



THE COURT OF BOSNIA AND HERZEGOVINA

---

**Number:** S1 1 K 003336 11 Krž 3

**Date:** **Pronounced:** 21 June 2012  
**Written verdict issued:** 1 August 2012

---

**Before the Appellate Panel composed of:** Judge Redžib Begić, Presiding  
Judge Tihomir Lukes, Member  
Judge Senadin Begtašević, Member

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

v.

**VELIBOR BOGDANOVIĆ**

---

**SECOND INSTANCE VERDICT**

---

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

Remzija Smailagić

**Defense Counsel for the Accused:**

Nada Dalipagić

## TABLE OF CONTENTS

<b>VERDICT</b> .....	<b>3</b>
<b>R E A S O N I N G</b> .....	<b>3</b>
<b>I. PROCEDURAL HISTORY</b> .....	<b>3</b>
A. FIRST INSTANCE VERDICT .....	3
B. APPEALS AND RESPONSES .....	4
<b>II. GENERAL ISSUES</b> .....	<b>5</b>
<b>III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC BiH: ESSENTIAL VIOLATIONS OF THE PROVISIONS OF THE CRIMINAL PROCEDURE</b> .....	<b>5</b>
A. STANDARDS OF REVIEW .....	5
B. APPEAL OF THE DEFENSE FOR THE ACCUSED .....	7
1. Sub-Ground One: Article 297(1)(d) of the CPC BiH: The Defence argues that the right to a defence was violated .....	7
2. Sub-Ground Two: Article 297(1)(k) of the CPC BiH: The Defense argues that the wording of the Verdict is incomprehensible, internally contradictory or contradicts the grounds of the Verdict or it does not cite reasons concerning the decisive facts .....	9
3. Sub-Ground Three: Article 297(1)(i) of the CPC BiH: The Defence argues that the Verdict is based on evidence that may not be used as the basis of a verdict under the CPC BiH .....	<b>Error! Bookmark not defined.</b>
4. Sub-Ground Four: Article 297(2) of the CPC BiH: The Defence argues that the Court did not apply or incorrectly applied CPC provisions which affected the rendering of a lawful and proper verdict .....	<b>Error! Bookmark not defined.</b>
<b>IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC BiH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS</b> .ERROR! BOOKMARK NOT DEFINED.	
A. STANDARDS OF REVIEW .....	<b>ERROR! BOOKMARK NOT DEFINED.</b>
B. APPEAL OF THE DEFENSE FOR THE ACCUSED	
1. Sub-Ground One: Rape .....	<b>Error! Bookmark not defined.</b>
2. Sub-Ground Two: Taking of S.Z. ....	<b>Error! Bookmark not defined.</b>
<b>V. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC BiH: VIOLATIONS OF THE CRIMINAL CODE</b> .....	<b>26</b>
A. STANDARDS OF REVIEW .....	26
B. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED	<b>ERROR! BOOKMARK NOT DEFINED.</b>
<b>VI. DECISION ON CRIMINAL SANCTION</b> .....	<b>28</b>
A. STANDARDS OF REVIEW UNDER ARTICLE 300 OF THE CPC BiH .....	28
B. APPEAL OF THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA	<b>ERROR! BOOKMARK NOT DEFINED.</b>
C. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED	
<b>VII. DECISION ON THE PROPERTY LAW CLAIMS</b>	
A. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED.....	35

## IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as the Appellate Division Panel, with Judge Redžib Begić as the presiding judge, and Judges Tihomir Lukes and Senadin Begtašević as the Panel members, with the participation of legal advisor - assistant Neira Kožo as the record-taker, in the criminal case of the Accused Velibor Bogdanović, charged with the criminal offense of War Crimes against Civilians, in violation of Article 173(1)(e), as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (the CC BiH), all as read with Article 29 of the CC BiH, deciding on the Appeals of the Prosecutor's Office of Bosnia and Herzegovina and attorney Nada Dalipagić, Defense Counsel for the Accused Velibor Bogdanović, filed from the Verdict of this Court No. S1 1 K 003336 10 Krl dated 29 August 2011, having held a Panel's session in the presence of Remzija Smailagić, Prosecutor of the Prosecutor's Office of BiH, attorney N.D., Defense Counsel for the Accused, in the absence of the Accused Velibor Bogdanović who was duly informed, pursuant to Article 310(1), in conjunction with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH), on 21 June 2012 rendered the following:

### VERDICT

The Appeals filed by the Prosecutor's Office of BiH and Defense Counsel for the Accused Velibor Bogdanović **are refused as unfounded** and the Verdict of the Court of BiH No. S1 1 K 003336 10 Krl dated 29 August 2011 **is upheld**.

### REASONING

#### I. PROCEDURAL HISTORY

##### A. FIRST INSTANCE VERDICT

1. By the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH), No. S1 1 K 003336 10 Krl dated 29 August 2011, the Accused Velibor Bogdanović was found guilty of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e), in conjunction with Article 180(1) of the CC BiH and Article 29 of the CC BiH, and sentenced to 6 (six) years of imprisonment.

2. Pursuant to Article 188(2) and (4) of the CPC BiH, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings, which shall be paid from the budgetary appropriations of the Court of BiH.

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

## **B. APPEALS AND RESPONSES**

4. The Prosecutor's Office of BiH (the Prosecution) filed an appeal from the Verdict on the ground of the decision on the criminal sanction, moving the Appellate Division Panel (the Appellate Panel) to modify the Verdict with regard to the decision on sentence and impose on the Accused a more lengthy prison sentence within the limits of the statutory penalty prescribed for the criminal offense at issue.

5. Attorney Nada Dalipagić, Defense Counsel for the Accused Velibor Bogdanović, filed a response to the Prosecution's appeal, moving the Appellate Panel to refuse it and modify the First Instance Verdict by rendering a verdict acquitting the Accused of the charges or to revoke the Verdict and hold a retrial.

6. Defense Counsel for the Accused also filed an appeal on the grounds of essential violations of the criminal procedure provisions, a violation of the Criminal Code, incorrectly and incompletely established state of facts, the decision on the criminal sanction and the decision on property law claims. The Defense moved the Appellate Panel to revise the First Instance Verdict by rendering an acquittal, or revoke the Verdict altogether and hold a retrial.

7. Pursuant to Article 304 of the CPC BiH, the Panel's session was held on 21 June 2012. This Article, in paragraph 4 thereof, provides that the Panel shall not be precluded from holding a session due to the failure of the parties and defense counsel who were duly informed to appear before the Court. Consequently, the session was held notwithstanding the absence of the Accused Velibor Bogdanović who was duly informed.

8. At the Appellate Panel's session, the Prosecution and the Defense for the Accused briefly presented their respective appeals and responses, pointing out that they stood by their arguments made in writing.

9. Having reviewed the contested Verdict within the scope of the arguments raised in the appeals, the Appellate Panel, pursuant to Article 306 of the CPC BiH, rendered the decision as stated in the enacting clause, for the reasons that follow.

## II. GENERAL ISSUES

10. Prior to providing the reasoning for individual grounds of appeal, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the appellant must include in the appeal both the legal ground for contesting the verdict and the reasoning behind the appeal.

11. Since pursuant to Article 306 of the CPC BiH the Appellate Panel reviews the Verdict only within the limits of the grounds of appeal, the appellant is obliged to draft the appeal in such a manner so that it can serve as the basis for reviewing the Verdict.

12. In this respect, the appellant must identify the grounds on which he contests the appeal, specify which part of the verdict, evidence or action of the Court he contests, and present clear arguments in support of his claim.

13. A mere impartial indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes does not constitute a valid ground to review the first instance verdict. Therefore, the Appellate Panel dismissed as ungrounded all unreasoned and unclear grounds of appeal.

## III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC BIH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

### A. STANDARDS OF REVIEW

14. A Verdict may, pursuant to Article 296 of the CPC BiH, be contested on the grounds of essential violations of the provisions of criminal procedure. The essential violations of the criminal procedure are prescribed under Article 297 of the CPC BiH.<sup>1</sup>

---

<sup>1</sup> Article 297 **Essential Violations of the Criminal Procedure Provisions:** (1) An essential violation of the provisions of criminal procedure exists: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the verdict who did not participate in the main trial or who was disqualified from trying the case by a final decision, b) if a judge who should have been disqualified participated in the main trial, c) if the main trial was held in the absence of a person whose presence at the main trial was

15. Given the gravity and importance of violations of the procedure, the CPC BiH differentiates between the violations which, if their existence is established, create an irrefutable assumption that they negatively affected the validity of the rendered Verdict (absolutely essential violations) and the violations where the Court evaluates, in each specific case, whether the established violation had or could have negatively affected the validity of the verdict (relatively essential violations).

16. Absolute essential violations of the CPC BiH are listed in Article 297(1) subparagraphs a) through k) of the CPC BiH.

17. Should the Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC BiH, except in the cases set forth under Article 314(1) of the CPC BiH.

18. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise if during the main trial or in rendering a verdict the Court did not apply a provision of the law, or the Court applied the provision incorrectly, which affected or might have affected a lawful and proper rendering of the verdict.

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

---

required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language, d) if the right to defense was violated, e) if the public was unlawfully excluded from the main trial u, f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority, g) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction, h) if, in its verdict, the Court did not entirely resolve the contents of the charge; 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, j) if the charge has been exceeded, k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code to the preparation of the main trial 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.

## B. APPEAL OF THE ACCUSED

### 1. Sub-Ground One: Article 297(1)(d) of the CPC BiH: The Defense argues that the right to a defense was violated

(a) The Appellate Panel is satisfied that the Accused's right to a defense was not violated and dismisses the appeal arguments of Defense Counsel as unfounded.

#### (i) Appeal arguments of the Defense

20. The Defense argues in the appeal that the Court erred in the contested Verdict by violating the presumption of innocence and *in dubio pro reo* principles. The Defense submits that the presumption of innocence implies that the Accused, although entitled to a defense, is not obliged either to defend himself or prove his innocence, since the burden of proof rests with the prosecutor. Accordingly, the Defense argues that the Court must render an acquittal not only when satisfied that the accused is innocent but also when it is not satisfied that he is either guilty or innocent. In other words, when in doubt, the Court, according to the Defense, must apply the *in dubio pro reo* principle, which is a crucial element of the right to a fair trial.<sup>2</sup>

#### a. Findings of the Appellate Panel

21. The Appellate Panel holds that any violation of a procedural norm to the detriment of the Accused means that his right to a defense, guaranteed both under the CPC BiH and international instruments, has been violated, and it therefore reviewed the appeal arguments relating to the application of the presumption of innocence and *in dubio pro reo* principles to determine whether there has been a violation of the Accused's right to a fair trial or to a defense.

---

<sup>2</sup> Defense Appeal, pp. 3-4.

22. The Panel finds that in conducting the main trial and assessing the evidence, the Trial Panel relied on the principle of legality and the need to prevent innocent people from being convicted and to impose on the perpetrator a criminal sanction under the terms envisaged by the CC BiH.

23. In view of the foregoing, the Appellate Panel, contrary to the Defense appeal arguments, determined that the parties had an equal procedural position during the trial as well as an equal position in presenting the Defense and Prosecution arguments, respectively. The Defense was not brought into a less favorable position in relation to the Prosecution, given that the Accused Velibor Bogdanović was afforded the opportunity to state his position on both inculpatory and exculpatory facts and evidence. The Trial Panel conducted the proceedings without delay and precluded any abuse of the rights to which both the Defense and the Prosecution are entitled.

24. In this regard, the Panel finds that each piece of evidence was assessed in the contested Verdict both individually and in their combination. The fact that the Trial Panel did not assess the evidence in a manner desirable to the Defense does not mean that the right to a defense and a fair trial has been violated. In addition, the fact that the Trial Panel found as established the facts detrimental to the Accused, or those suggesting the justification of the charges, cannot be interpreted as a different treatment of the parties to the proceedings.

25. The Appellate Panel therefore concludes that the contested Verdict contains sufficient reasons on the decisive facts and takes into account all relevant evidence that served as the basis for the contested Verdict.

26. Consequently, the Appellate Panel notes that there has been no essential violation of the criminal procedure provisions in the present case, as indicated in the Defense appeal.



**2. Sub-Ground Two: Article 297(1)(k) of the CPC BiH: The Defense argues that the wording of the Verdict is incomprehensible, internally contradictory or contradicts the grounds of the Verdict or it does not cite reasons concerning the decisive facts**

(a) The Appellate Panel finds that the Defense appeal arguments suggesting that the wording of the First Instance Verdict contradicts the grounds of the Verdict and that it does not cite reasons concerning the decisive facts are groundless.

(i) Appeal arguments of the Defense

27. The Defense argues in the appeal that the right to a fair trial under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) consists of the right to a conscientious and meticulous evaluation of the evidence and facts established before the Court as well as providing reasons concerning the decisive facts in the reasoning of the verdict, which the court did not comply with in the present case and consequently rendered a completely erroneous conclusion on the essential fact concerning Salko Zerem's status at the time of the alleged criminal offense.<sup>3</sup>

28. In this regard, the appeal indicates that it is not correct that Salko Zerem was a civilian at the relevant time, nor is it true that the Prosecution proved beyond a reasonable doubt that Salko Zerem had the status of a civilian at the relevant time. Quite the contrary, it follows from the documents subsequently submitted by the Prosecution that Salko Zerem had the status of a military person at the material time.<sup>4</sup>

a. Findings of the Appellate Panel

29. Following a thorough and comprehensive analysis of the enacting clause of the contested Verdict, the Appellate Panel concluded that it is sufficiently clear and comprehensible and that the reasons provided in the reasoning are not contradictory. The Appellate Panel concludes that the form and contents of the Verdict are in accordance with

---

<sup>3</sup> Defense appeal, p. 4.

<sup>4</sup> Defense appeal, p. 5.

provisions of the procedural law and that there has been no violation of the law in this regard.

30. The disputed Verdict provides the reasoning as to the decisive facts relevant to the adjudication in the criminal matter and in this regard the Trial Panel provided a detailed reasoning in relation to the factual account in the enacting clause of the Verdict by presenting its position on the reasons which guided the Trial Panel to render such decision. The disputed Verdict contains the reasoning relevant to all decisive facts and points to the evidence on which the Trial Panel relied when making the decision, including the decisive fact pertaining to the status of the injured party Salko Zerem at the time of the criminal offense.

31. Furthermore, the contested Verdict contains an overall evaluation of the evidence, correctly stating that although the Trial Panel considered and evaluated all presented evidence it will make reference in the Verdict only to those pieces of evidence that are relevant to the decision making and explain and provide findings on the facts that are essential to the decision. In paragraphs 64, 74, 75, 77, 79, 80, 81, 121 and 122 of the contested Verdict, the Trial Panel explained in detail how it evaluated the evidence of the Prosecution and the Defense.

32. Therefore, the Panel will refuse as unfounded the argument that the evaluation of the exculpatory evidence and facts is missing, but it will address this appeal argument in more detail in the part of the Verdict pertaining to the erroneously and incompletely established state of facts in the contested Verdict or in addressing the appeal argument contesting the factual finding of the Trial Panel that the injured party Salko Zerem had the status of a civilian at the material time.

**3. Sub-Ground Three: Article 297(1)(i) of the CPC BiH: The Defense argues that the Verdict is based on evidence that may not be used as the basis of a verdict under the CPC BiH**

(a) The Appellate Panel concludes that the contested Verdict is not based on the unlawful evidence and therefore it refused as unfounded the appeal arguments of the Defense raised in this regard.

(i) Appeal arguments of the Defense

33. The Defense reiterated in the appeal, as well as throughout the proceedings, that the identification of the Accused was performed from a photograph nearly 17 years after the relevant incident, which means that the identification procedure was conducted in contravention of Article 85 of the CPC BiH. Moreover, the appeal argues that the Accused did not leave the place of residence and was continuously available to the prosecution authorities. Also, such a manner of identification procedure should be regarded as unlawfully obtained evidence. According to the Defense, a court decision cannot be based on this kind of evidence.<sup>5</sup>

a. Findings of the Appellate Panel

34. The Appellate Panel holds that although the identification is of corroborative value, it is, pursuant to Article 85 of the CPC BiH, not obligatory and therefore the presence of the suspect Velibor Bogdanović at the time of the identification was not of essential importance. Moreover, the appeal did not indicate in its grounds the crucial importance of this evidence from the aspect of the correctness and lawfulness of the contested Verdict.

---

<sup>5</sup> Defense appeal, p. 6.

**4. Sub-Ground Four: Article 297(2) of the CPC BiH: The Defense argues that the Court did not apply or incorrectly applied CPC provisions, which affected the rendering of a lawful and proper verdict**

(a) The Appellate Panel concludes that the Trial Panel correctly applied provisions of the CPC BiH without making an essential violation of the criminal procedure provisions laid down in Article 297(2) of the CPC BiH.

(i) Appeal arguments of the Defense

35. Defense Counsel indicates in the appeal that the Court violated in the first instance proceedings provisions of Article 14 of the CPC BiH and Article 7 of the same Code by not allowing the presentation of very important evidence of the Defense, the hearing of witness Petar Zelenika who, according to Defense Counsel, would have clearly confirmed that Salko Zerem was at the relevant time a member of the Council, hence he was a military rather than a civilian person.<sup>6</sup>

36. In addition, Counsel also complains that the Court did not request ex officio a phone record from the Management Section for 9 January 2011, 11 January 2011 and 18 January 2011, although the Defense presented evidence to the Court to prove that it attempted to obtain these records itself, all because Salko Zerem called from his telephone the Accused Velibor Bogdanović, insulting and intimidating not only him but also his family.<sup>7</sup>

a. Findings of the Appellate Panel

37. Having considered the appeal argument, the Appellate Panel concludes that the Trial Panel did not violate the methodological approach in establishing and examining the

---

<sup>6</sup> Defense appeal, p. 6.

<sup>7</sup> Defense appeal, p. 7.

decisive facts as provided in Article 14 of the CPC BiH, which pertains to the *equality of arms* standard, since it evaluated with equal attention all the facts without disregarding any of them that was relevant to adjudication.

38. Moreover, the refusal by the Appellate Panel of the mentioned evidence because of the lack of clear indications in support of the proposals for presentation of such evidence or because this evidence is of cumulative or irrelevant value, does not constitute the ground for the Appellate Panel to conclude that there was an essential violation of the criminal procedure provisions, as the Defense unjustifiably argued.

39. In this regard, the Panel concludes that the Defense appeal failed to successfully prove that the Trial Panel rendered an unlawful and incorrect verdict as a result of the omissions indicated in the appeal. Consequently, the appeal arguments are refused as unfounded.

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

##### **A. STANDARDS OF REVIEW**

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

41. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

42. 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.

43. 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".

44. Article 299 of the CPC BiH stipulates when a verdict may be contested because of erroneously or incompletely established state of facts. Decisive facts are established directly by evidence or indirectly from other facts (indications or control facts). Only the facts being established by a verdict may be regarded as existent, and irrespective of the existence of decisive facts conclusions about their existence must always be made, or else there is no the established factual status (incompletely established factual status). In case a certain decisive fact has not been established in the manner it existed in the reality of a certain event, then there exists an incorrectly established factual status.

45. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.<sup>8</sup> However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

## **B. APPEAL OF THE DEFENSE FOR THE ACCUSED**

### **1. Sub-Ground One: Rape**

(a) The Appellate Panel concludes that the factual state has been correctly and completely established in the contested Verdict.

(i) Appeal arguments of the Defense

46. The Defense complains that the Prosecution presented no evidence to corroborate the allegations that, on the relevant night, it was precisely the Accused Velibor Bogdanović that entered into the apartment of Mina and Salko Zerem and, together with unidentified soldiers, ransacked the apartment and took from it various devices. It further failed to prove that the Accused was in the apartment of Mina and Salko Zerem on the relevant night at all. A large number of the Prosecution witnesses, as the appeal alleges, confirmed that they saw the Accused for the first time in their lives only in the courtroom, while the Accused proved through witnesses that he was not at all in Mostar at the relevant time.<sup>9</sup>

47. As for the allegations of the injured party Mina Zerem that she had been raped, the Defense indicates that the Court did not receive any corroborating medical documents

---

<sup>8</sup> M.Š., AP-661/04 (Const. Ct. of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

<sup>9</sup> Defense appeal, pp. 7-8.

although she was a person who had worked throughout the war and had proper health care. The Defense adds the fact that Mina Zerem gave her first statement about this incident 17 years later, which certainly gives rise to a suspicion of the truthfulness and accuracy of the incident.<sup>10</sup>

48. The Defense submits that the testimony of the witnesses: Anica Pudar, Blaž Šimunović, Junuz Vajzović, Jusuf Numanović and Senad Velić clearly shows that no one knew anything about the incident in question, that they did not see anything, or that Mina and Salko Zerem told them anything about the alleged incidents. Nearly all the witnesses confirmed that they had never seen the Accused Velibor Bogdanović and that they had never heard of the name of this man before they received the summons by the Court.<sup>11</sup>

49. According to the appeal, it was only the witness Fatima Pehlić that stated that she knew the Accused Velibor Bogdanović but it was established during cross-examination that she often talked about the alleged incident with Mina Zerem and that they saw the Accused in the Court trial reports available on the internet.<sup>12</sup>

50. According to the Defense, the findings and opinion of the expert witnesses, neuro-psychiatrists Dr. Alma Bravo Mehmedbašić and M.Sc. Senadin Fadilpašić, hired by the Prosecution, cannot be taken as relevant because they could not clearly and unambiguously explain when and where Mina Zerem started her psychiatric treatment, nor could they answer the question relating to the prescribed therapy. They found no mention in the findings of the neuro-psychiatrist or psychologist that the injured party's psychological disorder was a result of the rape and that this person had for the full 17 years a complete working capacity and activity without having or seeking any professional help.<sup>13</sup>

51. The Defense further indicates that it does not doubt the truthfulness of the testimony of witnesses Mario Cvitković and Emil Ćorić because they were soldiers who had been members of units throughout the war. The precision of their testimony is related to well-known dates, 9 May 1993, as the beginning of the conflict between Croats and Muslims in the area of Mostar. Thus, at the time of the alleged incident described in the

---

<sup>10</sup> Defense appeal, p. 8.

<sup>11</sup> Defense appeal, p. 11.

<sup>12</sup> Defense appeal, p. 11.

<sup>13</sup> Defense appeal, p. 12.



indictment, the Accused was not in Mostar at all, nor did he commit the criminal offense charged against him.<sup>14</sup>

52. The Defense further points out that he is a family man, that he himself loathes the act of rape, that he helped many people during the war, especially Bosniaks during the conflict with Croats in Mostar, and that his sister is married to a Bosniak. The above mentioned witnesses also confirmed that he was a decent soldier who diligently discharged his duties and treated civilians very fairly, that he was merely a plain soldier throughout the war without any commanding role.<sup>15</sup>

a. Findings of the Appellate Panel

53. Having reviewed the appeal arguments of the Defense indicating that the state of facts in the contested Verdict was erroneously and incompletely established, and having thoroughly analyzed the contents of the contested Verdict and the case file, the Appellate Panel reached the conclusion that these arguments are unfounded. The Panel concludes that the state of facts was established correctly and completely and that the contested Verdict contains compelling and acceptable reasons concerning all decisive facts based on which the Panel convicted the Accused Velibor Bogdanović

54. In its appeal, the Defense primarily contested the presence of the Accused at the crime scene at the relevant time, which the Appellate Panel finds groundless.

55. Following a review of the trial transcript, the Appellate Panel finds that the appeal arguments of Defense Counsel for the Accused are unfounded and that the Trial Panel was justified in giving full credence to the compelling testimony of the witness-injured party Mina Zerem, since she completely corroborated the Prosecution allegations throughout her testimony, categorically and consistently identifying the Accused Velibor Bogdanović as the person who raped her.

56. Therefore, the Appellate Panel finds that the Defense appeal arguments indicating that there is no doubt as to the truthfulness of the testimony of the witnesses Mario Cvitković and Emil Ćorić who were fellow-soldiers of the Accused throughout the war and who gave him alibi for the time of the perpetration of the criminal offense are groundless, as well as the Defense arguments that the Accused was not in Mostar at all during the relevant period. The mentioned witnesses were not categorical at any moment that the

---

<sup>14</sup> Defense appeal, p. 13.

<sup>15</sup> Defense appeal, pp. 13-14.

Accused was not in Mostar at the relevant time but only made personal assumptions without challenging the thorough, sincere and above all compelling testimony of the injured party Mina Zerem.

57. Since the injured party was certain about the identity of the Accused from the very beginning, the identification of the Accused Velibor Bogdanović during the investigation in the manner as argued by the Defense was not of crucial importance for the Court, while the identification of the Accused in the courtroom by the injured party constitutes an integral part of the witness testimony. In addition, other evidence was also presented to establish the identity of the perpetrator of the underlying criminal offense.

58. First of all, it should be noted that the present case concerns one of the criminal offenses that is most difficult to prove given that in most cases there are no witnesses, the injuries on the victims are not observed in time or the offense was not timely reported. A great problem is also that most rape cases occur in enclosed spaces, places without any eyewitnesses, with only the perpetrator of the criminal offense and the victim being present.

59. In this regard, the Appellate Panel regards the testimony of witness Mina Zerem reliable and consistent in relevant parts and points out that the witness, in giving the account of her ordeal and the aggravated sexual violence committed against her, presented what she indeed experienced and saw.

60. The Appellate Panel finds the witness' testimony credible and reliable, noting that the Defense appeal arguments did not call into question or diminish the importance of the testimony of this witness/injured party, which leaves no room for a doubt that everything she had experienced did indeed happen as the witness described.

61. It is noteworthy that the contested Verdict correctly states that the witness Mina Zerem described in detail the first arrival of the Accused in their apartment, which happened during the period from 9 May to 14 May 1993, when her neighbor Fatima Pehlić was also in their apartment together with her and her husband, and whom the Accused told to leave. Part of the testimony of the injured party which appears to be significant is where she stated that on that occasion the Accused introduced himself saying his full name and that he was from Jesenice, which again corroborates that the injured party knew the identity of the Accused.

62. Furthermore, the witness also explained in detail the second arrival of the Accused in their apartment, pointing out that the Accused was in uniform and accompanied by four or five armed soldiers in uniforms. On that occasion, the Accused, having realized that the witness recognized him, said that he was the same person that was also there for the first time. According to the witness, the Accused and the soldiers who came with him in the apartment, ransacked the apartment, stole things and valuables and took her husband out of the apartment.

63. In the Panel's opinion, the witness also gave a very sincere and thorough account of the very act of rape and the extremely traumatic experience which she had undergone in her own apartment.

64. The Trial Panel was justified in finding that this incident certainly caused severe suffering and mental pain to the injured party, who stated that she was ashamed of what she had experienced, feeling humiliated, saying: "...so naked in my bedroom. And he was then maybe of the same age as my children,"<sup>16</sup> "I was left there humiliated, feeling numb, lying there on my bed."<sup>17</sup>

65. It should be stressed that the rape victim is hurt both physically and mentally, that she is in a special emotional state of mixed feelings of shame, fear, confusion, self-accusation, concern and uncertainty, with the loss of self-respect, self-confidence and the sense of inferiority. Moreover, most of the rape victims are facing traumatic consequences, such as withdrawal from society, which occurs as a result of all mentioned feelings of the victims.

66. The First Instance Verdict correctly notes that the witness, after the incident, left her apartment and went to her neighbor Anica Pudar where she stayed until the morning, and after that she went to her neighbor Fatima Pehlić. Fatima Pehlić's husband asked the witness' boss to take care of her because her husband was taken away, which he did, so the witness spent some time in Blaž Šimunović's apartment and then returned to her own place.

67. It is important to take into account the fact that the witness knew from the very first encounter with the Accused who he was, regardless of the fact that she did not share this information with her family, neighbors and friends, stating that she had never told anyone

---

<sup>16</sup> Transcript dated 1 February 2011, p. 12.

<sup>17</sup> Transcript dated 1 February 2011, p. 12.

that the Accused had raped her but only that he mistreated her, for the following reasons: *"I did not do it because we are a generation, how to put it, that kept these intimate things to ourselves, and we were not free to talk about it. I was afraid of my husband's reaction if I told him all these details. We stayed in the apartment, did not go anywhere. I was also afraid of my then 18-years old son's reaction, what he would do if he found out who it was, because I knew this person. It would have been different if it had been an unknown person and if I did not know who did it. What would my family say, the community, my neighbors..."*<sup>18</sup>

68. It is also necessary to take into consideration the conservative community, lack of education, a general lack of empathy, which are only some of the reasons for which rape victims, including the injured party Mina Zerem, rarely report the perpetrators of this criminal offense. The foregoing is particularly relevant when combined with the time of perpetration and the fact that this was an unprotected ... woman who happened to be in the territory under the control of the Council.

69. The foregoing clearly indicates that it is because of her religion and ethnicity that the injured party was subjected to the degrading treatment, notwithstanding the inscription on their door suggesting that they were under the Council's protection.

70. It is common knowledge that sex crime victims reluctantly decide to report these offenses, for many reasons, primarily due to the fear of retribution, embarrassment, sense of self-accusation, mistrust in the prosecution authorities, confusion and many other reasons.

71. In the opinion of the Appellate Panel, the injured party was quite understandably hiding the identity of the perpetrator, because the Accused used force and many threats against the injured party during the perpetration of the criminal offense, and because she feared for her safety and the safety of her husband who had been taken to a camp.

72. Having properly evaluated the evidence produced at the main trial, the Trial Panel reached the correct finding that the injured party Mina Zerem and her husband were civilians who were in their own apartment, while the Accused was at the relevant time an armed soldier in uniform, which he took advantage of and committed the criminal offense described in the enactment clause of the contested Verdict.

---

<sup>18</sup> Transcript dated 1 February 2011, p. 15.

73. The absence of documentary evidence, as indicated by the Defense in the appeal, does not diminish the weight of other evidence, which clearly points to the Accused Velibor Bogdanović as the perpetrator of the criminal offense in question.

74. The Appellate Panel therefore finds that the appeal argument that the lack of documentary evidence on the rape calls into question the existence of rape is groundless given that the collection of physical evidence at the time of the offense would have been entrusted to the persons belonging to the same military and police structures as the perpetrator. Considering the overall circumstances underlying the perpetration of the criminal offense, one cannot objectively expect that the investigation would have been conducted in a proper and unbiased manner.

75. In this regard, when asked if she went to a doctor after the relevant incident, the injured party stated: *“How was I to go to see a doctor back in '93, which doctor could I have possibly gone to?”*<sup>19</sup>

76. The Trial Panel was correct in giving credence to the witness – injured party Mina Zerem also in part of the testimony relating to the first time the injured party spoke about what had happened to her, that is, when she told doctor Ramo Omanović in 2006 that she had been raped.

77. The Trial Panel corroborates this finding of fact with Exhibit T11 that clearly indicates that during the war the injured party had suffered severe mental and physical traumas which are beyond human dignity. The medical report clearly shows that the injured party was prescribed a therapy and follow-ups. The Appellate Panel therefore accepts as correct and logical the Trial Panel’s finding that this evidence clearly shows that the injured party was raped, although it is not expressly mentioned in the medical finding.

78. The Defense appeal argument that the injured party Mina Zerem was employed and had health insurance, which is why it was illogical that she did not seek professional help after the rape, is also unfounded, because the Trial Panel provided proper and sufficient reasoning about his appeal argument.

79. The contested Verdict correctly states the fact that rape victims often work and appear to function normally, referring to the expert witnesses’ testimony given before the

---

<sup>19</sup> Transcript dated 1 February 2011, p. 20.

Court, who pointed out that these persons “suffer quietly” and function with diminished capacity.

80. The Trial Panel also properly evaluated the finding of the expert team, Dr. Alma Bravo Mehmedbašić and Dr. Senadin Fadilpašić, dated 17 September 2010, stating that the injured party was diagnosed with ... In addition, the injured party showed the symptoms of ....

81. Consequently, the Appellate Panel concludes that the testimony of the witness Mina Zerem is credible and reliable in this regard as well, and that the Defense appeal arguments indicating that the injured party reported the crime in order to get the status of a woman-victim of the war and thereby obtain certain benefits, are groundless.

82. The Appellate Panel finds that the convicting part of the Verdict is not solely based on the testimony of the injured party Mina Zerem, but the Trial Panel established all decisive facts based on the testimony of the Prosecution witnesses: Fatima Pehlić, Blaž Šimunović, Anica Pudar, Junuz Vajzović, Jusuf Numanović and Senad Velić who were all consistent in relevant parts and in their entirety and mutual correlation indicated that the incident occurred precisely in the manner as described in the indictment.

83. The Appellate Panel therefore concludes that the Defense did not offer any substantiated and compelling reason pertaining to the convicting part of the Verdict, which is, *inter alia*, based on the testimony of the injured party, that would make the Panel distrust the factual findings from the contested Verdict.

84. Based on the offered evidence, the Trial Panel established with certainty that the Accused committed the criminal offense in the manner, at the time and in the place as specified in the enactment clause of the Verdict, which conclusion is also accepted by this Panel as correct and sufficiently reasoned.

85. The Appellate Panel therefore concludes that the Trial Panel correctly established that the Accused Velibor Bogdanović committed the criminal offense of which he was found guilty under the First Instance Verdict, with a direct intent, knowingly and deliberately, with a clear knowledge about the character of the undertaken acts and the ensuing consequences. By the act of rape, the Accused acted in contravention of the rules of international humanitarian law, thereby committing the criminal offense of War Crimes against Civilians under Article 173(1)(e) as read with Article 180(1) and Article 29 of the CC BiH.

## **2. Sub-Ground Two: The abduction of Salko Zerem**

(a) The Appellate Panel concludes that the state of facts was correctly and completely established in the contested Verdict.

(i) Defense appeal arguments

86. In its appeal, the Defense in particular indicates that the Court could not have in any case given credence to the testimony of the injured party Salko Zerem because it was bias and given with the intention to harm the Accused. In addition, the Defense submits that the Prosecution's argument that Salko Zerem was a civilian at the relevant time is unfounded because the documents submitted by the Prosecution clearly show that he was the HQ commander until the end of 1992 and since then a member of the Council of M. The appeal further indicates that the witnesses who were next-door neighbors of Salko Zerem and Mina Zerem confirmed that at the relevant time there was an inscription on the door of this couple's apartment indicating that they were under the Council's protection. According to Defense Counsel, this type of protection was afforded only to the members of the Council.<sup>20</sup>

87. The appeal further alleges the attitude of Salko Zerem towards the Court and the entire criminal proceedings, which is, according to the Defense, clearly corroborated by the fact that on 9 January 2011, 11 January 2011 and 18 January 2011, during the proceedings before the Court, Salko Zerem, on several occasions, intimidated the Accused and his family on the telephone, and by insulting him in the street, which the Accused reported to the relevant police department in Mostar and which is properly documented.<sup>21</sup>

88. The appeal also argues that Salko Zerem enjoys a military old-age pension and that it is not correct that he is entitled to early old-age pension.<sup>22</sup>

---

<sup>20</sup> Defense appeal, p. 9.

<sup>21</sup> Defense appeal, p. 10.

<sup>22</sup> Defense appeal, p. 10.

a. Findings of the Appellate Panel

89. According to the Defense appeal, the primary issue is that of the status of the injured party Salko Zerem at the time of the criminal offense. In that sense, the Appellate Panel finds that the Trial Panel correctly and completely established the state of facts pertaining to the status of the injured party Salko Zerem and that he was a civilian, which points to the conclusion that the appeal arguments raised to that effect are unfounded and unsubstantiated.

90. It is undisputed, as correctly stated in the contested Verdict, that the injured party, Salko Zerem, was a member of the Army,<sup>23</sup> more specifically the HQ commander, and that he was removed from that duty on 25 October 1992.

91. The injured party also stated at the main trial that at the time he did not engage in combat activities, and the Trial Panel gave him credence to that effect, which is also accepted by this Panel. However, the foregoing does not mean that the injured party Salko Zerem did not have the status of a civilian when he was on that night taken out of his apartment to a camp<sup>24</sup> where, along with other locations, he spent about a month.

92. According to the definition laid down in Article 3(1) of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention), the notion “protected category” under the term “civilian” refers to persons not taking part in hostilities, including members of armed forces who have laid down their arms and/or persons placed *hors de combat*,<sup>25</sup> also including here persons incapacitated for combat.

93. Based on the produced evidence, the Trial Panel correctly found that the injured party Salko Zerem was a person enjoying protection under the Geneva Convention and that he was deprived of liberty as a civilian.

94. The injured party was in his apartment when he was captured and was not engaged in military activities, and by the very act of deprivation of liberty he was incapacitated for combat. Consequently, the Trial Panel’s finding is correct that the injured party was a civilian person at the time of perpetration of the criminal acts, and that in the present case

---

<sup>23</sup> T26-Main Staff Order dated 25 October 1992.

<sup>24</sup> T4-Certificate of the Association of Camp Inmates dated 16 June 2010.

<sup>25</sup> ICTY, *Blagojević and Jokić* – Trial Chamber, 17 January 2005, para. 544.



he falls within the category of persons protected under international humanitarian law and the Geneva Convention.

95. Also, the finding from the contested Verdict is correct that the Accused Velibor Bogdanović, violating provisions of international humanitarian law, unlawfully took the injured party Salko Zerem to a camp.

96. The Trial Panel reached this conclusion based on the testimony of the witness Salko Zerem as well as witnesses Junuz Vajzović, Jusuf Numanović and Senad Velić, whose testimony, according to the Appellate panel's opinion, is reliable and consistent in relevant parts. The Panel therefore concludes that the findings of the Trial Panel with regard to the status of the injured party Salko Zerem are correct and sufficiently substantiated.

97. In this regard, the contested Verdict correctly states that during the deprivation of liberty the witness was not informed of the reasons for his arrest, except that the Accused Velibor Bogdanović told him that they were taking him for interrogation.

98. Consequently, the Trial Panel's finding is correct that the absence of procedural guarantees and judicial review in this case offers strong evidence that the injured party Salko Zerem was not lawfully deprived of liberty but detained solely on the ground of his ethnicity.

99. Therefore the arguments raised in the appeal are not sufficient to contest such correct and complete establishment of facts.

100. The Defense appeal further indicated that the injured party Salko Zerem harassed the Accused Velibor Bogdanović on several occasions during the criminal proceedings.

101. In this regard, and given that the Defense raised the same objection at the main trial, the contested Verdict properly stated that the Defense arguments, as well as the evidence presented by the Defense in relation to this fact, are not relevant to the outcome of the criminal proceedings.

102. Accordingly, the Appellate Panel finds this appeal argument irrelevant with regard to the decision on the existence of the criminal offense and the guilt on the part of the Accused Velibor Bogdanović.

103. Finally, having examined the appeal arguments of the Defense with regard to the erroneously and incompletely established state of facts, the Appellate Panel concluded that the Trial Panel, based on the produced evidence, reliably established all decisive facts based on which it found that the acts of the Accused Velibor Bogdanović, that is, the acts of the unlawful detention of the civilian Salko Zerem, satisfy all the elements of the criminal offense of the War Crimes against Civilians under Article 173(1)(e) as read with Article 180(1) and Article 29 of the CC BiH, which conclusion has not been refuted by the appeal arguments of the Defense for the Accused.

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

### **A. STANDARDS OF REVIEW**

104. An appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim, and explain how the error affects the decision resulting in its unlawfulness.

105. Where an error of law arises from the application in the Verdict of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

106. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314(1) and 308 of the CPC BiH.

## **B. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED**

(a) The Appellate Panel finds that the Defense appeal arguments relating to the misapplication of the CC BiH are unfounded.

### (i) Appeal arguments of the Defense

107. According to the appeal, the Court, while rendering this Verdict, violated the Criminal Code because of the factors that eliminate the criminal responsibility and the fact that the law which cannot apply was applied to the criminal offense, which is the subject of the indictment. The Defense argues that the Court made a series of essential violations of the criminal code provisions and incompletely and erroneously established the facts, which has logically led to the misapplication of the Criminal Code and the wrong decision on the criminal sanction.<sup>26</sup>

#### a. Findings of the Appellate Panel

108. First of all, it is important to underline that in considering the issue of selecting the more lenient law (*lex mitior*), the basic starting point is that it is not resolved *in abstracto*, but *in concreto*, that is, not by a general comparison between the old and new law(s), but by their comparison against the specific case, because the same law can be more favorable to one of the accused but more severe to the other, depending on the offense charged against them, the manner in which the elements of the criminal offense are defined in the law and the provisions that govern the guilt or punishment for the offense.

109. Based on the application of the relevant legal provisions and rules for deciding on the application of the criminal code, the Appellate Panel concludes that the Trial Panel reached the correct conclusion in the contested Verdict that the CC BiH should be applied in the present case rather than the adopted CC SFRY, as the Defense argues, and therefore it entirely accepts the arguments contained in the contested Verdict.

---

<sup>26</sup> Defense appeal, p. 16.

110. Having determined that the CC BiH is applicable in the present case, the Trial Panel reached the correct conclusion that the acts of the Accused Velibor Bogdanović, as described in detail in the enacting clause of the contested Verdict, satisfies all essential elements of the criminal offense of War Crimes against Civilians under Article 173(1)(e), in conjunction with Article 180(1) and Article 29 of the CC BiH.

111. In view of the foregoing, the Appellate Panel finds that the Defense appeal arguments raised in relation to the application of the criminal code are unfounded and confirms that the Trial Panel properly applied the CC BiH to the correctly and completely established state of facts from the contested Verdict.

## **VI. DECISION ON CRIMINAL SANCTION**

### **A. STANDARDS OF REVIEW UNDER ARTICLE 300 OF THE CPC BiH**

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

113. 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.

114. 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.

115. 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.

116. 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.

## **B. APPEAL OF THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

(a) The Appellate Panel finds that the criminal sanction was properly determined and therefore the Prosecution's appeal arguments are unfounded.

### (i) Prosecution's appeal arguments

117. The Prosecution argues that the Court, in meting out the punishment, disregarded the aggravating circumstances and overestimated the mitigating ones ascribing to them in their entirety the character of exceptionally mitigating circumstances, which is why the pronounced sentence of imprisonment for a term of 6 (six) years is inappropriately lenient.<sup>27</sup>

118. The Prosecution argues that the fact that the Accused apologized to the injured party in 1995 cannot be taken into consideration as a mitigating factor, bearing in mind that during the criminal proceedings the Accused never showed remorse with any gesture, act or word or that he regretted having done what he did.<sup>28</sup>

---

<sup>27</sup> Prosecution's appeal, p. 2.

<sup>28</sup> Prosecution's appeal, p. 2.

119. The fact that the Accused was 22 at the time of the criminal offense cannot be regarded as an exceptionally mitigating factor because it encourages young persons to commit criminal offenses.<sup>29</sup>

120. The appeal further submits that the Court, in determining the punishment, did not bear in mind the aggravating circumstances on the part of the Accused, such as the manifested recklessness and cruelty in his actions during the perpetration of the criminal offense, which was observed through the testimony of the injured party at the trial, as well as the evident lack of remorse for the committed criminal offense.<sup>30</sup>

121. The Court should have regarded as an aggravating circumstance that the offense was committed out of hate under the war circumstances given that the Accused was a member of the HVO while the injured party was a Bosniak civilian, that they belonged to two opposing, worrying factions or parties to the conflict.<sup>31</sup>

a. Findings of the Appellate Panel

122. Considering the decision on sentence within the arguments raised in the appeal, the Appellate Panel concludes that the Trial Panel properly assessed both mitigating and aggravating circumstances, as required by Article 48 of the CC BiH. In doing so, the Trial Panel will in particular consider the degree of criminal liability of the Accused, the motives for the perpetration of the criminal offense, the degree of danger or violation to the protected value, the circumstances under which the criminal offense was perpetrated, the previous life of the perpetrator, his personal situation and conduct after the offense, as well as other circumstances pertaining to the perpetrator's personality.

123. Contrary to the Prosecution's arguments, the Appellate Panel concludes that the Trial Panel gave the assessment of all mitigating and aggravating factors, bearing in mind all subjective and objective considerations underlying the criminal offense and its perpetrator.

124. Accordingly, the pronounced prison sentence for a term of 6 (six) years, in the opinion of this Panel, constitutes a proportionate punishment that reflects the severity of

---

<sup>29</sup> Prosecution's appeal, p. 2.

<sup>30</sup> Prosecution's appeal, pp. 2-3.

<sup>31</sup> Prosecution's appeal, p. 3.

the criminal offense of which the Accused Velibor Bogdanović was found guilty. In view of these considerations, the pronounced punishment will achieve both general and specific purpose of punishment as prescribed in Article 39 of the CC BiH, which is why the Prosecution's appeal arguments to this effect have been regarded as unacceptable.

125. As for the mitigating circumstances, the Trial Panel had regard to the fact that the Accused has no prior convictions, that he is married and provides for three minor children, that he is unemployed and that the Accused approached the injured party after the war and apologized to her for what he had done, offering help, and that he was 22 at the time of the perpetration of the criminal offense.

126. The contested Verdict states as an aggravating factor that the Accused took advantage of the fact that he was a member of the Council the Muslim civilians feared, and under such impression he committed the described war crimes. In this regard, the Appellate Panel considers necessary to point out that this aggravating factor constitutes an element of the criminal offense of which the Accused was found guilty, and as such cannot be taken into consideration in determining the sentence. However, the severity of the imposed punishment is nevertheless proportionate to the gravity of the criminal offense and the ensuing consequences.

127. The Trial Panel also found on the part of the Accused Velibor Bogdanović exceptionally mitigating circumstances which are reflected in the Accused's age and his obvious immaturity and lack of judgment in the war circumstances. The Trial panel therefore ruled in favor of the Accused and reduced the minimum 10 years' imprisonment by four years and sentenced the Accused to a prison sentence of 6 (six) years, considering that the purpose of punishment can also be achieved with the reduced punishment.

128. In the opinion of the Appellate Panel, all the factors affecting the severity of punishment were properly assessed by the Trial Panel, which rightfully used its discretionary right in valuing these factors, concluding that the circumstances taken into consideration justify in their entirety the sentence imposed.

129. Consequently, the Panel concludes that the Trial Panel did not give excessive weight to the mitigating factors on the part of the Accused, as the Prosecution unfoundedly claims in its appeal.

130. Furthermore, in relation to the degree of criminal liability, the Trial Panel determined that the Accused acted with direct intent and that he was aware that by his actions he was committing the criminal offense of War Crimes against Civilians in violation of Article 173(1)(e) as read with Article 180(1) and Article 29 of the CC BiH and that he desired its perpetration, which finding is entirely accepted by this Panel.

131. It is also necessary to bear in mind that the protected value of these criminal offenses are universal human values, the values that are the requirements and basis for common and human existence, a violation of which constitutes grave breaches of norms of international humanitarian law. The fact that these offenses are not barred by the statute of limitation speaks of their severity and gravity.

132. The Appellate Panel holds that the consequences of the criminal offense of rape are severe, since it is an offense which is at the moment of perpetration humiliating for the victim and leaves the victim in the state of trauma for a long time, which was also confirmed by the injured party Mina Zerem in her testimony, as well as medical expert witnesses.

133. Rape offends in an extremely cruel manner the woman's-victim's most intimate sphere of life, assaulting not only her sexual but her whole integrity. It is a typical act of violence. It constitutes a severe injury of the victim's personality, its autonomy, psychological and physical integrity, self-control and self-respect. Many other persons appear at times as secondary victims, starting from the victim's family members, relatives, friends, acquaintances and others. Moreover, it causes the sense of fear and disturbance among the public, giving rise to wider sociological consequences.

134. However, the contested Verdict properly found that the Accused Velibor Bogdanović in the present case raped one person, taking one act of perpetration against her.

135. There are a few criminal offenses that attract as much public attention, curiosity and disgust at the same time, as rape, and it is therefore necessary that justice authorities adequately punish the perpetrators. It is also necessary to help rape victims as much as possible to overcome the traumatic consequences, instead of rejecting them, which is often the case in our society.

136. Furthermore, the criminal offense of unlawful detention of civilians, in the present case the injured party Salko Zerem by the Accused Velibor Bogdanović, also constitutes a



grave criminal offense, given that the injured party, at the relevant time, belonged to the category of persons protected by international humanitarian law and the Geneva Convention.

137. The Appellate Panel therefore concludes that, in determining the sanction, the Trial Panel was aware of the need to render its decision in accordance with the goal to publicly condemn such a grave crime committed by the Accused, but at the same time it had in mind the rehabilitation of the Accused who was young at the time of perpetration of the criminal offense, that he is father of three minor children and that he expressed his regret to the injured party for his actions, apologized and offered help (*“He told me, madam, I do not know what came over me that I acted so towards you and that I behaved in such a manner, is there any way I can make it up to you, either financially or with some papers, or in some other way, can I help you?”*<sup>32</sup>).

138. For these reasons, the Appellate Panel concludes that the prison sentence imposed on the Accused Velibor Bogdanović, for a term of 6 (six) years, is adequate, purposeful and fair and that it will achieve both general and specific purpose of punishment.

### **C. APPEAL OF DEFENSE COUNSEL FOR THE ACCUSED**

(a) The Appellate Panel concludes that the Defense appeal did not successfully refute the decision on the criminal sanction in relation to the Accused.

#### a. Findings of the Appellate Panel

139. The Defense appeal does not contain an explicit ground for contesting the criminal sanction pronounced in the First Instance Verdict. However, as the appeal filed in favor of the Accused due to the state of the facts being erroneously or incompletely established or due to a violation of the Criminal Code shall also contain an appeal from the decision concerning the criminal sanction (Article 308 of the CPC BiH<sup>33</sup>), the Appellate Panel

---

<sup>32</sup> Transcript dated 1 February 2011, p. 16.

<sup>33</sup> Article 308 of the CPC BiH (Extended Effect of the Appeal): An appeal filed in favor of the accused due to the state of the facts being erroneously or incompletely established or due to the violation of the Criminal

considered this ground of appeal in favor of the Accused, concluding that the Trial Panel correctly assessed all the circumstances relevant to the mitigation or aggravation of the punishment, including the extenuating circumstances on the part of the Accused, that it ascribed a realistic importance to all these circumstances viewed individually and in their entirety and rendered a lawful and correct sentencing decision, and therefore this appeal argument is refused as unfounded.

## VII. DECISION ON THE CLAIM UNDER PROPERTY LAW

(a) The Appellate Panel concludes that the decision on the claim under property law is correct and the Defense appeal arguments are unfounded.

a. Findings of the Appellate Panel

140. Defense Counsel for the Accused Velibor Bogdanović also filed an appeal from the decision on the claim under property law, offering no reasoning in support of his argument for the Appellate Panel to examine the contested Verdict in the relevant part. As the appeal contains no reasoning in support of the argument raised, the Panel refused this appeal argument as unfounded.

141. In view of the foregoing considerations and pursuant to Article 313 of the CPC BiH, it was decided as stated in the enactment clause of the Verdict.

**Record-taker:**

Neira Kožo

**PRESIDENT OF THE PANEL**

**JUDGE**

**Redžib Begić**

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

---

Code shall also contain an appeal of the decision concerning the punishment and forfeiture of the property gain