



THE COURT OF BOSNIA AND HERZEGOVINA

Number: X-KRŽ-08/502

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Panel composed of: Judge Hilmo Vučinić, President of the Panel
Judge Phillip Weiner
Judge Mirza Jusufović

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

ZRINKO PINČIĆ

APPELLATE VERDICT

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

Vesna Budimir

Defense Counsel for the Accused:

Velimir Marić

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Number: X-KRŽ-08/502
Sarajevo, 2 December 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division composed of Judge Hilmo Vučinić, as the President of the Panel, and Judges Phillip Weiner and Mirza Jusufović, as the Panel members, with the participation of the Legal Officer Nevena Aličehajić as the Record-taker, in the criminal case against Zrinko Pinčić for the criminal offence of War Crimes against Civilians, in violation of Article 173(1)e) of the Criminal Code of BiH (hereinafter: the CC of BiH), in conjunction with Article 180(1) of the CC of BiH, deciding on the Appeals filed by the Prosecutor's Office of BiH No. KT-RZ-19/06 dated 6 January 2009 and the Defense Counsel for the Accused Zrinko Pinčić, attorney Velimir Marić, dated 6 January 2009, from the Verdict of the Court of BiH No. X-KR-08/502 dated 28 November 2008, following the public session, in the presence of the Prosecutor of the Prosecutor's Office of BiH, Vesna Budimir, the Accused Zrinko Pinčić and his Defense Counsel, attorney Velimir Marić, announced the following:

V E R D I C T

The Appeals filed by the Prosecutor's Office of BiH and the Defense Counsel for the Accused Zrinko Pinčić, attorney Velimir Marić, are hereby dismissed as unfounded, whereby the Trial Verdict of the Court of BiH No. X-KR-08/502 dated 28 November 2008 is upheld in its entirety.

R e a s o n i n g

1. By the Verdict of the Court of BiH, the Accused Zrinko Pinčić was found guilty of having committed the criminal offence of War Crimes against Civilians in violation of Article 173(1)e) of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH, through the actions described in the operative part of the Trial Verdict. The First Instance Panel sentenced him to 9 (nine) years of imprisonment for the abovementioned criminal offence.
2. Pursuant to Article 188(1) of the Criminal Procedure Code of BiH (hereinafter: the CPC of BiH) the Accused must reimburse the costs of the criminal proceedings, and their amount will be determined by the Court in a separate decision.

I APPEALS

3. The Prosecutor and the Accused filed the Appeals from the Trial Verdict within the statutory deadline.

4. In its Appeal the Prosecutor's Office contests the Trial Verdict due to the decision on the criminal sanction noting that the First Instance Court erred while meting out the punishment for the Accused by imposing upon him a too lenient punishment for the criminal offence the Panel found him guilty of and moved that the Trial Verdict be revoked and a sentence longer than 9 years of imprisonment pronounced.

5. The accused Zrinko Pinčić contested the Trial Verdict for the following reasons:

1. existence of essential violations of the criminal procedure provisions,
2. violations of the Criminal Code,
3. erroneously and incompletely established state of facts,
4. decision on the costs of the criminal proceedings,

and he moved the Appellate Panel to grant the Appeal, render a decision revoking the Trial Verdict and schedule a hearing before the Panel of the Appellate Division or to revise the Verdict by acquitting the Accused of charges.

6. On 2 December 2009, pursuant to Article 304 of the CPC of BiH, a session of the Appellate Panel was held at which the Prosecutor and the Defense Counsel briefly presented their respective Appeals fully maintaining the arguments and motions submitted in writing. The Prosecutor briefly responded to the Defense Appeal, whereas the Defense Counsel briefly presented the contentions from the Response to the Appeal previously filed in writing. The Accused fully agreed with the submissions by his Defense Counsel.

7. Having inspected the contested Verdict within the scope of the Appeal, pursuant to Article 306 of the CPC of BiH, the Appellate Panel of the Court of BiH has decided as rendered in the Operative Part for the following reasons:

II GROUNDS OF APPEAL PURSUANT TO ARTICLE 297 OF THE CPC OF BiH – ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. Violations of the Right to a Defense

8. In his Appeal the Accused alleges that the First Instance Panel committed the following violations of his right to a defense: (a) the Panel improperly limited the questioning of Witness A in relation to her suffering prior to her arrival in Donje Selo and questioning of the expert witness in relation to determining the causes of the trauma of the injured party; (b) the Trial Panel improperly rejected the Defense's request for additional neuropsychiatric evaluations of both the Accused and Witness A; and (c) the Trial Panel improperly rejected

requests for a confrontation between the Accused and Witness A as well as polygraph testing of the Accused.

9. Article 297(1) of the CPC of BiH prescribes: *The following constitute an essential violation of the provisions of criminal procedure: ...d) if the right to defense was violated...i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code...* Paragraph 2 of the same Article of the CPC of BiH reads as follows: *There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.*

A. The Limitation of Questioning of Witness A and the Expert Witness

10. The Defense argues that the Trial Panel committed a procedural error by imposing strict limitations during cross-examination. Specifically, the Defense submits that he was improperly prevented from questioning both Witness A as to her difficulties prior to arriving in Donje Selo and the expert witness Alma Bravo-Mehmedpašić in relation to the causes of the injured party's trauma. The Defense further argues that the Trial Panel committed an error by rejecting his Motion to hold a confrontation with Witness A.¹

a. Inquiry by Defense Counsel

11. Article 263 of the CPC of BiH provides that:

{t}he judge or the presiding judge shall forbid the inadmissible or the repetition of irrelevant questions as well as answers to such questions. If the judge or the presiding judge finds that the circumstances that a party and the defense attorney wish to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence.

12. Article 264 of the CPC of BiH further states that:

{i}t shall not be allowed to ask an injured part about any sexual experiences prior to the commission of the criminal offence in question. No evidence offered to show the injured party's involvement in any previous sexual experience, behavior, or sexual orientation shall be admissible.

13. The Appellate Panel finds that the allegations of the Accused are unfounded and that the Trial Panel acted properly in limiting the questioning pursuant to Articles 263 and 264 of the CPC of BiH. With regard to the allegations related to the expert witness Alma Bravo-Mehmedbašić, a review of the evidence indicates that the witness testified that the complaining witness displays the symptoms of post traumatic stress disorder resulting from

¹ Defense Appeal at page 32 (English version).

trauma.² The doctor also noted that Witness A exhibits permanent personality changes which are consistent with victims of torture and rape.³ During cross-examination defense counsel questioned the witness on various matters. When counsel attempted to examine the witness concerning a prior rape suffered by Witness A, the Trial Panel prevented him from doing so pursuant to Article 264 of the CPC of BiH.⁴

14. While the Accused explains in his appellate brief the reasons why such line of inquiry should have been permitted, he failed to do so at trial. The Defense Counsel never explained how this inquiry would not violate Article 264. In fact, when the Presiding Judge asked counsel why he was *insisting on this question*, counsel never responded.⁵ Consequently, the Appellate Panel finds that the Accused failed to properly raise the issue before the Trial Panel and thus his appeal on this issue should be denied. Specifically, the Appellate Panel notes that a party should not be allowed to allege on appeal that an error was committed by a trial panel when that party has failed to provide its grounds and reasoning as to the admissibility/inadmissibility of evidence.

15. Nevertheless, the Appellate Panel having reviewed the matter finds that no essential violations of the criminal procedure provisions were committed. A review of the testimony indicates that the expert was in fact questioned whether she was told by Witness A that another person had raped her. Although the expert did not recall this conversation, the doctor noted that it was not her function to determine which factor caused the stress since she was only interested in the resulting consequences.⁶ Similarly, the doctor testified that she could not determine what stressful incident caused the PTSD.⁷ The expert concluded that Witness A suffered from *combine torture in the form of multiple sexual torture*.⁸ This problem could be the result of rapes by one person or by multiple persons.⁹

16. The Appellate Panel notes that the expert witness never concluded that the actions of the Accused caused the trauma.¹⁰ Moreover the psychiatrist testified that other circumstances including the death of family members, seeing dead bodies or incidents from Bradina could also be the reason(s) for the permanent change in personality.¹¹ The doctor further noted that she could not isolate one trauma as being the cause of Witness A's problem.¹² Finally, she responded that she was only interested in the aftermath of the trauma but could not try to determine who or what caused the trauma.

17. A review of the expert's testimony indicates that the doctor (1) was asked about a rape committed by another and (2) could not determine whether any specific incident or a combination of incidents caused the trauma suffered by the complaining witness. Therefore, counsel's attempted inquiry as to whether the PTSD could have been caused by

² Testimony of Dr. Alma Bravo-Mehmedbašić on 15 September 2008 at 50:20 to 50:55.

³ Ibid. at 52:45 to 53:10.

⁴ Testimony of Dr. Alma Bravo-Mehmedbašić on 16 September 2008 at 20:50 to 21:50.

⁵ Ibid. at 21:45 to 21:50.

⁶ Ibid. at 12:38 to 14:07.

⁷ Ibid. at 20:44 to 20:49.

⁸ Ibid. at 29:50 to 31:02.

⁹ Ibid. at 31:40 to 31:49.

¹⁰ Ibid. at 11:05 to 12:36.

¹¹ Testimony of Dr. Alma Bravo-Mehmedbašić on 15 September 2008 at 59:02 to 59:39.

¹² Ibid. at 59:48 to 1:00:07.

the prior rape would have been cumulative to testimony previously introduced. The Appellate Panel thus concludes that Trial Panel acted properly in limiting the cross-examination of the expert witness Dr. Alma Bravo-Mehmedbašić.

18. The Accused also alleges that the Trial Panel improperly limited his examination of the complaining witness. At trial, the Accused indicated his intent to question Witness A on various topics including the problems she faced prior to arriving in Donje Selo.¹³ The Trial Panel refused to allow this line of inquiry on the grounds of relevance.¹⁴

19. The Appellate Panel notes that the Accused failed at trial to explain the relevance of the proposed testimony and thus has not properly preserved the issue for appeal. Nevertheless, the Appellate Panel having reviewed the record indicates that the Trial Panel acted properly in rejecting the Accused's request.

20. A review of the record indicates that Defense Counsel advised the Trial Panel that he wanted to waive cross-examination and instead conduct a Direct Examination of Witness A.¹⁵ He also explained that he planned to inquire on several topics. Defense Counsel did not explain how any of this testimony would be relevant. When the Prosecutor questioned how this testimony was related to the allegations in the indictment,¹⁶ the Defense Counsel did not provide any basis for the admissibility of the evidence. It appears from the appeal that the Accused was planning to use the answers to argue that Witness A was subjected to traumatic experiences prior to her meeting the Accused.¹⁷

21. The Appellate Panel notes that Witness A and other witnesses testified as to the difficulties suffered prior to their arrival in Bradina.¹⁸ Moreover, Defense Counsel and the Accused were able to ask some questions relating to Witness A's situation prior to her residing in Donje Selo.¹⁹ As noted in the previous section of this Verdict, the expert witness testified that due to the many traumatic incidents suffered by Witness A including those in Bradina, she could not isolate one incident as causing the resulting psychological problems.²⁰

22. The Appellate Panel thus finds that any additional evidence that could have been gained through Defense Counsel's examination of Witness A on the requested topics, would only have been cumulative to the evidence in the record. Nor does the Accused identify any particular testimony that he was prevented from introducing through the witness. Therefore, the Appellate Panel concludes that the First Instance Panel did not improperly limit the examination of the complaining Witness A.

¹³ Testimony of Witness A on 08 September 2008 at 2:06:11 to 2:07:49.

¹⁴ Ibid. at 2:09:33 to 2:10:42.

¹⁵ Ibid. at 2:03:50 to 2:04:11.

¹⁶ Ibid. at 2:08:11 to 2:09:06.

¹⁷ Defense Appeal at pages 25-27 and 32. See also Testimony of Witness A on 08 September 2008 at 2:36:07 to 2:36:21, where the Defense Counsel indicates that his line of questioning is relevant to the issue of psychological trauma.

¹⁸ See the Testimonies of Witness A, Gordana Gligorević and Radmila Živak. See also Exhibits T-1, T-2, T-6 and T- 33.

¹⁹ Testimony of Witness A on 08 September 2008 at 2:34:54 to 2:35:58 and Testimony of Dr. Alma Bravo-Mehmedbašić on 16 September 2008 at 25:43 to 26:42.

²⁰ Testimony of Dr. Alma Bravo-Mehmedbašić on 15 September 2008 at 59:48 to 1:00:07.

b. Confrontation Between the Accused and Witness A

23. The Accused further argues that the Trial Panel erred in denying his request for allowing a confrontation between himself and Witness A.²¹ He has failed, however, to identify any prejudice that he suffered as a result of the Trial Panel's decision. The Accused has not indicated what he intended to accomplish or identified any line of inquiry which would have been used. Although he claims that it was error to refuse a confrontation with Witness A, Defense Counsel claims that the Accused *was not mentally fit to cross-examine the injured person A and put questions to her.*²²

24. The Appellate Panel further notes that the Trial Panel gave the Accused two opportunities to question Witness A and that he declined to do so on both occasions.²³ It should also be noted that the Accused did not request a confrontation until almost five weeks after the complaining witness testified. Furthermore, the Accused had the opportunity to present his side of the case as he testified at trial and introduced the testimony of several witnesses on his behalf.

25. The Appellate Panel finds that on the basis of the record, the Trial Panel could have properly refused the request for a witness confrontation on the grounds that (1) the proposed evidence was unnecessary, (2) that it was directed exclusively at postponing the criminal proceedings, and (3) that further questioning of the complaining witness would be mentally traumatizing. The Appellate Panel thus concludes that the Trial Panel's refusal of the Accused's request was proper and dismisses this ground of appeal as unfounded.

B. The Accused's Fitness to Stand Trial and the Need for a Psychiatric Evaluation for both the Accused and the Complaining Witness

26. The Accused argues that he was not fit or competent to stand trial. Specifically, he claims that he fainted on several occasions during trial and that he was neither able to question Witness A nor to follow the proceedings. He claims that a neuropsychiatric evaluation should have been conducted in order to establish that he was incapable of standing trial. The Accused submits that the Trial Panel also erred in failing to order a neuropsychiatric evaluation of Witness A since it would have established whether her psychological trauma was the result of events that occurred in Bradina as opposed to those occurring later in Donje Selo.

27. An examination of the record indicates that the First Instance Panel initially granted the Defense request for neuropsychiatric evaluations of the Accused and Witness A.²⁴ However, when Defense Counsel failed to abide by the Trial Panel's instructions and engage an expert witness, the Trial Panel ruled that the Accused's request was really a ploy for postponing the criminal proceedings and revoked its previous decision.²⁵ The Trial

²¹ Trial Hearing on 14 October 2008 at 3:00:23 to 3:01:09.

²² Defense Appeal at page 32.

²³ Testimony of Witness A on 08 September 2008 at 2:07:55 to 2:08:01; and 2:49:28 to 2:49:31.

²⁴ See the Trial Hearing on 14 October 2008.

²⁵ Trial Verdict at pages 10-11 (English version).

Panel further noted that the requested expert evaluation would not have provided any additional relevant evidence.²⁶

a. Evaluation of the Accused

28. The Appellate Panel notes that a psychiatric examination must be ordered *if a suspicion arises...that {an Accused} is not capable to participate in the proceeding due to... mental disturbance.*²⁷ In *Prosecutor v. Strugar*, the Trial Court provided a non-exhausted list of capacities which must be evaluated in determining fitness to stand trial. These criteria include the ability to plead, to understand the nature of the charges, to understand the details of evidence, to instruct counsel, to understand the consequences of the proceedings, and to testify.²⁸

29. The Appellate Panel notes that a review of the trial proceedings indicates that the Accused did not exhibit any signs indicating that he was incapable of attending the trial. Nor does the record substantiate any of the claims of poor health as alleged by Defense Counsel. The Defense Counsel never asked the Trial Panel to adjourn or postpone the trial on account of the Accused not being fit to stand trial. On October 2008, Defense Counsel filed his request for psychiatric examination where he described various emotional and psychiatric problems allegedly suffered by the Accused.²⁹ He does not, however, indicate that the Accused was unable to instruct counsel, to understand the charges or evidence or to understand and follow the proceedings.³⁰ The Defense Counsel's allegation that during the trial he fainted on several occasions for short periods of time and that his head would drop onto his chest, was not corroborated by any evidence or medical records.

30. Rather, the record demonstrates that the Accused actively participated in the trial. Specifically, the Accused put coherent questions to witnesses³¹, testified in a clear and articulate manner,³² and addressed the Trial Panel in a rational and appropriate way.³³ Some three months prior to trial, the Accused gave a statement to the Prosecutor's Office, the contents of which demonstrated a clear and logical thought process and a good memory for detail.³⁴ Also when advised at that time of the charges against him and his rights in the criminal process, the Accused indicated that he understood this information.³⁵

31. The Appellate Panel notes that a review of the record does not establish that a suspicion arose that the Accused was unable to stand trial. Therefore, the Trial Panel acted

²⁶ The Defense's request was denied pursuant to Articles 13(2), 239(2) and 263(2) of the CPC of BiH.

²⁷ Article 110(1) of the CPC of BiH.

²⁸ *Prosecutor v. Pavle Strugar*, IT-01-42-T, Decision Re The Defence Motion To Terminate Proceedings, 26 May 2004 at para. 36 (hereinafter referred to as the "Strugar Decision"), affirmed *Prosecutor v. Pavle Strugar*, IT-01-42-A, Judgment, 17 July 2008 at para. 55.

²⁹ See the Defense Motion titled "Request for Issuance of Order to Carryout a Psychiatric Examination" dated 16 October 2008.

³⁰ At a Trial Hearing on 20 October 2008 at 04:03 to 04:14, Defense Counsel says that he believes that the Accused is not capable of following the proceedings due to his mental state.

³¹ See e.g., Testimony of Dr. Alma Bravo-Mehmedbašić on 16 September 2008 at 25:42 to 26:40.

³² Testimony of Zrinko Pinčić on 07 October 2008.

³³ Trial Hearing on 24 November 2008 at 2:06:14 to 2:07:06.

³⁴ See Exhibit T-35.

³⁵ Ibid.

properly in rejecting Defense Counsel's request for a neuropsychiatric evaluation of the Accused. Moreover, based on the Accused's conduct at trial, the First Instance Panel could have properly found that Defense Counsel's request was little more than a ploy to prolong the proceedings.

b. Evaluation of Witness A

32. The Accused also argues that the Trial Panel erred in rejecting its request for a neuropsychological evaluation of Witness A in order to determine whether her PTSD symptoms were the result of stressful events that she witnessed prior to arriving in Donje Selo.³⁶ The Trial Panel found that the Accused's failure to obtain an expert witness by the last month of trial indicated that the request constituted a ploy to prolong the trial. The First Instance Panel also found that any resulting evidence would be of little value.³⁷

33. As previously noted Dr. Alma Bravo Mehmedbašić testified that since the complaining witness suffered many traumatic experiences during the war, it was not possible to determine which event triggered the PTSD.³⁸ The Appellate Panel notes that the Accused failed to obtain an opinion/statement from any expert indicating that a neuropsychiatrist could isolate the triggering event causing PTSD in situations where several sufficiently stressful events occurred. Moreover, the Accused failed to retain an expert witness to testify in his behalf. The Appellate Panel finds that the Trial Panel's rejection of the Defense Counsel's request was not erroneous and could have reasonably found that the request was little more than a delay tactic.

C. The Rejection of the Request for a Polygraph Test

34. The Accused alleges that the Trial Panel erred in refusing his request for a polygraph examination.³⁹ The Appellate Panel, however, finds that the Trial Panel's decision was proper.

35. The Appellate Panel notes that *the consensus in the scientific community...is that polygraph examinations are an unreliable indication of credibility*.⁴⁰ Moreover, some studies have concluded that the level of accuracy of a polygraph test is as low as fifty percent (50%).⁴¹ As a result, a number of Courts have refused to admit the results of polygraph tests.⁴²

36. The Appellate Panel also notes that the Court, as an independent and impartial authority, is exclusively charged with evaluating the evidence and determining credibility.

³⁶ Defense Appeal at pages 24-28 and 32-33.

³⁷ Trial Verdict at pages 9-11.

³⁸ Testimony of Dr. Alma Bravo-Mehmedbašić on 15 September 2008 at 59:48 to 1:00:07.

³⁹ Defense Appeal at page 33.

⁴⁰ *Prosecutor v. Mladen Natelić and Vinko Martinović*, IT-98-34-PT, Decision on the Request of the Accused to be Given the Opportunity to be Interrogated Under the Application of a Polygraph, 27 November 2000, at page 2.

⁴¹ See *United States v. Scheffer*, 523 U.S. 303, at page 310 (1998).

⁴² *Ibid.* at 311 and cases cited therein; See also *Prosecutor v. Mladen Natelić*, *Supra* at footnote 3.

Article 281(2) of the CPC of BiH provides that *the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.*⁴³

37. Therefore, the Appellate Panel recognizing the questionable level of accuracy surrounding this test concludes that a Trial Panel acted properly in dismissing the Accused's request for a polygraph test since it would provide only marginal assistance in determining credibility.⁴⁴ In fact, a Trial Panel could also find that a polygraph test would interfere with their responsibility for determining the credibility and weight of evidence. Furthermore, pursuant to Article 15 of the CPC of BiH which establishes the principle of free evaluation of evidence, during the evaluation of the evidentiary proceedings the Court is not bound by or limited to special formal evidentiary rules. Given that the Accused testified at the main trial when he was directly and cross-examined, while the Trial and the Appellate Panel both considered his testimony individually and in correlation with other pieces of evidence when rendering the decision, any potential statement of the Accused given with the polygraph test could neither add nor reduce strength and value of the statement the Accused already gave at the main trial. The Appellate Panel thus finds that the Trial Panel did not commit an error in rejecting the Accused's request for a polygraph test.

2. Legality of the Search of the Accused's Home

38. The Accused alleges that the First Instance Panel committed an essential violation of Article 297(1)(i) of the CPC of BiH by admitting documents illegally seized during the search of his house⁴⁵ and subsequently relying upon them in its verdict. He further argues that this error necessitates the revocation of the verdict.

39. The Accused argues that the search of Zrinko Pinčić's house was executed contrary to the law and the search order; namely, it commenced at 5:30 and not at 6:00 am as authorized by the Court. The Accused submits that a review of the CD containing photographs of the search, establishes that the search commenced prior to 6:00am. He also relies upon testimony of Zdravko and Ljubica Rajić, who witnessed the search being conducted and claimed that upon their arrival at Zrinko Pinčić's house at 5:45 am, the search had already started.

40. The Prosecutor responds that the search of Zrinko Pinčić's house commenced at 6:05 am and introduced testimony from two SIPA inspectors (Safet Ratkušić and Amir Sijerčić) to substantiate this claim. The Prosecutor further submits that the discrepancy as to the time of the search was the result of the failure of the photographer to adjust the camera's time stamp after the seasonal time change (Daylight Savings Time); thus, the photographs noted a time of one hour earlier than when they were actually taken.

41. The First Instance Panel relying on the testimony of the SIPA inspectors Safet Ratkušić and Amir Sijerčić and the Record of the deprivation of liberty (noting that the Accused was

⁴³ See also Article 290(7) of the CPC of BiH which necessitates that the trial panel furnishes in the verdict *an assessment of the credibility of contradictory evidence...*

⁴⁴ *Prosecutor v. Mladen Natelić et al.*, *Supra* at page 3.

⁴⁵ The documentary evidence marked with numbers T-16 through T-28.

placed under arrest at 5:50 am) concluded that the search was executed in accordance with Article 59(2) of the CPC of BiH and the search order of the Court.⁴⁶ The First Instance Panel having assessed the testimony of the witnesses Zdravko and Ljubica Rajić found that their testimony was not credible as they were attempting to diminish the criminal liability of the Accused or to exempt him from the liability.⁴⁷ The Trial Panel also found that the Defense had modified or manipulated the CD of the search by technical means in order to indicate that the search began much earlier than authorized.⁴⁸

42. In determining the validity of these allegations, the Appellate Panel will first review whether the Trial Panel factual findings as to the validity of the search were reasonable and then address the issue of whether the verdict was based on illegally obtained evidence.

43. Article 59(2) of the CPC of BiH provides that:

{a} search warrant may be executed on any day of the week. It may be executed only between the hours of 6:00 A.M. and 9:00 P.M., unless the warrant expressly authorizes execution thereof at any time of the day or night, as provided in Article 55(2) this Code.

44. The Appellate Panel finds that the Trial Panel's findings in relation to the validity of the search of the Accused's home were reasonable and proper. Witnesses Safet Ratkušić and Amir Sijerčić testified that the search began at 6:05 am in accordance with the search order and was completed at approximately 8:00am.⁴⁹ This testimony was corroborated by the Record of the Search which indicated that the search began at 6:05am.⁵⁰ The CD containing photographs of the search further corroborates the testimony of the SIPA investigators that the search was initiated after 6:00am. In addition, the Trial Panel having reviewed the Accused's Record of Deprivation of Liberty which indicated that Zrinko Pinčić was arrested at 5:50am⁵¹, could have reasonably concluded that the search of the house could not have occurred prior to the Accused's arrest. Similarly, the Trial Panel could have found that witnesses to the search would not have been contacted until after an arrest was executed.

45. The Trial Panel evaluated the testimony of defense witnesses Zdravko and Ljubica Rajić and found their evidence not to be credible but rather was motivated by a desire to help the Accused avoid criminal liability.⁵² The Appellate Chamber notes that the Trial Panel could have found that their testimony was not credible since it conflicts with the testimony of other witnesses and exhibits and since certain portions were not convincing. For example, Zdravko Rajić indicated that he checked to insure that the document was stamped but did not check the data or information contained therein.⁵³ Ljubica Rajić testified that she signed the Record of Search without reading it even though she works in

⁴⁶ See Exhibit T-56.

⁴⁷ Trial Verdict at pages 39-40

⁴⁸ Ibid. at page 40.

⁴⁹ Testimony of Safet Ratkušić on 20 October 2008 at 1:25:01 to 1:25:15 and 1:31:19 to 1:31:24; and Testimony of Amir Sijerčić on 20 October 2008 at 2:16:19 to 2:16:35 and 2:17:19 to 2:17:24.

⁵⁰ Exhibits T-55 and O-3.

⁵¹ See Exhibit T-51.

⁵² Trial Verdict at pages 39-40.

⁵³ Testimony of Zdravko Rajić on 04 November 2008 at 1:35:16 to 1:36:26.

the Social Welfare Center in Mostar where she reads documents to the parties and advises that they can read the documents before signing them.⁵⁴ The witnesses recalled the time that they entered the house but did not know the day of the week which the search occurred.⁵⁵ Furthermore, while they signed the Record of Search which lists the time that the search began, they still maintained that the search started much earlier.⁵⁶ Therefore, based on the conflicts and questionable statements, the Trial Panel could have reasonably found that their testimony was not credible and was motivated by a desire to help the Accused avoid liability.

46. The Appellate Panel, however, finds the Trial Panel's conclusion that the Defense modified or manipulated by technical means the CD containing the photographs of the search of Zrinko Pinčić's house, is not substantiated by the evidence. A review of the two CDs indicates that each contains the same photographs documenting the search of the Accused's home. Furthermore, both CDs provide the same time periods in relation to the photographs.

47. When reviewing the characteristics of each photograph (the technical background information on the taking of each photograph), the "general" and the "advanced"/"summary" properties must be examined. The general properties of each photograph include the basic information relating to the photograph (date, time, camera model and dimensions) while the summary/advance properties provide more extensive criteria (date, time, camera model, dimensions, horizontal and vertical resolution, flash and metering modes, bit depth, frame count, focal length, exposure time and version of software). It should be noted that both CDs possess the same technical information relating to properties of each photograph.

48. The Appellate Panel also notes that information contained in one of the photographs supports the conclusion that the search was initiated after 6:00 am and that the time provided in the photographic properties are proper. For example, on photograph number DSC_0061, the general properties provides a time of 6:06:38 while the more extensive summary/advanced properties list the time that the photograph was taken as being at 6:06 hours. This latter time period is actually corroborated by the photograph which contains a small clock on the table next to the bed which when enlarged indicates the time to be 6:09 am. The Appellate Panel thus finds that Trial Panel's conclusion that the Accused using technical devices modified the CD is unfounded but that this conclusion did not affect the determination of criminal liability or the level of punishment imposed upon the Accused. The Appellate Panel further finds that this error does not affect the ultimate finding on this issue.

49. The Appellate Panel finds that the Trial Panel's conclusion that the search was executed in accordance with the law and Court Order was reasonable and was supported by the evidence. Moreover, the Accused has failed to establish that no reasonable court could have ruled in this same manner. Therefore, since the Appellate Panel has found the Trial Panel's findings on the validity of the search to be reasonable and proper, there is no need to address the issue of whether the Trial Verdict relied upon evidence obtained through an

⁵⁴ Testimony of Ljubica Rajić on 04 November 2008 at 57:48 to 58:33 and 1:05:58 to 1:06: 24.

⁵⁵ Testimony of Ljubica Rajić on 04 November 2008 at 34:46 to 34:53 and 1:02:06 to 1:02:17 and Testimony of Zdravko Rajić on 04 November 2008 at 1:24:21 to 1:24:48 and 1:37:23 to 1:38:23.

⁵⁶ See Exhibits T-55 and O-3.

essential violation of the CPC of BiH.⁵⁷ As a result, this ground of appeal is dismissed as unfounded.⁵⁸

3. Violation of Article 23 of the Law on Protection of Witnesses

50. The Accused argues that the First Instance Panel violated Article 23 of the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses by basing their verdict to a decisive extent on the testimony of a protected witness.⁵⁹ This article provides that *{the}Court shall not base a conviction either solely or to a decisive extent on evidence provided according to Articles 11, or 14 through 22 of this Law.*

51. The Appellate Panel notes, however, that a review of the record indicates that Witness A was not granted the status of a protected witness stipulated under Article 14 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses and that she did not testify pursuant to Articles 15 through 22 of this Law. Therefore, since the Accused has failed to establish the necessary factual basis to support his argument, this appellate issue is deemed to be without merit and is hereby dismissed.

III GROUND OF APPEAL PURSUANT TO ARTICLE 298 OF THE CPC OF BiH – VIOLATIONS OF THE CRIMINAL CODE

A. Applicable Law

52. The Accused alleges that the Trial Panel erred in its ruling that the CC BiH as opposed to the SFRY CC applies in the instant case. Specifically, he argues that the SFRY CC is more lenient and should have been applied since it provides for a lesser minimum sentence than the CC of BiH and a lesser maximum sentence due to the death penalty being abolished in 1998.⁶⁰

53. After analyzing the various laws including the CC BiH, SFRY CC and the European Convention on Human Rights as well as verdicts issued by this Court, the First Instance Panel concluded that the CC BiH should be applied since it was more lenient to the Accused.⁶¹

54. The CC BiH has codified certain principles of criminal law in articles 3, 4 and 4(a). They are as follows:

⁵⁷ See Article 10(2) and (3) of the CPC of BiH.

⁵⁸ Based on the evidence, the Trial Panel could have found that there was no need to approve the Accused's request to obtain the services of an expert in graphology. In fact, when the Trial Panel inquired as to the need of an expert, Defense Counsel did not explain what tests the expert would perform or how this witness could assist the court. Rather, Defense Counsel responded that it was needed to determine who wrote the date. Since a witness had already admitted that he wrote the date on the Record of Search, the Trial Panel could have properly found that the Accused's request was not necessary or relevant to the issues at trial.

⁵⁹ Defense Appeal at pages 9-10.

⁶⁰ Defense Appeal at pages 2-3.

⁶¹ Trial Verdict at pages 17-20.

Article 3 (1): *Criminal offences and criminal sanctions shall be prescribed only by law.*

Article 3 (2): *No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.*

Article 4 (1): *The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.*

Article 4 (2): *If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.*

Article 4 (a): *Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.*

55. An examination of the statutes indicates that the crime of rape constitutes a violation of the CC of BiH as well as the SFRY CC which was in effect at the relevant time period. Article 173(1)(e) of the CC of BiH provides for a sentence of *not less than ten years or long-term imprisonment* while Article 142(1) of the SFRY CC provides for punishment of *not less than five years or by the death penalty*. It should be further noted that *long term imprisonment* as defined in the CC of BiH has a maximum term of forty-five years.⁶²

56. The Accused argues that since the death penalty was abolished in 1998, the SFRY CC has become the more lenient to the Accused.⁶³ The Appellate Panel notes that since the death penalty was applicable at the time that the crime was committed, it cannot simply be ignored. Compare Abduladhim Maktouf v. Court of BiH⁶⁴ (where the Constitutional Court refused to overlook the maximum penalties in the statutes including the death penalty and ruled that *...it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply the only other, more lenient sanctions...*). Therefore, the Appellate Panel will analyze the article of the SFRY CC which was in effect at the time that the crime was committed (and which includes the death penalty).

57. The CC of BiH does not identify any method of analysis for determining which law is more lenient. It is left to the courts to determine on a case by case basis. Since 2006, the Appellate Panels of the State Court of Bosnia and Herzegovina have addressed this issue and have repeatedly held that the CC of BiH is the more lenient law.⁶⁵

⁶² Article 42(2) of the CC of BiH.

⁶³ Defense Appeal at page 3.

⁶⁴ *Abduladhim Maktouf v. Court of BiH*, AP 1785-06, Decision of the Constitutional Court, 30 March 2007 at para. 69.

58. In *Prosecutor v. Abduladhim Maktouf*, No. KPŽ-32/05, Appellate Verdict, 04 April 2006, the Court addressed the issue of which code was more lenient to the accused who was charged with War Crimes against Civilians [Article 173(1)(e) of the CC of BiH]. The Court found the comparison of maximum sentences to be the substantial factor in the determination. The Court found the CC of BiH to be more lenient since *there is no heavier penalty than capital punishment* which was the maximum punishment in the corresponding section of the SFRY CC.⁶⁶

59. The Appellate Panel has continued to find the CC of BiH to have the more lenient penalties based on the SFRY CC having the death penalty as its maximum punishment. See *Prosecutor v. Mirko Pekez*, No. X-KRŽ-05/96-1, Appellate Verdict 29 September 2008 at page 10; *Prosecutor v. Niset Ramić*, No. X-KRŽ-06/197, Appellate Verdict, 21 November 2007 at 6; and *Prosecutor v. Goran Damjanović et al.*, No. X-KRŽ-05/108, Appellate Verdict, 19 November 2007 at page 10 (*the punishment prescribed by the Criminal Code of BiH is in any case more lenient than the death penalty which was in effect in accordance with the CC SFRY...*).⁶⁷

60. The Appellate Panel finds that these previous decisions of the Court are persuasive and constitute a practical analysis for determining the most lenient law. Utilizing this standard, this Appellate Panel finds that the CC of BiH is more lenient to the Accused than the SFRY CC which has the death penalty as a maximum form of punishment. Therefore, the Appellate Panel finds that the First Instance Court acted properly in concluding that the CC of BiH was applicable in the instant case.

IV. GROUNDS OF APPEAL PURSUANT TO ARTICLE 299 OF THE CPC OF BiH - INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

A. The Standards

61. The Accused alleges that the First Instance Panel erred in several of its factual findings and conclusions. In *Prosecutor v. Mirko Todorović and Miloš Radić*, the Appellate Chamber described the standards of review for allegations of error pursuant to Article 299 of the CPC of BiH. Specifically, the Chamber stated:

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

The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the

⁶⁵ *But see Prosecutor v. Zijad Kurtović*, No. X-KRŽ-06/299, Second Instance Verdict, 25 March 2009 at paras. 127-132.

⁶⁶ *Prosecutor v. Abduladhim Maktouf*, No. KPŽ-32/05, Appellate Verdict, 04 April 2006 at page 17.

⁶⁷ The Appellate Panel has also found the CC of BiH to be more lenient based on an application of Article 4a) of that same code. See e.g., *Prosecutor v. Jadranko Palija*, No. X-KRŽ-06/290, Appellate Verdict, 24 April 2008 at pages 11-13.

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.

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.

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".

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.²⁹ 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.⁶⁸

B. Allegations in Relation to the Testimony of Witness A

62. The Accused argues that the First Instance Panel erred in finding that Witness A's testimony is credible. The Accused submits that Witness A's testimony was in conflict with her prior statements as well as the testimony given by Radmila Živak. He further claims that there was no corroboration to Witness A's testimony that (1) she was forced into the bedroom by means of a rifle and (2) that the Accused threatened her in front of her relatives in the house. The Accused also argues that the victim is confusing her relationship with him with that of a prior rape committed by another soldier.⁶⁹ The Prosecutor responded, however, that Witness A's testimony was corroborated by the evidence provided by Radmila Živak.⁷⁰

63. The Appellate Panel notes that the Accused's argument is merely an allegation that the complaining witness's testimony is not credible due to inconsistencies and confusion. He has not, however, argued that the Trial Panel's conclusion on credibility was not reasonable or alternatively, that no reasonable trial court have reached this decision. Consequently, the

⁶⁸ *Prosecutor v. Mirko Todorović et al.*, X-KRŽ-07/382, Appeal Judgment, 23 January 2009 at paras. 85-89.

⁶⁹ Defense Appeal at pages 3-9 (English version).

⁷⁰ Prosecutor's response at the appellate hearing held on 02 December 2009.

Accused's argument *is insufficient to raise an issue concerning the reasonableness of the Trial Panel's finding.*⁷¹

64. Nevertheless, the Appellate Panel will consider the issue and finds that the evidence is sufficient to establish the allegations against the Accused and that the Trial Panel could have reasonably found the testimony of Witness A to be credible. With regard to the allegation that the testimony is not credible since it is the result of the witness's confusion between the facts in two rapes, the evidence indicates that Witness A described two different rapes in which she was the victim. In one incident which she referred to as the *first rape* three men *stormed* into their house during the night. The perpetrator who was approximately twenty years old forcefully took her into another room and struck her on the head with a grenade.⁷² He had threatened to kill everyone in the house. She believed that the perpetrator was under the influence of drugs. He raped her that night. The witness never saw the perpetrator again but learned that his name was Almir or Admir Cosić.⁷³

65. With relation to the allegations in the indictment, Witness A describes how the Accused and his brother who were HVO soldiers came to her house. He came there on several occasions from November 1992 through March, 1993. She recalls that the Accused (1) would come with his brother (2) was wearing a uniform (3) was armed with a rifle, (4) was responsible for issuing permits and (5) talked about protection. It should be noted that the Accused confirmed each of these facts in his testimony.

66. Witness A explained how the Accused took her from the living room to a bedroom down the hall. He was armed and threatened her that saying *do you know what would happen to you if fifteen soldiers would come here*. He would then rape her.⁷⁴ The witness explained that this happened several times over a five month period.⁷⁵

67. The Appellate Panel concludes that a review of the facts indicate that Witness A has described acts of rape committed by two different perpetrators. The circumstances surrounding these incidents differ in relation to the entry into the home and the manner of force or threats used by the perpetrator. Furthermore, while one situation involved a single incident, the allegations against this Accused concerned multiple rapes. In addition, Witness A has continually described these incidents as being separate rapes and has identified the perpetrators by name. Therefore, the Trial Panel could have reasonably rejected the Accused's argument that the complaining witness was not credible since she was confusing the two incidents.⁷⁶

⁷¹ *Prosecutor v. Todorović*, Supra at para. 125.

⁷² Testimony of Witness A on 08 September 2008.

⁷³ *Ibid.* See also Exhibit T-1, Statement 1 dated 25 August 2006 and Statement 2 dated 30 October 2007.

⁷⁴ Testimony of Witness A on 08 September 2008.

⁷⁵ *Ibid.* and Exhibit T-1, Statement 1 dated 25 August 2006.

⁷⁶ Radmila Živak also described separate and distinct circumstances in relation to the rape allegations against the Accused and another soldier. One incident concerned the evening when three drunken soldiers came to their house. One of the soldiers told Witness A to go into another room with him. She saw that he had a grenade in his hand and was threatening Witness A. At some point Radmila Živak started screaming and the soldiers left the house. With regard to the allegations in the indictment, the witness described the Accused and his brother coming to their house on several occasions while armed and dressed in military uniform. She describes her observations of the Accused and the complaining witness. See Testimony of Radmila Živak on 06 October 2008 and Exhibit T-33 dated 09 October 2007.

68. The Accused also argues that Witness A's testimony that the Accused forced her into another room is not credible as it was not corroborated by the testimony of Radmila Živak.⁷⁷ The Appellate Panel initially notes that corroboration is not required for establishing credibility.⁷⁸ The Appellate Panel further notes that the Trial Panel relied upon the testimony of Radmila Živak in support of its finding of the use of force. An examination of the evidence indicates that Radmila Živak repeatedly stated that the Accused *took* Witness A to another room (emphasis supplied).⁷⁹ This witness never described a situation where the Accused and Witness A proceeded happily or pleasantly to the bedroom; rather, the witness described the fear and pain that she observed on Witness A's face prior and subsequent to being taken to the bedroom.⁸⁰ The witness further explained that:

*{h}e was a man who was armed and he entered our house whenever he wanted and he would take her into the room whenever he wanted.*⁸¹

69. Witness Radmila Živak later testified that the complaining witness was taken to the other room by force and noted that she was scared when she went there with the Accused.⁸² The Appellate Panel notes that from the testimony of Witness A and Radmila Živak, the Trial Panel could have reasonably concluded that the Accused *forced* Witness A to go to the bedroom with him. The Trial Panel could also have reasonably found this testimony to be credible. The Appellate Panel thus concludes that the argument noted in the Appeal concerning Witness A's credibility is not supported by the record.

70. The Accused also questions the credibility of the complaining witness since no witnesses (including Radmila Živak) corroborated her testimony that the Accused's openly threatened to bring fifteen soldiers to the house if she refused to have sex with him.⁸³ The Appellate Panel agrees that no witness corroborated this testimony. This deficiency, however, is not sufficient to determine that Witness A's testimony lacks credibility. The Trial Panel could have found Witness A's testimony to be credible based on the corroboration provided by witnesses Radmila Živak and Gordana Gligorević.

71. Radmila Živak testified that the complaining witness was *'very frightened when the Accused came to their house and she was afraid of their arrival.'*⁸⁴ After they would leave the room, the complaining witness would cry.⁸⁵ In her prior statement Radmila Živak further explained that after the Accused would leave, *Nada was in a very bad condition, she cried all the time.*⁸⁶ She also told Radmila Živak on several occasions that it would have been *better for her to be killed in Bradina than to be experiencing this.*⁸⁷

⁷⁷ Defense Appeal at pages 4 and 9.

⁷⁸ *Prosecutor v. Dragomir Milošević*, IT-98-29/1-A, Judgment, 12 November 2009 at para. 248.

⁷⁹ Testimony of Radmila Živak on 06 October 2008 and Exhibit T-33 dated 09 October 2007.

⁸⁰ *Ibid.*

⁸¹ Testimony of Radmila Živak on 06 October 2008 at 39:44 to 39:53.

⁸² *Ibid.* at 1:36:40 to 1:36:48.

⁸³ Defense Appeal at pages 6-9 and 36-37.

⁸⁴ Testimony of Radmila Živak on 06 October 2008 at 38:30 to 38:46.

⁸⁵ *Ibid.* at 1:38:06 to 1:38:14.

⁸⁶ Exhibit T-33 dated 09 October 2007 at page 5.

⁸⁷ Testimony of Radmila Živak on 06 October 2008 at 1:38:33 to 1:38:47.

72. Gordana Gligorević testified that she had known Witness A since childhood and lived near her in Donje Selo.⁸⁸ She saw the Pinčić brothers visiting the house where Witness A lived and noticed that after they left, Witness A *was terrified, she was frightened {and} shaken-up*.⁸⁹ In her prior statement, Gordana Gligorević noted that whenever the Pinčić brothers arrived, Witness A's *face would be covered with fear*.⁹⁰

73. The Appellate Panel notes that the fear and poor/terrified condition exhibited by Witness A whenever the Accused would arrive or leave her home indicates that some serious problem was occurring there. Obviously, her disposition was not consistent with that of a person in a loving relationship. The Appellate Panel thus concludes that the corroborating evidence from these two witnesses provided sufficient strength to Witness A's testimony so that the Trial Panel could have reasonably found her testimony to be credible. Therefore, the allegations in the Appeal concerning credibility of Witness A as raised by the Accused are dismissed as unfounded.

C. The Credibility of the Defense Witnesses

74. The Accused argues that the First Instance Panel erred in its finding that the Defense witnesses were not credible. Specifically, he claims that the Trial Panel's finding that the Defense witnesses would not have been aware of this extra-marital affair is erroneous.

75. The First Instance Panel notes that the Accused has again failed to explain how a reasonable trial panel could not have reached this conclusion. In *Prosecutor v. Todorović et al.*, the Appellate Chamber in dealing with a similar situation reasoned:

*...the Defense has merely recited certain evidence and contended that it is incomprehensible that the Trial Panel did not accept that evidence or reach the conclusion suggested by the Defense. However, in order to establish an error of fact, the Defense must in addition specifically address the evidence upon which the Trial Panel relied and the Trial Panel's reasoning, clearly showing how the Trial Panel's factual conclusion was unreasonable. Where the Defense fails to do so, the Defense merely provides an alternative view of the facts and reargues its position at trial. As the Trial Panel's factual conclusions are accorded deference on appeal, the Appellate Panel will not evaluate the positions of the parties at trial, but will only consider arguments that the Trial Panel's factual conclusions are unreasonable. By failing to identify and argue how the Trial Panel's factual conclusions are unreasonable, the Defense has failed to properly raise the issue on appeal.*⁹¹

76. In this case, the Accused has also failed to properly raise the issue on appeal. The Appellate Panel has decided, however, to review the matter and has determined that the First Instance Panel's factual finding on the credibility of the defense witnesses was

⁸⁸ Testimony of Gordana Gligorević on 22 September 2008.

⁸⁹ Ibid. at 32:12 to 32:41.

⁹⁰ Exhibit T-6 dated 09 October 2007 at page 6.

⁹¹ *Prosecutor v. Mirko Todorović and Miloš Radić*, X-KRŽ-07/382, Appeal Judgment, 23 January 2009 at para. 94

reasonable. An examination of the record indicates that the corroborating prosecution witnesses described a situation where the Accused was forcing the complaining witness to have sexual intercourse with him while the defense witnesses described a love affair which was known throughout the town. In resolving this conflict, the Trial Panel determined that the testimony of the defense witnesses was not credible.⁹²

77. Specifically, the Trial Panel found that the defense testimony indicating that the Accused and the complaining witness walked around the town hand-in-hand and hugged in public was not plausible. The Trial Panel could have reasonably questioned the likelihood of such conduct occurring since the Accused's wife lived in the vicinity and even visited with her children one of Witness A's neighbors.⁹³ The Trial Panel could have also reasonably found that the defense witnesses' recall of the detail of insignificant events to be inconceivable.⁹⁴ Similarly, the Trial Panel could have reasonably preferred to credit the testimony of those witnesses who observed the critical events over those persons who were just casual observers. The Appellate Panel thus concludes that the First Instance Panel's findings were reasonable and that the Accused has failed to demonstrate that no reasonable trier of fact could have reached the same verdict. Therefore, the Accused's appeal on this ground must be denied.

D. Existence of an Armed Conflict

78. The Accused argues that the Trial Panel erred in concluding that there was an armed conflict at the time that the alleged crimes were committed between the Army of the Republic of Bosnia and Herzegovina (hereinafter "ABiH") and the Croatian Defense Council (hereinafter "HVO"), on one side, and the Armed Forces of the Serb Republic of Bosnia and Herzegovina, on the other.⁹⁵ The Accused further submits that such armed conflict did not exist in either the Konjic area or in the whole BiH territory.

79. The Prosecutor responds that there were three armies established, with the HVO and the ABiH on one side fighting against the Army of Serb Republic of BiH (hereinafter "VRS"). The Prosecutor further argued that an actual conflict between the HVO and the ABiH started on 18th April 1993.⁹⁶

80. Article 173 (1) of the CC of BiH requires that the Prosecution establish the existence of an armed conflict at the time when the alleged offense was committed.⁹⁷ In the present case, the Trial Panel found that the crime occurred *during the war in Bosnia and Herzegovina, during the armed conflict between the Army of the Republic of Bosnia and*

⁹² Trial Verdict at page 41 (English version).

⁹³ Compare *Prosecutor v. Milan Lukić*, IT-98-32/1-T, Judgment, 20 July 2009 at para. 212 (where the Trial Chamber found that a defense witness's testimony of the events was not plausible).

⁹⁴ Compare *Prosecutor v. Milan Lukić*, Supra at para. 217 (where the Trial Chamber rejected a witness's testimony since there were no significant events which would have enabled the recall of such detailed information).

⁹⁵ Defense Appeal, p. 10

⁹⁶ The Prosecutor did not file a response to the Accused's Appellate arguments but rather, addressed them at the appellate hearing on 02 December 2009.

⁹⁷ Article 173(1) of the CC of BiH states in its pertinent part: *Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts*

*Herzegovina and Croat Defense Council on one side, and the armed forces of the Serb Republic of Bosnia and Herzegovina on the other ...*⁹⁸

81. The Appellate Panel notes that an examination of the record indicates that the Trial Panel's conclusion in relation to the existence of an armed conflict is supported by the evidence. Specifically, the "established facts" admitted by the Trial Panel indicate the following:

*{t}he Croat Defense Council (hereinafter "HVO") was formed on 8 April 1992 as the military force of the Croat Community of the Herceg-Bosna....During most of 1992, the HVO and units from the HV sided with the Bosnian TO (later the Bosnian Army) against the JNA and VRS. Towards the end of 1992, however, clashes developed between the HVO and the Bosnian Army and this conflict continued into 1993.*⁹⁹

*the Konjić Municipality was...the site of some significant armed violence in 1992.*¹⁰⁰

*there were "significant amounts of evidence regarding military attacks on and the shelling of Konjić town itself, as well as many of the villages in the municipality, including Borci, Ljubina, Džajići, Gakići, by these Serb forces. It is further uncontested that military operations by the forces of the municipal authorities...{including}the HVO against the villages of, inter alia, Donje Selo, Bradina, Bjelovčina, Cerći and Brđani. It was as a result of these operations that persons were detained in the Čelebići prison-camp.*¹⁰¹

*{i}n Konjić, the TO and MUP were joined for a short period by the HVO as part of a Joint Command established and organized to fight the Serb forces.*¹⁰²

82. There was also testimonial and documentary evidence introduced indicating that the village of Bradina which was predominantly Serb was attacked by HVO and ABiH soldiers in late May of 1992. The men from the village were sent to the prison camps in Čelibići and Konjić.¹⁰³ The women and children that remained in Bradina were eventually forced to leave in July, 1992 and were escorted by soldiers to Donje Selo.¹⁰⁴ There were checkpoints in Donje Selo that were controlled by the ABiH and the HVO and persons could not leave the town without a permit granted by the HVO.¹⁰⁵ In fact, soldiers from those armies would

⁹⁸ Trial Verdict at page 1.

⁹⁹ *Prosecutor v. Zejnil Delalić et al.*, IT- 96-21, Trial Judgment, 16 November 1998 at para. 118.

¹⁰⁰ *Ibid.* at para. 188.

¹⁰¹ *Ibid.* at para. 189.

¹⁰² *Ibid.* at para. 191.

¹⁰³ Testimony of Radmila Živak on 06 October 2008; Exhibit T-5 dated 03 June 2008; and Exhibit T-33 dated 09 October 2007; See also Testimony of Witness A on 08 September 2008.

¹⁰⁴ Testimony of Witness A on 08 September 2008; and Testimony of Radmila Živak on 06 October 2007. See also Exhibit T-1, Statement 3 dated 26 February 2008.

¹⁰⁵ *Ibid.* See also Exhibit T-5 dated 03 June 2008; and Exhibit T-6 dated 09 October 2007.

move through the town and enter the houses where the Serb families were living.¹⁰⁶ The women would regularly visit their husbands or relatives being held in the camps in Konjić and Čelibići.¹⁰⁷ In April of 1993, conflict erupted in Konjić between the HVO and the ABiH.¹⁰⁸

83. The Appellate Panel concludes that the First Instance Panel findings on the existence of an armed conflict are supported by the evidence. The Appellate Panel further concludes that the Trial Panel's findings that the alleged crimes occurred during an *armed conflict between the Army of the Republic of Bosnia and Herzegovina and Croat Defense Council on one side, and the armed forces of the Serb Republic of Bosnia and Herzegovina on the other*...are proper and reasonable based on the evidence.

84. Therefore, this ground of appeal is without merit and is dismissed.

E. The Nexus Between the Crime and the Armed Conflict

85. The Accused argues that the First Instance Panel erred in finding that there was a nexus between his alleged conduct and the armed conflict. Specifically, the Accused submits that the Trial Panel's conclusion of "nexus" is grounded on the findings that he was a soldier and that the victim was detained in Donje Selo. He argues that since these findings are contrary to the evidence, the finding of "nexus" cannot prevail.

86. The prosecutor maintains that there were several factors supporting the finding of a nexus between the criminal act and the armed conflict. The Prosecutor submits that since the incident involved (1) a perpetrator from one side of the conflict and a civilian victim from an opposing side, and (2) a victim who was being detained during an armed conflict, the evidence was sufficient to establish a "nexus".¹⁰⁹

87. Article 173 (1) of the CC of BiH, requires that the *Prosecution must establish not only the existence of an armed conflict but also a sufficient link between the alleged acts of the accused and the armed conflict.*¹¹⁰ Indeed,

*[t]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit the crime his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed*¹¹¹.

¹⁰⁶ Testimony of Radmila Živak on 06 October 2008; See also Exhibit T-5 dated 03 June 2008 and Exhibit T-33 dated 09 October 2007.

¹⁰⁷ Testimony of Radmila Živak on 06 October 2008 and Testimony of Witness A on 08 September 2008; See also Exhibit T-6 dated 09 October 2007 and Exhibit T-33 dated 09 October 2007.

¹⁰⁸ Testimony of Witness A on 08 September 2008.

¹⁰⁹ The Prosecutor did not file a response to the Accused's Appellate arguments but rather, addressed them at the appellate hearing on 02 December 2009.

¹¹⁰ *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-T, Judgment, 30 November 2005, at para. 91.

¹¹¹ *Prosecutor v. Novak Djukić*, X-KR-07/394, Trial Verdict, 12 June 2009 at para. 175 citing *Prosecutor v. Dragoljub Kunarac et al.*, IT-96-23-A and IT-96-23/1, Appeals Judgment, at para. 58.

Alternatively, what distinguishes a war crime from a purely domestic crime is that a war crime is shaped by or dependant upon the environment – the armed conflict – in which it is committed.¹¹²

88. In order to qualify as a war crime, the *armed conflict must still have played a substantial part in the perpetrator's ability to commit the crime, his decision to commit it, the manner in which it was committed, or the purpose for which it was committed.*¹¹³ As discussed by the Appeals Chamber in the *Kunarac* judgment:

*In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, inter alia, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.*¹¹⁴

89. An examination of the evidence against these standards indicates that there are a number of factors or circumstances linking the crime to the armed conflict. Initially, the Appellate Panel notes that the main argument raised by the Accused as to his military status is inconsequential; rather the issue is whether he served in an official capacity (be it as a soldier or civilian) at the time when the crimes occurred.¹¹⁵ The Accused stated that he served as the Secretary of the HVO in Hrasnica and was in charge of civilian affairs. In this capacity, he was responsible for issuing travel permits to civilians and military personnel.¹¹⁶

90. The Appellate Panel further notes that it was only the result of the armed conflict that the victim and the Accused lived in the same village. Specifically, the evidence indicates that the victim was expelled from her home town of Bradina and sent to Donje Selo, as a result of the military campaign in the region.¹¹⁷ Similarly, the Accused was forced to leave Hrasnica due to shelling by the VRS and went to Donje Selo.¹¹⁸

91. The Appellate Panel notes that the Accused used his position with the HVO to commit the crimes. The Accused testified that he visited Serbs households in order to inform them that they should not be afraid of them (HVO).¹¹⁹ He went to the victim's house dressed in an HVO uniform and carrying a rifle¹²⁰ that was later used to pressure the victim to have

¹¹² *Prosecutor v. Kunarac*, *Supra* at para. 58.

¹¹³ *Ibid.*

¹¹⁴ *Prosecutor v. Kunarac*, *Supra* at para. 59.

¹¹⁵ In fact, the Accused does not need to be related or linked to one of the parties to the conflict; the absence of such relation/link, which is not the case here, does not automatically negate the nexus and result in a dismissal of the charges brought upon him. See *Prosecutor v. Akayesu*, ICTR-96-4, Appeals Judgment, 1 June 2001, para. 641-644.

¹¹⁶ Testimony of Zrinko Pinčić on 07 October 2008 and Exhibit T-35 dated 30 May 2008.

¹¹⁷ Testimony of Witness A on 08 September 2008 and Exhibit T-1, Statement 1 dated 25 August 2006..

¹¹⁸ See Exhibit T-35 dated 30 May 2008.

¹¹⁹ See Exhibit T-35 dated 30 May 2008.

¹²⁰ Testimony of Zrinko Pinčić on 7 October 2008; Testimony of Radmila Živak on 06 October 2008 and Testimony of Witness A on 08 September 2008.

sexual relations.¹²¹ He also threatened that if she did not sleep with him, he could order 15 soldiers to go the house and then she would see what would happen to all of them.¹²²

92. Although this is not a case where the crime perpetrated is in clear line with the goal of the armed conflict, the Appellate Panel is of the opinion that the crime of rape perpetrated by the accused is sufficiently linked to the armed conflict. Specifically, the Accused would have never been able to commit the crime if it were not for the armed conflict. Thus, the crime was *shaped by* and *dependant upon the environment – the armed conflict – in which it is committed*.¹²³

93. The Appellate Panel notes that the Accused's position in the HVO¹²⁴ and his use of that authority to commit the crime reinforces the nexus between the rape and the armed conflict. In addition, their ethnicity (the Accused and the victim) and their being linked to opposing sides in the war as well as the reason for their being in the village and their capacities therein (an armed official and a refugee) further substantiate the requisite of nexus.¹²⁵

94. The Appellate Panel thus concludes that a review of the trial record establishes that the First Instance Panel's findings of the existence of nexus between the crimes and the war are supported by the evidence. Therefore, the Accused's appeal on this ground is ill-founded and dismissed.

V. GROUNDS OF APPEAL PURUSANT TO ARTICLE 300 OF THE CPC of BiH – THE DECISION ON THE SENTENCE AND THE COSTS OF THE PROCEEDINGS

A. Prosecution's Appeal

95. The Prosecutor argues that the First Instance Panel erred by imposing a sentence that is too lenient when considering the gravity of the crime and the resulting consequences to the victim.¹²⁶ Specifically, the Prosecutor submits that the Trial Panel had (1) improperly determined that certain criteria constituted mitigating circumstances and (2) failed to consider the serious impact of the crime upon the victim as an aggravating circumstance.¹²⁷

96. The Accused opposed the Prosecutor's request for a modification of the sentence arguing that the Prosecutor has misread the facts and that a review of the evidence indicates

¹²¹ Testimony of Witness A on 08 September 2008 and Exhibit T-1, Statement 3 dated 26 February 2008.

¹²² Testimony of Witness A on 08 September 2008.

¹²³ *Kunarac et al.* Appeal Judgment, para. 58; *Rutaganda* Appeal Judgment, para. 569-570.

¹²⁴ Although refraining from addressing the issue of whether the Accused was a soldier, the Appellate Panel notes that there was sufficient evidence to establish this fact.

¹²⁵ The Appellate Panel has also refrained from addressing the issue of whether the complaining witness was detained in Donje Selo. The Appellate Panel notes that the Trial Panel could have properly found that the record supported the conclusion that those persons forcibly removed from Bradina and placed in houses in Donje Selo (which had military checkpoints at both ends of the village and that persons could not leave without a travel permit issued by the HVO) were detained. Compare *Prosecutor v. Blagoje Simić, et al.*, IT-95-9-T, Judgment, 17 October 2003 at para. 680.

¹²⁶ Prosecutor's Brief at pages 1-2.

¹²⁷ *Ibid.*, pages 2-4.

that the victim's emotional problems are the result of a previous rape committed by Almir or Admir Ćosić.¹²⁸

97. The First Instance Panel having found highly extenuating circumstances and no aggravating circumstances sentenced the Accused to a term of nine (9) years of imprisonment.¹²⁹

98. In *Prosecutor v Mirko Todorović and Miloš Radić*, the Appellate Chamber articulated the standards of review for appeals of sentencing decisions. The Chamber stated:

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

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.

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.

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.

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.

¹²⁸ Submission filed by the Defense, pages 1-3. It should also be noted that pursuant to Article 308 of the CPC of BiH, an Appellate Court must review the sentence imposed upon an Accused in all cases alleging erroneous or incompletely established facts or a violation of the criminal code. Consequently such review will be conducted by the Appellate Panel. .

¹²⁹ Trial Verdict at pages 2 and 42-43.

*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.*¹³⁰

99. The Appellate Panel after having reviewed the record, concludes that the First Instance Panel did not abuse its discretion in the imposition of punishment upon the Accused. Although the Trial Panel did not consider the resulting consequences of the rape as an aggravating factor, it took these facts into consideration in determining the sentence. Specifically, the Trial Panel noted that the *consequences of these criminal offences are immeasurable and permanent* and later indicated that it considered *the gravity of the consequences*.¹³¹ The Trial Panel also noted that it reached a determination to sentence below a term of ten years having recognized the consequences of the crimes.¹³² The Appellate Panel thus concludes that while the Trial Panel did not properly recognize the serious consequences being suffered by the victim as an aggravating circumstance, it still took this circumstance into consideration in its determination of a fair and just sentence.

100. The Appellate Panel further notes that the age and health/medical condition of an accused have constituted mitigating factors for consideration in the imposition of a sentence.¹³³ Similarly, the fact that an accused has a disability can also be considered a mitigating circumstance.¹³⁴ While the weight, if any, applied to these factors will vary on a case-by-case basis, these factors may be considered in all cases.¹³⁵

101. Contrary to the allegations by the Prosecutor's Office, while meting out the punishment for the Accused both the Trial and the Appellate Panel were mindful of the gravity of the consequences of the crime that affected Witness A, as noted in paragraph No. 95. Furthermore, they were aware that the consequences Witness A suffers from could also be described as a form of disability. However, the aforementioned circumstance does not reduce the relevance of the fact that the Accused himself is an 80 percent disabled veteran and that he is in the seventh decade of his life, which is why this Panel finds proper the conclusion of the First Instance Panel that the above noted circumstances could be considered as highly extenuating which, this Panel too, deems to be a basis to reduce the sentence.

102. The Appellate Panel finds that since these mitigating factors as well as the consequences of the crime were carefully considered by the Trial Panel, an abuse of discretion did not occur. Therefore, the Prosecutor has failed to establish that the Trial Panel erred in determining a proper sentence and the appeal based on this allegation is dismissed.

¹³⁰ Appellate Verdict in the *Mirko Todorović and Miloš Radić* case, No. X-KRŽ-07/382 dated 23 January 2009, paras. 180-186.

¹³¹ Trial Verdict at page 43.

¹³² *Ibid.* at page 42.

¹³³ See *Prosecutor v. Milan Simić*, IT-95-9/2-S, Sentencing Judgment, 17 October 2002 at paras. 95-103; and *Prosecutor v. Biljana Plavšić*, IT-00-39&40/1-S, Sentencing Judgment, 27 February 2003 at paras. 95-106.

¹³⁴ *Prosecutor v. Nenad Tenasković*, X-KRŽ-06/165, Appellate Verdict, 15 October 2008 at pages 37 and 39.

¹³⁵ See: the Appellate Verdict in the *Marko Samardžija* case, No. X-KRŽ-05/07, dated 15 October 2008, page 38 and the Appellate Verdict in the *Muhamed Huskić* case, No. X-KRŽ-07/345, dated 8 July 2008, page 9.

103. The Appellate Panel, having reviewed the sentence imposed upon the Accused as required by Article 308 of the CPC of BiH (extended effect of the appeal), finds that the Trial Panel applied the proper legal provisions and did not abuse its discretion in determining an appropriate sentence. The Appellate Panel finds that the pronounced sentence fulfils in its entirety the purpose of the punishment as prescribed by the Law.

B. Decision on the costs of the criminal proceedings

104. The Appellate Panel has dismissed as unfounded the allegations of the Defence Appeal that the decision of the Trial Panel, imposing on the Accused the obligation to reimburse the costs of the criminal proceedings, was unlawful. Specifically, the Defence failed to offer a single piece of evidence of his allegedly indigent status, either during the first instance proceedings or in order to corroborate the averments in the Appeal from the Trial Verdict. According to the information obtained by the Court, the Accused is a beneficiary of a disability pension and, thus, he receives regular income. Pursuant to Article 188(1) of the CPC of BiH, the Accused must reimburse the costs of the criminal proceedings when the Court finds the accused guilty. Paragraph 4 of the same Article represents an exception to the aforementioned rule and stipulates the possibility that the accused be relieved of the duty to reimburse the costs of the criminal proceedings if their payment would jeopardize the support of the accused or of persons whom the accused is required to support financially. Given that the Defense failed to prove that the payment of the costs of the criminal proceedings would jeopardize the support of the Accused or the persons whom the Accused is required to support financially, the Appellate Panel finds that the decision of the Trial Panel obliging the Accused to reimburse the costs of the criminal proceedings was correct.

105. Based on the aforementioned, pursuant to Article 310(1), in conjunction with Article 313 of the CPC of BiH, the Court has decided as rendered in the Operative Part of the Verdict.

RECORD-TAKER:

Nevena Aličehajić

**PRESIDENT OF THE PANEL
JUDGE**

Hilmo Vučinić

LEGAL REMEDY NOTE: No appeal shall be allowed from this Verdict.

*I hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian.
Sarajevo, 23 April 2010
Emina Jelesković
Certified Court Interpreter for English*