Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босна и Херцеговина

Case no.: S 1 1 K 003426 10 Krž (reference X-KR-10/948)

Date: **Delivered on 27 September 2011**

Written copy sent out on 28 December 2012

Before the Panel composed of: **Judge Mirko Božović, Presiding Judge**

Judge Hilmo Vučinić

Judge Phillip Weiner

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Miodrag Marković

SECOND INSTANCE VERDICT

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

Božidarka Dodik

Defense Counsel for the Accused:

Attorney Svetlana Lazić

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Number: S 1 1 K 003426 10 Krl (reference X-KRŽ-07/442)
Sarajevo, 27 September 2011

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Appellate Division Panel comprising Judge Mirko Božović as the Presiding Judge and Judges Hilmo Vučinić and Phillip Weiner, as the Panel members, with the participation of Legal Adviser Dženana Deljkić Blagojević, as the Record-Taker, in the criminal case against the Accused Miodrag Marković, for the criminal offense of War Crimes against Civilians in violation of Article 173(1)e) of the Criminal Code of BiH as read with Article 180(1) of the CC of BiH, deciding upon the Appeal by the Defense Counsel for the Accused, attorney Svetlana Lazić from Doboj, filed from the Verdict of this Court number S1 1 K 003426 10 Krl (X-KR-10/948) of 15 April 2011, at the Panel Session, in the presence of the Prosecutor of the Prosecutor's Office of BiH, Božidarka Dodik, the Accused Miodrag Marković and his Defense Counsel, attorney Svetlana Lazić, held pursuant to Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH), on 27 September 2011, rendered the following:

VERDICT

The Appeal by the Defense Counsel for the Accused, attorney Svetlana Lazić from Doboj, filed from the Verdict of this Court number S1 1 K 003426 10 Krl (X-KR-10/948) of 15 April 2011 IS HEREBY REFUSED **as unfounded,** and the First Instance Verdict is **upheld in its entirety.**

R E A S O N I N G

I. PROCEDURAL HISTORY

1. Under the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH) number S1 1 K 003426 10 Krl (X-KR-10/948) of 15 April 2011, the Accused Miodrag Marković was found guilty of having committed 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 of BiH), by the acts described in the operative part of the Verdict. The First Instance Panel sentenced the Accused to imprisonment for a term of 7(seven) years for the mentioned criminal offense. By the application of Article 188(4) of the CPC of BiH, the Accused was exempted from reimbursing the costs of the criminal proceedings. Pursuant to Article 198(2) of the CPC of BiH, the aggrieved party Z1 was referred to take civil action for a potential claim under property law.

2. The Defense for the Accused Miodrag Marković, attorney Svetlana Lazić, filed in a timely manner an appeal from the First Instance Verdict, contesting it on the grounds of:

a) Essential violation of the criminal procedure provisions (Article 297(1) d) and k) and paragraph 2)
b) Violation of the Criminal Code (Article 298 of the CPC of BiH)
c) Erroneously and incompletely established state of facts (Article 299 of the CPC of BiH)
d) Decision on the criminal sanction (Article 300(1) of the CPC of BiH)

3. The Defense moved the Appellate Panel to (1) uphold the allegations in the Appeal, modify the First Instance Verdict and acquit the Accused of charges, or (2) to modify the First Instance Verdict in relation to the decision on the sanction and impose on the accused a shorter prison sentence, or (3) revoke the First Instance Verdict and schedule a retrial.

4. The Prosecutor's Office of BiH filed its Response to the Appeal, proposing that the Appeal by the Accused Miodrag Marković be refused as unfounded in its entirety.

5. At the Appellate Division Panel held on 27 September 2011, pursuant to Article 304 of the CPC of BiH, the Defense Counsel for the Accused and the Accused himself briefly presented their Appeal, while the Prosecution offered a verbal response to the Appeal, maintaining their written submissions in their entirety.

6. At the public session, the Defense proposed the examination of two additional witnesses, Velimir Jelić and Željko Popović, who would testify that the Accused did not commit this criminal offense. As an explanation for not proposing these witnesses earlier, the Defense offered its financial inability to summon them to the Court.

7. Having reviewed the contested Decision within the allegations and arguments raised on appeal, in accordance with Article 306 of the CPC BiH, the Appellate Division Panel (Appellate Panel) rendered the Decision as stated in the operative part, for the following reasons:

II. PROCEDURAL DECISIONS

8. As regards the Defense Motion to examine two additional witnesses, the Appellate Panel first notes that Article 295(4) of the CPC of BiH provides for the possibility of proposing new evidence on appeal. New evidence can be accepted if despite due attention and cautiousness it could not be presented during the main trial, while the appellant must cite reasons for failing to present it earlier.

9. In this particular case, the Defense for the Accused stated that additional witnesses proposed in the appeal had not been proposed earlier because the accused was not in a financial position to secure their presence before the Court.

10. The stated reason, however, does not explain why the evidence could not have been adduced during the main trial. At the time of presentation of defense evidence, these witnesses were known to exist, while the costs of the arrival of witnesses are paid by the Court (and eventually by the person convicted by a final verdict, if the Court decides that he/she is bound to reimburse those costs). Additionally, witnesses in this particular case would testify about exculpatory circumstances concerning the Accused, and they do not represent new, but additional witnesses. The contents of their testimony and circumstances about which they would testify constitute cumulative evidence.

11. In its essence, the Defense's appeal concerning the new evidence challenges the state of facts as determined by the Trial Panel. The issue of properly and fully determined state of facts is a separate ground of appeal and will be elaborated on separately.

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

A. STANDARDS OF REVIEW ON APPEAL

12. A Verdict may, pursuant to Article 297 of the CPC of BiH, be contested mainly on the grounds of an essential violation of the provisions of criminal procedure which is always established in the cases specified in Article 297(1).

13. A substantial violation of provisions of criminal procedure is also established when the Trial Panel during the trial or in reaching the verdict failed to notice or incorrectly applied a provision of the Criminal Procedure Code, but only if it affected or might have affected the rendering of a lawful and correct verdict.

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

15. The Trial Panel recalls that Article 297(1)d) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Verdict where the accuracy of the facts established or not established by the Trial Panel is contested.

16. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the Verdict. The Appellate Panel will examine whether, on its face, the wording is

incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts[1]. The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the Verdict formally contains all necessary elements for a well-reasoned and comprehensible verdict.

17. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Verdict. A non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Verdict.

18. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Verdict and should raise alleged errors of fact under Article 299 of the CPC BiH.

B. VIOLATION OF THE RIGHT TO DEFENSE

19. Article 297(1) of the CPC of BiH stipulates that „The following constitutes an essential violation of the provisions of criminal procedure:.. d) if the right to a defense was violated; k) if the wording of the verdict contradicted the grounds … if the verdict did not cite reasons concerning decisive facts." Paragraph 2 of the same Article of the CPC of BiH reads: „*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.*"

20. The right to a defense and equality of arms are among the basic criminal procedure principles. Article 6 of the European Convention on Human Rights and Article 14 of the CPC BiH stipulate that "each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent."[2] However, "while Article 6 of the Convention guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence or the way it should be assessed, which are therefore primarily matters for regulation by national law and the national courts."[3]

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[1] See, *e.g. Nenad Tanasković No.* X-KRŽ-06/165 (the Court of BiH), Verdict of the Appellate Panel of 26 March 2008, p. 7-9.

[2] *Dombo B.V. vs Holland*, App. No. 14448/88, ECtHR (27 Oct. 1993), para 33, as cited by Jasmin Bajrić, AP-292/06 (Constitutional Court) 28 Nov. 2008, para 42.

[3] *Garcia Ruiz v. Spain*, App. No. 30544/96, ECtHR (21 January 1999), Para 28, See also, D.S. AP-1781/07 (Constitutional Court), 30 May 2009, Para 43 (finding that "the admissibility of evidence is a matter that is determined primarily by national law, while the assessment of the presented evidence is, as a rule, up to the regular courts.").

Accordingly, the BiH Constitutional Court has determined that Article 14 of the CPC BiH and Article 6 of the ECHR do not "stipulate that the regular court will consider all arguments the parties to the proceeding present during the trial, but only those arguments that the court finds to be relevant."[4]

21. In addition, this Panel considers acceptable any reason for which the Trial Panel did not admit a certain piece of evidence, if it is evident from the proceedings that the proposal for the presentation of the evidence is not supported with clear indication that there is a justified need for that piece of evidence to be presented, or that cumulative proof or proof of irrelevant facts is excluded.

(a) Limited presentation of evidence due to expertise on mental capacity of the accused

22. The Defense argues that during the First Instance Proceedings, the right to a defense under Article 297(1)d) of the CPC of BiH was violated because the Defense Motion was dismissed to present evidence by providing an expertise on the mental capacity and mental health of the Accused Marković in order to correctly and completely establish the Accused's attitude towards the perpetrated offense.

23. The Prosecutor argues that the Defense Motion was presented too abstractly and arbitrarily, in contravention of Article 110 of the CPC BiH, since the Defense did not offer a single piece of evidence that the Accused's mental capacity was either non-existent or diminished at the time of perpetration.

24. Specifically, the challenged Verdict explains the refusal to present this piece of evidence by the fact that in its Motion to establish the mental capacity of the Accused *tempore criminis*, the Defense did not offer specific facts indicating that the presentation of this piece of evidence is indeed justified and that the reasons for which the expertise was sought include his frequent state of inebriation, allegedly reduced intellectual capacity, unstable and changeable behavior, which all might have affected his ability to understand the significance of the offence and control his actions. The Trial Panel states that the Defense was bound to offer particular evidence which gives rise to a suspicion that *at the time the criminal offense was committed the Accused was either mentally unaccountable or had a reduced mental ability*.

[4] *Nermin Ćupina*, AP-3388/06 (Constitutional Court), 17 March 2009, para 37.

25. The Appellate Panel agrees with the argumentation offered in the contested Verdict, because aside from the general remarks of the Defense Counsel that the Accused is a person with reduced intellectual capacity and the information about his alleged behavior under the influence of alcohol, the Court was not provided with any specific information which would raise suspicion as to the Accused's mental accountability at the time the criminal offense was perpetrated, thereby calling into question the Trial Panel's decision to refuse the presentation of this piece of evidence.

26. Furthermore, it is important to note that the Accused presented his appellate arguments at the public Appellate Panel session. From his overall conduct, speech and presentation of his appellate allegations, the Panel could not draw a conclusion that the Accused is a person who can be said to have diminished intellectual abilities. The Panel actually notes that the Accused spoke in an organized and logical manner, and presented his case eloquently. Additionally, the Panel notes that it was proven in the First Instance Proceedings that the Accused served in the military security, and, given that it is a generally known fact that membership in such a formation implies special skills and professional competence, that fact is in contradiction with the purely personal view of the Defense Counsel that the Accused is a person with diminished intellectual abilities.

27. Furthermore, the Defense requested an expertise of his mental capacity at the time the criminal offense of rape was perpetrated, which is analyzed only in cases where it is not disputed that the Accused committed the criminal offense (Article 110(3) of the CPC BiH). This Motion is in contradiction with the Defense thesis that the Accused Marković did not commit the criminal offense.

28. The Appellate Panel concludes that the Defense did not present any strong proof that the First-Instance Panel's refusal to hear the evidence by an expert witness regarding the Accused's mental condition amounts to a violation of Article 297(1)d), so this appeals argument is dismissed as unfounded.

(b) Weak link between the aggrieved party's trauma and the criminal offense

29. The Defense submits that the Trial Panel did not pay due attention to their evidence. Specifically, the Defense claims that the Trial Panel did not properly take into account the Defense evidence that rendered questionable the existence of … on the part of the aggrieved party Z1, and that brought into question the cause-and-effect relation between the critical incident and … symptoms. The Defense also claims that the Trial Panel prevented its team of experts to examine

the aggrieved party, which is why they were not in a position to adequately challenge her diagnosis.

30. In response to this claim by the Defense, the Prosecutor stresses that by their finding the defense expert witnesses did not contest the expertise and objectivity of prosecution expert witnesses, nor did they bring into question the validity of the conducted tests. They also did not deny that there was a trauma on the part of the aggrieved party. The only difference of opinion is – what specific event was the "trigger" of the aggrieved party's trauma.

31. Nevertheless, in this regard, the Appellate Panel notes that the aggrieved party's … and its possible connection with the perpetration of the criminal offense is ultimately irrelevant to the conclusion on the guilt of the Accused. The Accused is charged with the perpetration of the criminal offense under Article 173(1)e) of the CC of BiH, which clearly stipulates the elements that must be satisfied on the part of perpetrator so as to lead to the conclusion on the existence of the offense. The existence of …, or for that matter any other factor relevant to the mental state of the aggrieved party, is not mentioned in the given Article. The effect of perpetration of the criminal offense against the aggrieved party and the consequences of what she went through can be relevant only while meting out the punishment for the perpetrator.

32. Furthermore, while presenting as evidence the expertise conducted by the Defense team of experts who gave their findings and opinion based on the documentation and expertise performed by the Prosecution team of experts, the Defense expert witnesses agreed to a great extent on the mental state of the aggrieved party, deeming that their immediate examination of the aggrieved party was not necessary. The Defense team of experts provided clear findings of high quality, without requesting to perform a detailed examination of the aggrieved party. The proposal for the examination of the aggrieved party was made solely by the Defense Attorney, and the Appellate Panel agreed with the expert assessment that the examination was not necessary for a quality opinion in the particular case. These Defense objections are therefore refused as unfounded.

(c) Insufficient time to prepare written closing arguments

33. The Defense also points out that it did not have sufficient time to prepare the closing argument in writing, whereby the right to a defense was violated. The Appellate Panel notes that the CPC of BiH does not provide for the obligation to prepare the closing arguments in writing, nor does it stipulate any consequences to the proceedings and defense for the accused if the closing argument has not been submitted in writing.

34. The Criminal Procedure Code provides the parties to the proceedings with the possibility

to present their closing arguments. Thus, a failure to submit closing arguments in writing would in no way reduce the quality of defense in the criminal proceedings or negatively affect the outcome of the proceedings.

(d) Refusal of evidence in the form of additional examination of Witness Mile Blagojević

35. The Defense further submits that the Trial Panel violated the right to a defense by refusing an additional examination of Witness Mile Blagojević about his conflict with the Accused at the time of the perpetration of the offense. Nevertheless, as it follows from the First Instance Verdict, this proposal was refused as evidence of the fact that there had been a conflict between this Witness and the Accused, which ultimately was not disputed at all and it would be irrelevant to prove that fact.

36. The Appellate Panel agrees with this conclusion, finding that the appellate arguments did not bring into question the correctness of the conclusion. Therefore, this Defense argument is also dismissed as unfounded.

C. VERDICT CONTRADICTORY TO THE GROUNDS

37. The Appeal further notes that it does not contain reasons concerning decisive facts which pertain to the evidence that the aggrieved party was raped. The Defense argues that the Trial Panel refers only to the testimony of the aggrieved party and her closest relatives, and not to the evidence provided by Defense witnesses, primarily Mile Blagojević and Momir Bogdanić, who called into question the testimony of the aggrieved party Z1 and the merits of the charge.

38. The Appellate Panel notes that in his allegations the appellant must specifically point to the flaws in the contested Verdict and that mere allegations without stating specific omissions shall not be admitted.

39. The Defense stresses that the Verdict is contradictory to the grounds as it does not contain reasons concerning decisive facts. Furthermore, the Defense submits that the Verdict was rendered in contravention of Article 3 of the CPC of BiH (*in dubio pro reo*) given that the Trial Panel did not apply this legal provision referred to by the Defense. The Defense submits that its evidence threw doubt at the testimony of the aggrieved party and the existence of the elements of the criminal offense of rape.

40. In response to this Defense's argument, the Prosecution claims that all the circumstances of

the perpetration of the crime were described in consistent statements given by prosecution witnesses, which were in some parts corroborated even through the evidence provided by defense witnesses and extraordinary documentary evidence.

41. The allegation that the Trial Panel did not provide adequate reasons for its findings on particular decisive facts may be raised on appeal in accordance with Article 297(1)k). The Appellate Panel assesses such allegations and their merit if the Defense specifies the parts of the Verdict that are contradictory to the reasons provided therein. Here, the Defense failed to do so in a proper manner, so that such an allegation cannot be considered at all.

42. Nonetheless, the Appellate Panel notes that the First-Instance Panel reviewed all facts with equal attention, not overlooking a single fact that would be important for adjudication, so the Appellate Panel drew a conclusion that the First-Instance Panel did not apply any methodological approach that would be in violation of Article 14 of the CPC of BiH, pertaining to the *equality of arms* standard. Therefore, this Panel finds that the appeals argument that the Defense evidence and/or facts in favor of the Accused were not evaluated is meritless. However, the Appellate Panel will further elaborate in more detail in Part V (concerning the allegations on errors of fact) on the claims that the first-instance verdict erroneously and incompletely established the state of facts.

IV. GROUNDS OF APPEAL UNDER ARTICLE 298 OF THE CPC OF BIH- VIOLATIONS OF THE CRIMINAL CODE

A. STANDARDS FOR REVIEW ON APPEAL

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

B. APPLICABLE LAW

44. Under the First Instance Verdict, the Accused Marković was found guilty of the criminal offense of War Crimes against Civilians in violation of Article 173(1) e) as read with Article 180(1) of the CC of BiH and sentenced to imprisonment for a term of seven years. The Accused was found guilty of having committed the mentioned offenses on 11 July 1992 during the war in BiH, as a member of the armed forces of the Army of Republika Srpska.

45. The Defense submits that the Criminal Code of SFRY should have been applied in this case[5], instead of the CC of BiH, on the grounds that this Code was applicable at the time of the alleged perpetration of the criminal offense, and that it is also more lenient to the perpetrator. [6]

46. The Defense argues that the referenced Verdict was rendered in violation of the Criminal Code, that is, that the law which was not the most favorable for the Accused Marković was applied, whereby the basic principle of equality of arms was violated. The Defense submits that had the Trial Panel properly applied the substantive law in force at the time of the perpetration of the criminal offense, the Court would have sentenced the Accused Marković to imprisonment for a term less than 5 years in case he was found guilty.

47. In its response to the appeal, the Prosecution claims that Defense's allegations about the erroneous application of substantive law are ill-founded and that this ground of appeal should be dismissed as ill-founded. To that end, the Prosecution cited the decision of the BiH Constitutional Court on appeal, filed by Abduladhim Maktouf, which concludes that the application of the CC BiH in the proceedings before the Court of BiH does not represent a violation of Article 7(1) of the ECHR.

48. Defense appeals arguments with regard to the application of the substantive law are unfounded in their entirety.

49. Certain principles of criminal law are codified in the CC of BiH, in Articles 3, 4 and 4a). They read as follows:

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[5] See: Decree Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and Criminal Code of the Socialist Federative Republic of Yugoslavia which was adopted as the Republic law at the time of imminent war threat or during the state of war (Official Gazette of RBIH number 6/92) and Law on Confirmation of Decree Laws (Official Gazette of RBIH number 13/94).
[6] First Instance Verdict, pp. 12-16.

Article 3(1): Criminal offenses 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 offense.

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 4a): 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.

50. A review of the mentioned laws shows that the criminal offense of Rape constitutes a violation of both the CC of BiH and the CC of SFRY which was in effect at the time the criminal offense was perpetrated. Article 173(1)e) of the CC of BiH stipulates imprisonment in the duration of "at least ten years or a long-term imprisonment" whereas Article 142(1) of the CC of SFRY provides for imprisonment sentence for a term of "at least five years or capital punishment". It should also be noted that according to the CC of BiH, a punishment of "long-term imprisonment" carries a maximum prison sentence in the duration of forty-five years.[7]

51. The Appellate Panel concludes that, bearing in mind that capital punishment was in force at the time the criminal offense was committed, it cannot simply be ignored. In line with the Decision on Appeal filed by *Abduladhim Maktouf from the Decision of the Court of BiH* [8] (where the Constitutional Court refused to ignore the maximum sentence prescribed under law and ruled "that it was impossible to simply "eliminate" the more severe sanction under former and subsequent law and apply other more lenient sanctions...), the Appellate Panel will review the CC of SFRY in light of its Article 142(1), which was in effect at the time the criminal offense was committed (and which included capital punishment).

[7] Article 42(2) of the CC.
[8] *Abduladhim Maktouf* , AP 1785-06, Constitutional Court Decision, 30 March 2007, para. 69.

52. The Criminal Code of BiH does not determine the manner of analysis with regard to establishing a more lenient law. This was left for the courts to decide on a case by case basis. Appellate Panels of the Court of Bosnia and Herzegovina have been considering this issue since 2006, finding on several occasions the CC of BiH to be the more lenient law.[9]

53. In the *Prosecutor versus Abduladhim Maktouf* case number: KPŽ-32/05, the Second Instance Verdict of 4 April 2006, the Court dealt with the issue of which law was more lenient to the accused who was charged with the criminal offense of War Crimes against Civilians [Article 173(1)e) of the CC of BiH]. The Court found that the basic starting point for rendering a decision on this matter was to compare maximum prison sentences. The Court established that the CC of BiH is the more lenient law because „there is no heavier punishment than capital punishment."[10]

54. The Appellate Panel maintains that the CC of BiH is more lenient than the CC of SFRY which stipulates death sentence as a maximum punishment. See the Second Instance Verdict in the case against Mirko Pekez, number: X-KRŽ-05/96-1, of 29 September 2008, page 13; the Second Instance Verdict in the Nisvet Ramić case, number: X-KRŽ-06/197, of 21 November 2007, page 5; the Second Instance Verdict in the case against Goran Damjanović *et al*., number: X-KRŽ-05/108, of 19 November 2007 on page 10 ("the punishment stipulated by the Criminal Code of BiH is in any event more lenient than the death penalty, which was in effect under the CC of SFRY...")[11]

55. The Appellate Panel finds that these previous Court decisions are convincing and that they represent a realistic analysis for establishing the most lenient law. By using this standard, the Appellate Panel concludes that the CC of BiH is more lenient to the Accused as compared to the CC of SFRY which stipulates death sentence as the maximum punishment. Thus, the Appellate Panel finds that the Trial Panel properly concluded that the CC of BiH was to be applied in these particular proceedings.

[9] But see Second Instance Verdict in *Zijad Kurtović,* number X-KRŽ-06/299 of 25 March 2009, paras 127-132.
[10] Second Instance Verdict in *Adbuladhim Maktouf*, number: KPŽ-32/05, of 4 April 2006, p. 21.
[11] The Appellate Panel finds that the CC of BiH is the more lenient law, based on the application of Article 4.a) of the same Code. See e.g. Second Instance Verdict against *Jadranko Palija*, number: X-KRŽ-06/290, of 24 April 2008, pp. 11-13.

V. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH– ERRONEOUSLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS

A. STANDARDS

56. The Accused asserts that the First Instance Panel erred in several factual findings and conclusions.

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

58. 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.

59. 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.

60. 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".

61. The BiH Constitutional Court concluded that proving facts through circumstantial evidence is not by itself contrary to the principle of a fair trial, as laid down in Article 6(1) of the ECHR, but noted that circumstantial evidence serving as a basis for judicial findings must act "as a firm closed circle that allows but one reasonable conclusion in relation to the relevant facts."[12] Trial and

[12] *M.Š.*, AP-661/04 (BiH Constitutional Court), Decision on Admissibility and Merits, 22 April 2005, para. 36; *Senada Hasić*, AP 5/05 (BiH Constitutional Court), 2006, para. 31. *See also Trbić, Trial Verdict*, para. 70, quote from the Croatian Supreme Court, Kž 1744/68 (1968); *Dukić*. Trial Verdict, para. 129, quote from the Commentary on the BiH

appellate panels, as well as various trial and appellate panels of the ICTY, have been known to rely on circumstantial evidence in order to determine a particular fact or the existence of a criminal offense,[13] bring the Accused into connection with the criminal offense he has been charged with,[14] and draw a conclusion on the *mens rea* of the Accused or the form of his participation.[15] In certain cases, only circumstantial evidence constituted a basis for the factual finding or conviction.[16] In other cases, circumstantial evidence was used to support other pieces of oral or documentary evidence.[17]

(a) Non-existence of documentary evidence of the perpetration of the offense

62. The Defense submits that the Prosecution failed to prove that the rape actually occurred considering, in the first place, that there is no documentary evidence of the foregoing. It is a fact

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Criminal Procedure Code, p. 716. The ECHR itself relied on circumstantial evidence while adjudicating on the claims presented to it. *See, for instance, Cakici vs. Turkey*, No. 23657/94, 8 July 1999, para. 85.

[13] *See, for instance, Mejakić* **X**-KRŽ-06/200 (Court of BiH), Appellate Judgment, 16 Feb. 2009, para. 89 (the court relied on circumstantial evidence regarding the claim that the accused was in charge of the specific guard shift); *Kujundžić*, X-KR-07/442 (Court of BiH), Trial Judgment, 30 Oct. 2009, para. 383 - 385. *See also Prosecutor vs. Martić*, Judgment, IT-95-11-A, 8 Oct. 2008. ("Appellate Judgment in *Martić*"), para. 255, 259-261 (the Trial Panel correctly found that the shelling of Zagreb represented a wide-spread attack aimed against the civilian population "due to the characteristics of the weapon and the massive nature of the attack"); *Prosecutor vs. Krnojelac*, Judgment, IT-97-25-T, 15 March 2002 ("Trial Judgment in *Krnojelac*"), para. 326; *Prosecutor vs. Kvočka et al.,* Judgment, IT-98-30/1-A, 28 Feb 2005 ("Appellate Judgment in *Kvočka*"), para. 260. Circumstantial evidence may also be used to prove the *actus reus* of rape. *Prosecutor vs. Muhimana*, ICTR-95-1B-A, Judgment, 21 May 2007 ("Appellate Judgment in *Muhimana*") para. 49.

[14] *See, for instance, Stupar*, X-KR-05/24 (Court of BiH), Trial Judgment, 29 July 2008, p. 153 ("The awareness of a criminal offense may […] also be proven by circumstantial evidence."). *See also Prosecutor vs. Strugar*, IT-01-41-T, Judgment, 31 Jan 2005, ("Trial Judgment in *Strugar*"), para. 343 (it was inferred from circumstantial evidence that the accused was aware that his order "for the attack on Srdj necessarily includes the probability that his forces might need to shell all Croatian artillery and other military positions […]."). *Dukić*, Trial Judgment, para. 199, 363 *quote from Prosecutor vs. Limaj et al.*, IT-03-66-T, Judgment, 30 Nov. 2005, ("Trial Judgment in *Limaj*"), para. 515.

[15] *See, for instance, Stupar*, Trial Judgment, p. 142 (where it was confirmed that "[e]vidence of actual control may be direct or indirect."). *See also Savić,* Trial Judgment, para. 171; *Prosecutor vs. Kvočka et al.*, IT-98-31/1-T, Judgment, 2 Nov. 2001 ("Trial Judgment *in Kvočka* "), para. 324 (where the court finds that the "[k]nowledge of the joint criminal enterprise can be inferred from such indicia as the position held by the accused, the amount of time spent in the camp, the function he performs, his movement throughout the camp, and any contact he has with detainees, staff personnel, or outsiders visiting the camp."); *Prosecutor vs. Jelisić* IT-95-10-A, Judgment, 5 July 2005 ("Appellate Judgment in *Jelisić*"), para. 47 (it is noted: "As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context […]."); *Prosecutor vs. Blaškić*, IT-95-14-A, 29 July 2004 ("Appellate Judgment in *Blaškić*"), para. 56 (confirms the Trial Panel's reliance on direct evidence in order to determine the superior officer's knowledge).

[16] *See, for instance, Naletilić,* Appellate Judgment, para 492; *Kupreškić,* Appellate Judgment, para. 303 ("there is nothing to prevent a conviction being based upon such [circumstantial] evidence."); *Prosecutor vs. Galić,* IT-98-29-T, Judgment, 5 Dec. 2003, ("Trial Judgment in *Galić*"), para. 747; *Prosecutor vs. Stakić*, IT-97-24-A, Judgment, 22 March 2006, ("Appellate Judgment in *Stakić*), para. 224.

[17] *See, for instance, Savić,* Trial Judgment, para. 286; *Trbić*, Trial Judgment, para 471, *Strugar*, Trial Judgment, para 89; *Karajić,* Trial Judgment, para. 62. (The Court notes the practice of the Court of BiH to evaluate indirect evidence together with the "testimony of other witnesses and eye-witnesses as a whole."). *See also Prosecutor vs. Kordić and Čerkez,* IT-95-14/2-A, Judgment, 17 Dec. 2004 ("Appellate Judgment in *Kordić*"), para. 276 ("It is incorrect to suggest that circumstantial evidence cannot be regarded as corroborative."); *Prosecutor vs. Galić* IT-98-29-A, Judgment, 30 Nov. 2006 ("Appellate Judgment in *Galić*"), para. 221-223.

that, although the aggrieved party alleges that she was examined in a gynecology department of the Doboj Hospital, the hospital has unequivocally refuted this claim.

63. The Appeal contests the testimony of the aggrieved party pertaining to her alleged "torn shirt".

64. Furthermore, Defense witnesses Milo Blagojević and Momir Bogdanić who spoke with the aggrieved party after the offense had been reported, stated that there were no visible injuries on the aggrieved party and that she was neither upset nor crying. The Defense submits that the First-Instance Panel did not have a single real reason to refuse the Defense allegations and witness evidence, taking into account that it was presented solely for the purpose of proving the absence of the criminal offense and criminal liability, rather then for the purpose of evasion. The Defense holds that the Defense evidence was not considered with equal attention.

65. According to the Appellate Panel, the appeals arguments alleging the erroneously and incompletely established state of facts are unfounded.

66. As for the allegation on the non-existence of documentary evidence of rape, the Panel notes as a general procedural principle that a proof of the perpetration of an offense cannot be subjected to a specific calculation formula. Article 25 of the CPC of BiH (Free Evaluation of Evidence) represents a manifestation of the old principle of *testimonia panneranda sunt, non numeranda* (Evidence is evaluated, not counted). This principle stresses the evaluation of the weight and quality of evidence, not its quantity, multitude or nature. Therefore, while determining the existence or non-existence of facts the Trial Panel has the right to rely fully on the evidence in the form of witness statements.

67. Consequently, the absence of specific documentary evidence does not diminish the weight of all the evidence presented so far, pointing to the Accused as the perpetrator. Specifically, the evidence from which the conclusion on the guilt of the Accused was drawn is based on the testimony of the aggrieved party, the testimony of her relatives, eyewitnesses, report on the committed rape made on the day following the rape and the statement by the police officer who received the complaint and confirmed the authenticity of the report.

68. The Panel is satisfied that the First Instance Verdict offered clear, acceptable and sufficient conclusions on the evaluation of the evidence and value of each individual piece of evidence, as well as the correlation between those individual pieces of evidence and the final conclusion made

by the Panel.

69. Furthermore, the appeals argument that no traces of the perpetration of the criminal offense have been found (torn-up shirt, injuries and the like) cannot be accepted because the collection of traces was entrusted to the persons who belong to the same military and police structures to which the Accused himself belonged at the time. These military and police structures were in control of the territory where the victim, who belonged to the opposite side, found herself. The rape took place during the war, at the time, in the place and generally under the circumstances where one could not expect that a proper investigation has been conducted.[18]

70. Following the rape, the aggrieved party underwent an examination in the hospital in Doboj. However, the testimony given by the mother of the aggrieved party indicates that the examination was superficial and that no report of findings on the examination was ever made. The testimony of the victim's mother is also indicative in the sense that she emphasized how the aggrieved party found herself in an unpleasant situation during the examination, when the doctor told her that he did not consider her case a forced rape because "it is not a rape when there is one, but when there are 5 of them." The foregoing can lead to the conclusion that the aggrieved party did not receive a proper and professional treatment by the doctor, which provides an explanation to this Panel as to the non-existence of any documentary evidence on the aggrieved party's visit to the Doboj hospital.

(b) Absence of other witnesses and credibility of the Defense evidence

71. The Defense claims that the Trial Panel improperly convicted the Accused based solely on the statement given by the aggrieved party.

72. The Appellate Panel stresses that the Trial Panel indeed could have convicted the Accused based on the statement of the aggrieved party. "Evidence that is lawful, authentic and credible, may be considered sufficient to convict an accused even where its source is a single witness."[19] Although the Court of BiH does not strictly follow the doctrine of *stare decisis*, it is noteworthy that the Trial Panel returned a conviction in *Pinčić*, where the only eye-witness statements concerning rape were

[18] Instead of conducting a proper investigation into the allegations pertaining to the serious crime, the investigator actually tried to reconcile the allegedly aggrieved party and the perpetrator.
[19] *Mejakić et al.*, X-KR/06/200, Second-Instance Verdict, 16 Feb. 2009, Para 47.

those given by the victim herself.[20] Also, the Trial Panel in *Mejakić*, in its decision that was in relevant parts upheld by the Appellate Panel, convicted the Accused based solely on the statement by the aggrieved party, affirming that "realistically there is no reason not to credit the statement of that witness in a situation where the witness, as the sole eye-witness of an event, him/herself testified about the circumstances of the event […] if the statement of a witness is consistent in decisive facts with the statements of other witness concerning the particular event."[21]

73. The ICTY has also affirmed the legality of conviction of persons charged with a serious violation of international law based on the statement of a single witness. The Trial Panel in Tadić, which was the first one to consider this issue, concluded that although witness Hase Icić "was the only witness who testified in support of these charges, the quality of that testimony is sufficient to credit the allegations."[22]

74. This analysis was subsequently upheld by the Appellate Panel in *Rutaganda*:

> "Lastly, as regards the contention that the Trial Chamber should have taken into account the fact that Witness A was the sole witness to have testified that, on 8 April, Colonel Rusatira went to the ETO school and asked Hutus to separate themselves from the group, after which 600 to 1000 people left the group, the Appeals Chamber recalls that the evidence of a single witness on a material fact does not require, as a matter of law, any corroboration. Whether a Trial Chamber will rely on a single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case. That Witness A was the only witness who testified regarding Colonel Rusatira's visit does not affect the probative value of his entire testimony. As such, the Appellant's arguments on this point must fail."[23]

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[20] *Pinčić*, X-KR-08/502 (Court of BiH), Trial Verdict, 28 Nov. 2008., pp. 40-41. The Trial Panel has noted that other parts of the victim's testimony are corroborated by the testimony of witnesses Radmila Živak and Gordana Gligorević. The Verdict upheld in *Pinčić* X-KR-08/502 (Court of BiH), Appellate Verdict, 15 April 2010, paras 68-71.

[21] *Mejakić et al.*, X-KR/06/200, Trial Verdict, 30 May 2008, p. 189 (The Trial Panel also said that "[T]his is particularly true in case of those events that occurred in locations where there could not have been more than one person at the same time such as e.g. beatings during visits to the sanitary facilities or during interrogations."). In the relevant part, the Verdict was upheld in *Mejakić et al.*, X-KR/06/200, Appellate Verdict, 16 Feb. 2009, paras. 45-47.

[22] *Tadić* (Trail Panel), 7 May 1997, para 260. See also, paras 536 – 539. Partial excerpt;

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

[23] *Rutaganda* (Appellate Panel), 26 May 2003, para. 449.

75. In *Kupreškić*, the Panel compared the circumstances in the international court with those in national courts, and partly explained the rule of conviction based on a single witness' testimony, due to its civil law roots:

> "Most civil law countries adopt the principle of "free evaluation of evidence", allowing judges considerable scope in assessing the evidence put before them. The decisive element is the intimate conviction of the trial judge, which determines whether or not a given fact has been proven. However, the Federal Court of Germany, for example, has pointed out that a trial judge must exercise extreme caution in the evaluation of a witness' recognition of a person. Particularly in cases where the identification of the accused depends upon the credibility of a witness testimony, the trial judge must comprehensively articulate the factors relied upon in support of the identification of the accused and the evidence must be weighed with the greatest care. The Supreme Court of Austria, has emphasised that, where the identification of the accused depends upon a single witness, a fact finder must be extremely careful in addressing specific arguments raised by the defendant about the credibility of the witness. Similarly, the Supreme Court of Sweden has held, on numerous occasions, that all imprecision or inaccuracy in a witness' testimony must be addressed and analysed thoroughly by the fact finder.
>
> The Appeals Chamber has consistently held that the corroboration of evidence is not a legal requirement, but rather concerns the weight to be attached to evidence."[24]

76. The Appellate Panel notes that the proper test for the evaluation made by the Trial Panel is that of reasonableness or well-foundedness. In *Kupreškić*, the Appellate Panel, applying this same test, stressed that "a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction."[25] The Appellate Panel then goes on to describe a reasoned opinion as an opinion that "must carefully articulate the factors relied upon in support of the identification of the accused and adequately address any significant factors impacting negatively on the reliability of the identification evidence."[26]

77. The Appellate Panel concludes that the Trial Panel in Marković acted reasonably while carefully evaluation the testimony of the aggrieved party Z1 regarding the rape and the perpetrator's identity. The Trial Panel based its decision on the following:

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[24] *Kupreškić* IT-95-16, Appellate Panel, 23 Oct. 2001, para. 38. *Kordić and Čerkez* (Appellate Panel), 17 Dec. 2004., para. 274. See also *Kupreškić*, IT-95-16, Appellate Panel, 23 Oct. 2001, para. 33, where it is said that "with the exception of the testimony of a child not given under solemn declaration, the Trial Chamber is at liberty, in appropriate circumstances, to rely on the evidence of a single witness."
[25] *Kupreškić*, Appellate Panel, Para 34.
[26] *Ibid*, Para 39.

> […] on the assessment that the testimony of the victim is credible, consistent, logical, corroborated with a series of details which provide sufficient ground to give full credence to this witness. The testimony of the victim Z-1 was fully corroborated by the testimony of the witnesses Marija Kalem, Marko Kalem, Andro Kalem, and Radojica Čelić.
>
> The witnesses Marija Kalem, Marko Kalem, Andro Kalem, and the victim Z-1 testified about this event, and they had a chance to see the accused clearly, given that it was a bright moonlight that evening. They learned form their neighbor Ljubo Lazić that it was Miodrag Marković, who confirmed that it was the accused who came the previous day to ask about a combine. Also, the victim was, after her mother reported the rape, taken with the police patrol to the check-point where she recognized the accused, noting that he tried to hide his face.[27]

78. The Trial Panel acted properly for it took into account the corroboration of the victim's testimony regarding the events that took place *immediately before the moment when she was taken from her home and thus also from the sight of other witnesses*, and evaluated the reliability of the victim's testimony in relation to the corroborating evidence.

79. The Panel concludes that under the given circumstances the Trial Panel was justified in basing the conviction on the victim's testimony. The Trail Panel exercised due attention while evaluating the reliability of the witness in light of the coherence of her testimony and its consistence with the testimony of other prosecution witnesses. Moreover, the Appellate Panel notes that rape is often committed in front of a rather small number of people or none at all; the nature of this act is such that only the victims are in a position to identify the perpetrators and testify about the circumstances of the rape. The Trial Panel properly took into account this fact while evaluating the weight it should give to the victim's testimony.[28]

80. Finally, the Appellate Panel stresses that the Trial Panel properly dismissed minor inconsistencies in the victim's testimony and the statements she had given to the Prosecutor's Office

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[27] *Marković*, Trial verdict, 15 April 2011., pp. 51, 52.

[28] In *Furundžija*, the Accused was charged with interrogating Witness A, "while the Accused B rubbed his knife against Witness A's inner thigh and lower stomach and threatened to put his knife inside Witness A's vagina should she not tell the truth..." The Indictment further claimed that Witness A and Victim B (Witness D) were then taken to another room where the Accused B, in the presence of the Accused Furundžija, forced Witnesses A to have oral and vaginal sexual intercourse with him. Because of the failure to prevent the Accused B from raping Witness A, the Accused Furundžija was found guilty for aiding and abetting and contributing to outrages upon personal dignity (rape). The Accused was convicted of aiding and abetting and contributing to the described rape of Witness A based on the fact that his "presence and continued interrogation of Witness A encouraged Accused B and substantially contributed to the criminal acts committed by him." Witness A testified about the "Accused's presence and continued interrogation he conducted", and her testimony was corroborated by Witness D. Finding the Accused guilty, the Court noted that, in line with Rule 96 of the Rules of Procedure, it is clear that "no corroboration of the victim's testimony shall be required." *Prosecutor vs. Ante Furundžija*, Case No. IT-95-17/1, Trial Judgment, 10 Dec. 1998, Paras 271-274.

during investigation. As the Trial panel noted in *Furundžija*, "survivors of such traumatic experiences cannot reasonably be expected to recall the precise minutiae of events, such as exact dates or times. Neither can they reasonably be expected to recall every single element of a complicated and traumatic sequence of events. In fact, inconsistencies may, in certain circumstances, indicate truthfulness and the absence of interference with witnesses."[29] The Appellate Panel affirms this position, and consequently does not attach any particular weight to the inconsistencies in the victim's testimony regarding the date and time of the crime.

81. The Appellate Panel concludes that the Trial Panel could have found that the only reasonable conclusion that can be drawn based on the evidence is that the Accused did commit the crime of rape. Defense's allegations about the error of fact are therefore dismissed.

82. Moreover, the Panel concludes that the Trial Panel could have serious doubts about the testimony of the Accused himself, which, even at a glance, is contradictory and unconvincing. Thus, for example, the Accused claims he came to the house of the aggrieved party in the evening hours and called the man of the house to come outside because allegedly "some people are gathering in the house where the aggrieved party lived", although he knew, and it was an indisputable fact, that all men from the villages surrounding Doboj had been taken away by July 1992, including the men from the house where the aggrieved party had lived. He then stated that he had never seen the aggrieved party although it was proven during the proceedings that he had passed that way on the day before and noticed the aggrieved party near her house.

83. The Accused also stated that he came there to investigate the gatherings in the house of the aggrieved party, and to offer her help in finding her father and brother who had been taken away. He also claims that the aggrieved party and her mother deliberately conspired to blame him for this offense. It is unclear why they would blame him if he was the only person who offered help, as he said. The Trial Panel could have reasonably found that the accused's testimony is not credible and that it does not effectively challenge his guilt.

84. The First Instance Verdict offered clear reasons for not crediting the Accused and the Defense witnesses. Accordingly, the Appellate Panel refuses as ill-founded all Defense arguments about the erroneously and incompletely established state of facts, concluding that the Trial panel acted properly in this matter.

[29] *Furundžija*, Trial Judgment, Para 113.

VI. GROUNDS OF APPEAL UNDER ARTICLE 300 OF THE CPC OF BIH- DECISION ON SANCTION AND COSTS OF THE CRIMINAL PROCEEDINGS

A. STANDARDS OF REVIEW PURSUANT TO ARTICLE 300 OF THE CPC OF BIH

85. 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.

86. 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.

87. 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.

88. 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.

89. 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.

(a) Defense Appeal claims on criminal sanction

90. The Defense submits that while ruling on the criminal sanction the Court considered all the circumstances affecting the type and length of the sentence. However, the Defense also holds that there are numerous extenuating circumstances that the Trial Panel did not take into consideration. These primarily include particularly difficult financial situation given that no one in the family, apart from him, is employed, and no prior convictions. The Defense submits that the mentioned circumstances indicate that, in this specific case, the shortest possible sentence that can be pronounced may achieve all purposes of punishment.

91. In response to this argument, the Prosecution holds that the imposed sentence is proper, and the fact that it is below the threshold confirms that, while meting out the sentence, the court was mindful of the extenuating circumstances.

92. However, the Appellate Panel does not agree with the arguments raised on appeal, finding the sanction imposed by the challenged Verdict as correctly meted out. All the circumstances bearing upon the fashioning of the sentence were properly selected and considered, and the imposed sentence has already been reduced by the Trial Panel. The criminal offense of rape, as properly noted by the Court, inevitably has serious impact on the victim. The evidence by the Prosecution expert witnesses shows that the victim suffers from elements of …. Personal circumstances on the part of the Accused, among others, were correctly assessed, and the fact that he had no prior convictions evidently pointed to the Panel that the Accused was not a person prone to crime. Therefore, the Appellate Panel is satisfied that the sanction imposed on the Accused is commensurate with the degree of his criminal responsibility, his contribution and gravity of the perpetrated criminal offense, and that these sanctions will fully achieve the purpose of punishment under Article 39 of the CC of BiH. Thus, appeals arguments by the Defense to the contrary are considered unfounded.

93. In view of the foregoing, it was decided as stated in the operative part of the Verdict, pursuant to Article 310(1) as read with Article 313 of the CPC of BiH.

RECORD-TAKER: **PRESIDING JUDGE**

Dženana Deljkić Blagojević Mirko Božović

LEGAL REMEDY: No appeal lies from this Verdict.