and consented to such conduct.

(c) Section 2 b) of the acquitting part of the enacting clause (Count II c) of the Indictment)

30. With regard to this section, Prosecution submits that the Trial Panel erred in assessing the testimony of witnesses Lazar Stanišić and Blažan Todić as mutually contradictory. By paraphrasing portions of the testimony of witness Blažan Todić, Prosecution noted that he mentioned the full name of the accused Ibračević, adding that his statement was corroborated by witness Ismet Imširević who said that he knew that Todić was beaten up.

(d) Section 2 c) of the acquitting part of the enacting clause (Count II d) of the Indictment)

31. In contrast to the reasons adduced for the impugned judgment, Prosecution submits that injured party Lazar Stanišić after all tied Ekrem Ibračević to these acts, quoting the following part: "*that commander showed up with two soldiers, one of whom was Muće*".

32. In the Prosecution's view, a scrupulous analysis of the testimony of Lazar Stanišić (who said that Ćović took him out of the basement between the hours or two and four in the morning), linked with the testimony of Ismet Imširović (who said that Ćović visited the detention facility no matter what time of day or night it was), clearly suggests that that person was Mustafa Ćović aka Muće and that the latter made use of the vast powers that were granted to him by the accused Ekrem Ibračević.

33. Furthermore, Prosecution submits that facts were erroneously established with

regard to the acts – torture with a soldering iron as well, arguing that it is absolutely unrealistic to expect that the injured parties, who were locked up at the basement premises of the MZ Rapatnica, were able to see who brought the persons who mistreated them to the facility. Prosecutor maintained in the appeal that one could clearly infer that Ibračević, no matter what room in the facility he was in, could distinctly hear what was going on and that, given his authority of which all the witnesses spoke, it is absolutely impossible that such things occurred without his approval. In particular, Prosecutor referred to portions of the testimony of Ismet Imširović and Elvedin Ćudić respectively, ultimately claiming that their statements suggest that both Ekrem Ibračević and Faruk Smajlović were present. With regard to Faruk Smajlović, Prosecutor additionally cited witnesses Enis Softić, Elvedin Ćudić, Hasan Džanić, Nihad Omeović, as well as Eis Mahmoud Hai and Zlatko Kavgić.

(e) Section d) of the acquitting part of the enacting clause (Count II) e) of the Indictment)

34. Prosecution submits, recalling the reasons advanced in support of appeal allegations relative to section 2 a) of the acquitting part of the impugned judgment, that the Trial Panel erroneously established the facts in this section as well, noting that it has been established beyond doubt that Mustafa Ćović conducted interrogations on behalf of Military Security alone or in the presence of Ekrem Ibračević, and stressing that it is unrealistic to expect from the witnesses who testified to have knowledge of who authorized, supervised or approved the acts undertaken. According to Prosecution, the witnesses described soldiers with white belts; Drago Đukić identified Faruk Smajlović in the courtroom and said that Faruk punched and kicked him and hit him with batons, being 90% sure of that.

35. Regarding the acts when the witnesses-injured parties were tortured with a soldering iron on the same night with Lazar Stanišić, Prosecution referred to the previous allegations.

(f) Section 2 e) of the acquitting part of the enacting clause (Count II f) of the Indictment)

36. With regard to this section, Prosecution submits that the Trial Panel's contention that the persons detained in "Luke" facility were under the authority of civilian police-reserve police is ill-founded, and that it is a result of erroneously established facts. In

this respect, Prosecution referred to the testimony of witnesses Ibro Ibrić and Samir Begunić who said that there was a room on the premises of the MZ Luke that was used by the Military Police for holding/detaining persons in custody.

37. Refuting the Trial Panel's finding that guards and persons known to them beat the injured parties by authorization from and under the supervision of Ekrem Ibračević with the approval of Faruk Smajlović as charged under this count, Prosecution contended that the fact that witness Nebojša Davidović mentioned on several occasions that the persons whom he identified, respectively, as "Kapetan", "Muće" and "Sejdo" were in Luke facility, has not been addressed. Furthermore, Prosecution drew the attention to the testimony of witness Vasilije Jović who said that in "Luke" they were guarded by persons wearing blue police uniforms, but there were also persons wearing camouflage uniforms. According to Prosecution, the Trial Panel failed to take into consideration a portion of the testimony of witness Stokan Marković where he mentioned two persons: one of whom he identified as 'ključar' /turnkey/ – truck operator and the other one as the turnkey's brother, and described his distinctive gloves.

(g) Section 2 f) of the acquitting part of the enacting clause (Count II g) of the Indictment)

38. Prosecution submits that the Trial Panel's view on who had the competence over injured party Stokan Marković in "Luke" is erroneous and, in that context, cited the previous appeal allegations related to the interrogations of the persons held in "Rapatnica" and "Luke" detention facilities by Ekrem Ibračević and Muće. Moreover, Prosecution argued that the acts charging the accused Sejdalija Ćović with physical mistreatment of injured party Marković have also been proved, noting that a scrupulous analysis of the testimony of Stokan Marković and other witnesses does not call into question the responsibility of Sejdalija Ćović at all.

(h) Section 2 g) of the acquitting part of the enacting clause (Count II i) of the Indictment)

39. With regard to the acts under this section with which the first accused Ekrem Ibračević and third accused Sejdalija Ćović are charged (mistreatment of detainee Danilo Blagojević), Prosecution is of the view that the Trial Panel should have accounted for the fact that the case involved a senior and severely traumatized individual. In addition,

this section has been corroborated by statements of other witnesses who testified that there was physical mistreatment in “Rapatnica” facility during the interrogations.

(i) Section 2 h) of the acquitting part of the enacting clause (Count II j) of the Indictment)

40. First of all, Prosecution maintained that in the previous appeal allegations it adduced reasons regarding the identification of Sejdalija Ćović, the interrogation and the organization of the interrogation by security organ Ekrem Ibračević, and the role of the Military Police and Faruk Smajlović. It is further alleged in the appeal that witnesses (among others, Danilo Blagojević and Dobrivoje Mihajlović) described the very situations relating to the acts with which the accused are charged and they, when linked to the presented evidence, lead to a clear conclusion that the accused perpetrated the acts concerned.

(j) Section 2 i) of the acquitting part of the enacting clause (Count II k) of the Indictment)

41. By stating that the roles of Ekrem Ibračević and Faruk Smajlović had already been explained, Prosecution added with regard to this section that the participation of Sejdalija Ćović is unquestionable, bearing in mind that witnesses-injured parties described both the acts and the persons who mistreated them, stating that the person was wearing a pair of black fingerless gloves with rivets.

## 2. Appellate Panel’s findings

42. The Appellate Panel dismisses as ill-founded all the Prosecution’s arguments aimed at challenging the facts established in relation to the acquitting part of the impugned judgment.

43. To that effect, this Panel will first of all point to the general findings that it reached by analyzing the acquitting part of the impugned judgment insofar as it was contested by the appeal.

This Panel observes that the Prosecution’s Appeal rests solely on paraphrasing the findings in the impugned judgment and statements that the findings should have

been different, without providing appropriate arguments in that regard. Namely, in order to undermine the facts established by a Trial Panel, an appeal must offer clear, concrete and valid arguments showing that the Trial Panel possibly failed to give weight to particular pieces of evidence that are key to a particular decisive fact, or that a different state of facts should have ensued from the existing evidence as a result of a specific analysis serving as an irrefutable basis for a re-examination of facts before an Appellate Panel. Therefore, the standard to be applied by an Appellate Panel when considering alleged error of fact is the reasonableness of factual findings, considering that when examining alleged errors of fact one needs to determine whether any reasonable trier of fact could have reached the same conclusion beyond any doubt.

44. Along this line, 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, bearing in mind that the task of 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.

45. Naturally, the aforementioned does not rule out revoking or revising of an impugned judgment on this appellate ground in case the appellant's appeal includes legitimate claims about the Trial Panel's omissions. However, that is not the case here considering that the Prosecutor's Appeal contains but blanket statements, pointing to no piece of evidence or fact that the Trial Panel possibly failed to take into consideration; rather, the appeal gives an assessment of what the Trial Panel should have done: it should have relied on the description of the accused Ibračević regarding his participation in the criminal offense, i.e. his relationship with Mustafa Ćović aka Muće. With regard to the accused Faruk Smajlović, almost all the comments regarding this accused person are blanket statements, disregarding that most of the sections contain an observation that witnesses barely mentioned the accused Smajlović. As for the accused Sejdalija Ćović, Prosecution has been continuously insisting on an identifying feature – the gloves.

46. Prior to addressing each of the individual sections of the acquitting part of the enacting clause of the judgment, the Appellate Panel concludes beyond doubt that it shares the Trial Panel’s view that there is no question that the events as such have indeed occurred, and that there is no reason to distrust witness testimony in that regard. However,

this Panel too finds that the participation of the accused in the events and their responsibility are disputable, in view of the fact that a majority of witnesses did not identify the accused beyond any reasonable doubt.

47. In this connection, based on the aforesaid as well as the reasons below containing a brief comment on the particular sections, the Appellate Panel holds that a second-instance judgment represents a decision adopted in proceedings on appeal, and as for the reasons adduced for the judgment, it suffices for the judgment to refer to or contain an endorsement for the statements and assessments of the lower court to the extent that the in the reasons for its decision the appeals court points to the admissibility of the views and assessment of the lower court, i.e. the findings with which it concurs (*see European Court, García Ruiz v. Spain, 1999-I, 31 EHRR 589 GC*). This cannot be understood as requiring a detailed answer to each and every argument; rather, it suffices if the appeals court has considered the fundamental issues raised in the appeals that are of decisive importance in terms of adopting a final decision on the existence of the criminal offense and criminal responsibility (*see Constitutional Court, decisions U 62/01 of 5 April 2002 and AP 352/04 of 23 March 2005*).

48. Specifically, in relation to **section *1 a) of the acquitting part of the enacting clause of the judgment (Count I a) of the Indictment) (accused Ekrem Ibračević)***, the Appellate Panel notes that Prosecution's principle whereby the accused Ekrem Ibračević, having been found guilty of furthering inhumane conditions for the detainees in "Rapatnica" facility, should have also been found guilty of furthering unlawful imprisonment, is erroneous. This approach in the Prosecution's Appeal practically violates the fundamental postulates of criminal law disallowing assumptions, particularly when deciding on the guilt of an accused considering that each incriminating act (and even each factual detail in the act) must be proved beyond any reasonable doubt in terms of criminal responsibility of the accused. In contrast to the appeal allegations attempting to base the identification of the accused Ibračević on the testimony of witnesses who spoke about a person whom they addressed as 'kapetan' and linking it to certain documentary evidence (T-103, T-151 and, in particular, T-29 and T-64), the Appellate Panel finds that the view of the Trial Panel presented in paragraph 234 of the impugned judgment is reasoned and based on the offered evidence, reading that *none of the examined witnesses stated, nor can such a conclusion be drawn from the presented evidence, that it was the accused Ekrem Ibračević* who perpetrated the acts referred to in the factual description of this count.

When making this finding, this Panel takes into account the fact that the impugned judgment contains a detailed analysis of the testimony of witnesses-injured parties with respect to whom the incriminating acts were perpetrated. However, a decision on the guilt of the accused Ibračević could not have been made on the basis of those testimonies considering that it is evident that they do not facilitate an insight into the concrete person who deprived them of liberty and ordered their imprisonment, or the person who ordered or approved their arrest and detention. In this connection, the Appellate Panel also took into account the appeal allegation that, in support of its statements, refers to the passage of time, the condition of the persons who testified and other circumstances that may heavily influence the memory of those persons, but at the same time points out that when it comes to details of key importance they must be proved beyond doubt, and cannot be convalidated by any objective circumstances – impediments on the part of witnesses; there must be a coherent unity, a self-contained circle of evidence that rules out any other possible conclusion, which is not the case here.

49. In examining the appeal allegations, the Appellate Panel examined the portions of the impugned judgment referring to the testimony of, respectively, witnesses Elvedin Ćudić and Ismet Imširović on which the appeal contentions rely, and found beyond doubt that the cited testimony do not contribute to a different finding that the one reached by the Trial Panel in paragraphs 252 and 253 of the impugned judgment.

50. Finally, this Panel observes that Prosecution, other than the averment that witnesses mentioned one 'Kapetan' (who is supposed to be brought in connection with Ekrem Ibračević), does not offer a convincing factual and evidentiary basis in any other way, including through documentary evidence, that would, regardless of the inconsistencies in the accounts of witnesses for whom it is doubtful that they could be relied on in terms of identification of the person whom the witnesses possibly saw for the first time, and under those circumstances showed beyond doubt that the criminal responsibility of Ekrem Ibračević for the perpetrated acts cannot be ruled out in light of his function.

51. With regard to section ***2 a) of the acquitting part of the enacting clause of the judgment (Count II b) of the Indictment) (accused Ekrem Ibračević and Faruk Smajlović)***, the Appellate Panel observes, as noted in the introductory part of the findings, that the appeal fails to offer any concrete allegations on the Trial Panel's failure to assess

particular pieces of evidence that are key to particular decisive facts, or give a concrete analysis relying on the existing evidence to show that the state of facts should have been different. Rather, the appeal but reiterates the insistence on the Prosecution's thesis by citing the same allegations of the witnesses that were assessed by the Trial Panel, wrongly arguing that the conclusion from the state of things should have been different. Specifically, Prosecution revisited the issue of powers of Mustafa Ćović aka Muće, insisting on the testimony of witness Imširović wherefrom it is allegedly clear that 'Muće' had unlimited powers, but overlooking that such an allegation is far from having sufficient probative value to create the guilt of the accused Ibračević. Such allegations satisfy proving of the fact that "Muće" was authorized by Ekrem Ibračević to interrogate the persons detained in "Rapatnica" and "Luke", but in no way do they satisfy that such powers also involved perpetration of acts involving infliction of any pain or suffering on those civilians. According to the impugned judgment, the testimony of injured party Đukić, witness Imširović and other examined witnesses as well as the presented documentary evidence, does not suggest that in the case in question 'Muće' had any other powers except the one for interrogation, nor did the Prosecution offer any other evidence pointing to an unequivocal fact that 'Muće' could have taken such actions solely on the basis of authorization given by the accused Ibračević and in no other manner whatsoever. With regard to the alleged perpetration of the incriminating act with the approval of Faruk Smajlović, it is indicative to the Appellate Panel that none of the presented pieces of evidence suggested such a finding, and any decision to the contrary would violate one of the fundamental procedural principles – *in dubio pro reo*.

52. Having analyzed section ***2 b) of the acquitting part of the enacting clause of the judgment (Count II c) of the Indictment) (accused Ekrem Ibračević and Faruk Smajlović)***, this Panel holds that the appeal – save the contention that the Trial Panel erred in finding that the testimonies of witnesses Lazar Stanišić and Blažan Todić are contradictory, and that witness Todić identified the accused Ibračević by his full name – fails to offer any other acceptable allegations that would call into question the Trial Panel's findings, i.e. the appeal does not point to anything that is different from what the Panel has already analyzed, with presenting acceptable findings in that regard. Furthermore, the key role and conduct of the accused Ibračević are still not clarified in the appeal, nor is there an explanation for the contradictions between the testimony of Blažen Todić and Lazar Stanišić or between the statements of Todić from different time periods; rather, the appeal

applies a fragmented approach, pointing to portions that may be consistent but also overlooking key portions that are contradictory and, as such, definitely cannot serve as the basis for a conviction.

53. This Panel takes into account the Prosecutor's allegation, also in line with the allegations from the impugned judgment, that the injured party Todić identified the accused by his full name. However, it notes that a decisive fact for the Panel's decision is that in his statements Todić did not clarify the role of the accused Ibračević as he placed him in various aspects not corroborated by any other piece of evidence, and guilt cannot rest on such an incomplete chain of evidence.

54. With regard to the accused Smajlović, the Appellate Panel observes that Prosecution's Appeal did not refer to him in this section at all, the obvious thing being that no one mentioned him in the context of these acts in the first place.

55. The Appellate Panel also refused as ill-founded the arguments directed at challenging the facts established in relation to section ***2 c) of the acquitting part of the enacting clause of the judgment (Count II d) of the Indictment) (accused Ekrem Ibračević and Faruk Smajlović)***. Namely, by stating that it accepts all the findings presented by the Trial Panel in the impugned judgment with respect to this count beyond a doubt, following a comprehensive and evidently thorough analysis of all the key pieces of evidence that were relevant thereto, this Panel will but refer to the basic principles that make the finding of the Trial Panel acceptable.

56. With regard to the first aspect of the factual description of this count, i.e. the charge that the accused Ibračević interrogated Lazar Stanišić and ordered Mustafa Ćović to put a rifle barrel in his mouth and hit him (as described in detail with a consequence in the factual description of this count) – with respect to which the Prosecutor claimed that the injured party Lazar Stanišić did in fact tie the accused Ibračević to these acts if his testimony is viewed in combination with all the other pieces of evidence – this Panel finds that the Trial Panel was right to find that the participation of the accused could not have been determined beyond a reasonable doubt. To that extent, it is beyond dispute that the Trial Panel was guided by the principle of beyond any reasonable doubt as the basic standard of proving the guilt of an accused, which surely would not be respected if one were to follow the Prosecution's allegation that Stanišić's testimony – in which he did not

characterize the accused as a participant in this incident – is linked to the remaining evidence, all for the purpose of securing the guilt of the accused. By all means, the aforementioned would also violate the principle of in dubio pro reo as another principle mentioned in this judgment, which in its substance prohibits any establishment of facts to the detriment of an accused in this manner.

57. Furthermore, in relation to the second aspect of the factual description of this count, i.e. the torture of Lazar Stanišić upon a previous consent from Ekrem Ibračević and with the approval of Faruk Smajlović, by various persons including Mustafa Ćović aka Muće, it is beyond dispute that the consent from Ekrem Ibračević or the approval of Faruk Smajlović for such conduct have not been proved. First of all, the presented evidence, as properly found in the impugned judgment, in contrast to the appeal allegations, does not offer an indisputable basis for such a finding. Again, the claims in the appeal rest on insisting on evidence that refers to allegedly unlimited authority of 'Muće' given to him by the accused Ibračević, but again presents this in a way that absolutely does not undermine the irrefutable findings of the Trial Panel. In this respect, the Appellate Panel finds the conclusion of the Trial Panel in paragraph 278 of the impugned judgment to be particularly indicative, and the Appellate Panel upholds unreservedly:

> "With regard to the allegations from the factual description of this count of the Indictment that in a room on the ground floor in which Lazar Stanišić was detained, upon a previous consent from Ekrem Ibračević to interrogate Lazar Stanišić, with the approval of Faruk Smajlović that various persons could enter that room, including military police officer Mustafa Ćović aka Muće, especially at night time, knowing that Lazar Stanišić would be tortured, and those persons, including Mustafa Ćović aka Muće, entered that room and hit Lazar Stanišić with various objects all over his body in order to extort a statement on Serb military activities; Stanišić sustained serious physical and mental pain as a result of the beating, the consequences of which are present to this day. The Panel previously explained that it relied on the testimony of the injured party Ismet Imširović to find that Mustafa Ćović aka Muće had the approval of the accused Ekrem Ibračević to enter the facilities in Rapatnica at any time to interrogate the detained Serb civilians in order to obtain military-related information, but that authorisation did not extend to include any other action except interrogation. However, having examined the presented evidence to determine whether the case in question involved a previous consent from the accused Ekrem Ibračević to interrogate Lazar Stanišić, as well as the approval of the accused Faruk Smajlović that Muće, together with other persons, may enter the room in which the injured party Lazar Stanišić was detained, the Panel was unable to determine beyond a reasonable doubt that the accused Ibračević gave such consent or that it was done on the approval of the accused Smajlović. Furthermore, the Panel was not

> able to determine beyond a reasonable doubt that the aforementioned persons had a previous consent from the accused Ibračević and the approval of the accused Smajlović to hit the injured party with various objects all over his body, for the purpose of extorting a statement on Serb military activities. In addition, the Panel, relying on the evidence presented in this case, was not able to determine that the accused Ibračević and Smajlović were aware that Muće, together with other persons, would torture the injured party Lazar Stanišić, particularly bearing in mind that the factual description of this count of the Indictment does not specify where their awareness of torture of the injured party ensues from." (paragraph 278 of the impugned judgment)

The issue of awareness is disputable in other counts of indictment as well, and it also poses a problem in the framework of the appeal arguments. The Prosecution does not correlate its claims properly to form a circle of evidence, a unity of the incriminating act divided through the roles of the accused who directly committed the acts, which would thus render the guilt of the accused indisputable. In order to avoid repetition, the adduced reasons also apply to the portion of this count referring to actions against the injured party Lazar Stanišić involving intimidation with execution, being hit by a bat and a wooden chair.

58. Finally, with regard to the acts of torture using a soldering iron, in contrast to the appeal arguments, the Appellate Panel finds that the Trial Panel did in fact weigh all the facts and circumstances presented in that part of the appeal, relying on the analysis of such facts and circumstances (i.e. the evidence offered) to arrive at a proper conclusion that the guilt of the accused Ibračević and Smajlović cannot be determined beyond a reasonable doubt, and not the conclusions insisted on by the Prosecution, overlooking all the interruptions in the chain of evidence, i.e. the discrepancies in witness accounts that call into question the Prosecution's thesis.

59. Having analyzed the impugned judgment within the scope of appeal arguments directed at the facts established with regard to section ***2 d) of the acquitting part of the enacting clause (Count II e) of the Indictment) (accused Ekrem Ibračević and Faruk Smajlović)***, this Panel found that they too are ill-founded. Prosecution's appeal arguments have not succeeded in questioning the facts established by the Trial Panel considering that the Prosecution, when challenging the allegations made in paragraph 296 of the impugned judgment by arguing that it is unrealistic to expect from witnesses who have testified to know who authorized, supervised and approved the acts perpetrated, makes a blanket appeal argument. Having said that, the Appellate Panel finds that in a situation when it is understandable that witnesses – injured parties could not have known the

precise roles of accused persons or the accused themselves, one is required to supply a series of other evidence (documentary and testimonial) showing the guilt of the accused beyond doubt. In the case in question, as explained in the previous paragraphs, this is not possible solely on the grounds of the authorization that Mustafa Ćović aka Muće had, in view of the fact that it has not been proved that the authorization was exceeded on the indisputable knowledge and approval of Ekrem Ibračević.

60. With respect to the second part of the factual description of this count, i.e. alleged perpetration of the same acts by the accused in relation to the injured party Lazar Stanišić (section 2 c) of the acquitting part of the enacting clause - Count II d) of the Indictment) – torture by a soldering iron, the Panel notes that it would serve no purpose to reiterate the same arguments given that the counts correspond in terms of time and place.

61. With regard to the Prosecution's appeal arguments relative to section ***2 e) of the acquitting part of the enacting clause (Count II f) of the Indictment) (accused Ekrem Ibračević and Faruk Smajlović)***, a *prima facie* analysis of the question of who had the authority over the detained civilians at the Luke facility makes it evident that the appeal, by referring to the testimony of Samir Begunić and Ibro Ibrić, baselessly objects to the fully and properly established facts by the Trial Panel on the basis of testimony of witnesses Rade Jovanović, Petar Ninković, Nebojša Davidović, Vasilije Jović and Mićo Jovanović respectively, as the referenced testimony constitutes a whole that serves as the basis for a reasonable trier of fact to arrive at a proper conclusion as was the one reached by the Trial Panel.

62. Furthermore, as for the specific charges that are divided in two parts in the factual account (the first part: incriminating acts against Stokan Mraković, Nebojša Davidović, Ilija Marković, Neđo Stokanović, Vasilije Jović, Neđo Blagić and Stokan Blagić; and the second part: incriminating acts against Vasilije Jović), authorized and supervised by Ekrem Ibračević and approved by Faruk Smajlović, this Panel first of all observes a detailed analysis of the Trial Panel in which it juxtaposed all the relevant evidence, weighed the inconsistencies with regard to decisive facts and, relying on a detailed presentation of the facts, arrived at a proper conclusion (paragraph 316 of the impugned judgment). This view of the Appellate Panel, i.e. the fact that the appeal makes blanket statements, is also supported by the fact that the appeal contains an incorrect allegation about an omission on the part of the Trial Panel to consider the fact that *witness Stokan Marković mentioned two*

*persons, identifying one of them as "ključar" – truck operator and the other one as brother of the ključar* (page 34 of the Appeal). This appeal contention stands in contrast to the finding of the Trial Panel in paragraph 316 of the impugned judgment, reading as follows:

> "The Panel also had in mind that in his statements the injured party Stokan Marković described the persons who mistreated him, among them a person whom he referred to as *'Ključar',* as well as a person with fingerless gloves; he learned in the Tuzla prison that the two were brothers. However, the injured party Marković did not bring those persons in connection with him being taken to be executed, in the manner and with persons as described by witness Nebojša Davidović. The Panel finds that the injured party Stokan Marković – who described the persons who as he later learned were brothers (the same persons who, according to witness Nebojša Davidović, were always present during executions) – would have surely mentioned that those brothers led him out to be executed if they indeed had been the ones who actually did that." (paragraph 316, page 121, of the impugned judgment)

63. Therefore, taking into consideration Trial Panel's findings that were preceded by a detailed analysis of witness testimony, as well as the appeal arguments challenging the facts with blanket statements and even incorrect allegations on the omissions on the part of the Trial Panel, this Panel has no dilemma that given the state of things it is proper to rule in line with Article 284(c) of the CPC BiH, as was done by the Trial Panel.

64. Section ***2 f) of the acquitting part of the enacting clause (Count II g) of the Indictment) (accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović)*** refers to the acts of torture and violation of bodily integrity of the injured party Stokan Marković. In this respect, the Prosecution contested a proper finding of the Trial Panel that the guilt of the accused could not have been determined beyond any reasonable doubt on the basis of the existing evidence. First of all, the Appellate Panel observes that, with regard to this section, the appeal satisfies the standard of review of responsibility of Sejdalija Ćović only. Namely, in relation to the accused Ibračević and Smajlović, the appeal refers to the reasons adduced in the previous sections, on which this Panel has provided adequate reasoning; as the appeal alleges that the same reasons also apply in relation to the perpetration of this act, in order to avoid repetition and act purposefully, the Appellate Panel refers to the reasons adduced above. However, with regard to the criminal responsibility of the accused Sejdalija Ćović, it is important to note that the Prosecution's Appeal, by insisting on a scrupulous assessment of the testimony of witness Stokan Marković, is overlooking the fact that the impugned judgment makes it evident that his

testimony has indeed been scrupulously assessed and analyzed. However, the Trial Panel was deadlocked: a single witness's testimony incriminating the accused Ćović. In that situation it was necessary that the testimony of such a witness removed any doubt about any other finding, which was not the case here. In doing so, the appeal forgets that the testimony of witness Stokan Marković is specific in nature, considering that it is an exception to the direct presentation of evidence having been read out at the trial. For that reason, the Defense was denied the right to cross-examine the witness, so that such piece of evidence needed to be irrefutably decisive and convincing in order for the Trial Panel, all the deficiencies notwithstanding, to base its decision on the guilt of the accused solely on that piece of evidence. Given the state of things, the appeal should have offered to the Panel clear and concrete reasons why such a statement is credible, i.e. base such a statement on other corroborating evidence and not on the fact that many witnesses spoke about Stokan Marković's being "deformed" as a result of a beating. This is actually not at issue at all, because this Panel, the same as the Trial Panel, finds indisputable that the injured party Marković was mistreated, but what is in dispute is the responsibility of the persons charged by the Prosecution in that regard. For these reasons, the Panel, in light of the principle of *in dubio pro reo*, rendered the only proper decision possible, which is to acquit the accused and the co-accused (for the reasons adduced in that regard).

65. The acts described in section ***II g) of the enacting clause of the judgment (Count II i) of the Indictment) (accused Ekrem Ibračević and Sejdalija Ćović)*** relate to the mistreatment of Danilo Blagojević. In this respect, the Prosecution argues that the responsibility of the accused has been determined beyond doubt, whereas this Panel's analysis of the impugned judgment concludes that the appeal took a fragmented approach to the analysis of the established facts, disregarding the minimum standard of proof that needs to be satisfied in order to render a conviction. Namely, in case when a piece of evidence lacks the necessary level of credibility for a conviction in terms of substance and quality, this deficiency cannot be remedied solely by an appellate allegation about the personal situation of a witness (age, illness). Notwithstanding the repeated attempts by the Trial Panel, witness – injured party Danilo Blagojević failed to explain decisive facts with regard to the identity of the persons who perpetrated the incriminating acts against him. In this respect, the Appellate Panel finds highly indicative that he stated at the trial that while giving a statement during the investigation in 2008 he did not know the names of persons whom he named Mustafa, Sejo and Kapetan at the trial, having heard those names from

people in Bijeljina after the year 2008. Given the state of things, this Panel shares the Trial Panel's view that the testimony of this witness is unclear, confused and unconvincing, and there is no other evidence suggesting a different decision. In particular, this finding is corroborated by the fact that the appeal does not provide any concrete reasons that would raise doubt about the established facts; rather, the appeal challenges the facts in broad terms only, by pointing out the age of the witness.

66. Upon a review of the appellate arguments with regard to section ***2 h) of the acquitting part of the enacting clause (Count II j) of the Indictment) (accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović)***, it is unclear to the Appellate Panel just how the Prosecution arrived at the conclusion that the guilt of the accused is inferred from the fact that various persons entered the premises and perpetrated the acts described by witnesses. Specifically, the Trial Panel determined beyond doubt in paragraph 361 that some of the civilians of Serb ethnicity were hit by various persons during their stay in Rapatnica. However, none of the witnesses linked such acts to the authorization and supervision of Ekrem Ibračević or the approval of Faruk Smajlović, and the appeal does not offer any arguments indicating a possibility to this Panel that there is some evidence that the Trial Panel might not have taken into account, which might have possibly indicated such a possibility, resulting in a re-examination of such facts. Moreover, with regard to Sejdalija Ćović, the appeal allegations stand in contrast to paragraph 363 of the impugned judgment showing that the facts have not been clarified at all in that respect. For that reason, and also in the context of the testimony of witness Enis Softić who confirmed that Mustafa Ćović and not Sejdalija Ćović would show up at any hour, there is an obvious possibility about confusion between those two persons. Consequently, in accordance with Article 3 of the CPC BiH, the Panel ruled in favor of the accused because of the existence of a doubt about such a fact.

67. In the context of the last section, ***2 i) of the acquitting part of the enacting clause (Count II k) of the Indictment) (accused Ekrem Ibračević, Faruk Smajlović and Sejdalija Ćović)***, this Panel finds that it is appropriate, bearing in mind all the aforesaid, to comment only on the allegations regarding the identification of the accused Sejdalija Ćović, in view of the fact that in the reasons hitherto it did not address the issue of *black fingerless gloves with rivets* that are, in the Prosecution's view, key to identifying the accused. In this respect, the Appellate Panel has analyzed the Trial Panel's findings that preceded the decision that in the case in question, acknowledging the principle of *in*

*dubio pro reo*, it could not have been concluded beyond a reasonable doubt that the person who was wearing a pair of black fingerless gloves with rivets was in fact the accused Sejdalija Ćović. In contrast to the respective allegations of witnesses Neđo Stokanović, Dobrivoje Mihajlović, Velibor Mihajlović and Radenko Mihajlović, the testimony of, respectively, witnesses Nebojša Davidović, Elvedin Ćudić, Ismet Imširović, Enis Softić, Safer Ahmetović and Bahrudin Hodžić properly incurred suspicions with the Trial Panel that the referenced gloves are a definitive and absolute sign of identification of Sejdalija Ćović, and pointed to an objective possibility that the gloves may have been worn by some other person. Consequently, and bearing in mind that no other evidence in that regard effectively completed a circle that would constitute an irrefutable basis for the responsibility of the accused Ćović, the Trial Panel ruled as stated in its decision. In that respect, this Panel finds particularly indicative the fact that the respective testimony of witnesses Elvedin Ćudić, Ismet Imširović, Enis Softić, Safer Ahmetović and Bahrudin Ćudić – the persons who were members of the formations of the same party to the conflict and who accordingly knew the accused Sejdalija Ćović very well (which also ensues from their testimony) – are consistent, and that they stated that Huso aka Bobi wore such gloves, with Elvedin Ćudić and Enis Softić stating that they sometimes saw Sejdalija Ćović wearing similar gloves. In this respect, the Trial Panel properly assessed that in the case in question the testimony of persons detained in “Rapatnica” lack the necessary level of conviction that the accused Sejdalija Ćović was the person who wore fingerless gloves with rivets in every situation that they referred to, particularly for the reason that the witnesses who were detained in “Rapatnica” and “Luke”, although speaking about persons they referred to as Muće, Kapetan and Sejdo respectively, could not always explain how they learned those names and who were the persons with those names. Therefore, their statements in this regard are given less credibility than the testimony of the persons who knew the accused Sejdalija Ćović.

68. Finally, based on the foregoing, with regard to each of the charges for which an acquittal was delivered, the Appellate Panel arrives at the conclusion that the Trial Panel adduced sufficient and altogether acceptable reasons in support of its views and factual findings by relying on relevant evidence that corroborates the integral view of the Panel, adding that there were no grounds to raise objections against the assessment of the witness testimony, as attempted in the appeal, solely on the ground that the assessment of those statements and analyses made when adopting a conclusion thereon do not suit one

of the parties to the proceedings. In other words, the Prosecution cannot substitute the Panel's final findings with its own findings by a one-sided assessment of the body of evidence, pointing out only the allegations that are opposite of what the Trial Panel determined objectively and finding no support and corroboration for such contentions in a self-contained circle of evidence.

69. Consequently, the Appellate Panel, pursuant to Article 315(1)(a) of the CPC BiH, revoked the convicting part of the impugned judgment and ordered a trial, and upheld the acquitting part of the judgment pursuant to Article 313 of the CPC BiH, as stated in the enacting clause of this judgment.

| **Record-taker:** | **PRESIDING JUDGE** |
|---|---|
| Ena Granić Čizmo | **Tihomir Lukes** |

**LEGAL REMEDY**: No appeal is allowed against this judgment.