

BOSNA I HERCEGOVINA



БОСНА И ХЕРЦЕГОВИНА

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СУД БОСНЕ И ХЕРЦЕГОВИНЕ

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Case No.: S1 1 K003433 11 Krž  
(re: X-KRŽ-09/783)

Delivered on: 1 December 2011  
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In the Appellate Chamber

before: Judge Azra Miletić, Presiding  
Judge Tihomir Lukes, Reporting Judge  
Judge Phillip Weiner, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

DARKO DOLIĆ

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SECOND INSTANCE VERDICT

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

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## TABLE OF CONTENTS

<b>VERDICT .....</b>	<b>3</b>
<b>REASONS.....</b>	<b>3</b>
<b>I. PROCEDURAL HISTORY .....</b>	<b>3</b>
A. FIRST INSTANCE VERDICT .....	3
B. APPEAL .....	4
<b>II. GENERAL CONSIDERATIONS .....</b>	<b>5</b>
<b>III. GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC OF BIH: ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS.....</b>	<b>5</b>
A. STANDARDS OF REVIEW .....	5
B. APPEAL BY THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA.....	7
1. Sub-ground one: Article 297(2) of the CPC of BiH – Prosecution submits that the Court has not applied or has improperly applied CPC of BiH provisions in rendering the verdict, which affected the rendering of a lawful or proper verdict.....	7
<b>IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC OF BIH: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS.....</b>	<b>12</b>
A. STANDARDS OF REVIEW .....	12
B. APPEAL BY THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA .....	13
1. Sub-ground one: Article 299(1) of the CPC of BiH – Prosecution submits that the Court established the facts erroneously or incompletely because the Court has erroneously established some decisive fact or has failed to establish it .....	13

## IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting as an Appellate Division Panel composed of Judge Azra Miletić, as Presiding Judge, and Judges Tihomir Lukes and Phillip Weiner, as the Panel members, with the participation of legal adviser-assistant Neira Kožo, as the minutes-taker, in the criminal case against the Accused Darko Dolić charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), (e) and (f) in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC of BiH), all in conjunction with Article 29 of the CC of BiH, having deliberated on the Appeal filed by the Prosecutor's Office of Bosnia and Herzegovina from the Verdict of this Court no. S1 1 K003433 09 Krl (re: X-KR-09/783) of 26 April 2011, following the session of the Panel held on 1 December 2011 in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Sanja Jukić, the Accused Darko Dolić and his Counsel Zlatko Milović, pursuant to Article 310(1) in conjunction with Article 313 of the Criminal Procedure Code of Bosnia and Herzegovina, delivered the following

### VERDICT

**Refusing, as unfounded**, the Appeal by the Prosecutor's Office of Bosnia and Herzegovina, and **upholding** the Verdict of the Court of Bosnia and Herzegovina no. S1 1 K003433 09 Krl (re: X-KR-09/783) of 26 April 2011.

### REASONS

#### I. PROCEDURAL HISTORY

##### A. FIRST INSTANCE VERDICT

1. The Verdict of the Court of Bosnia and Herzegovina (Court of BiH) no. S1 1 K003433 09 Krl (re: X-KR-09/783) of 26 April 2011 acquitted the Accused Darko Dolić of the charges that he committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(c), (e) and (f) of the Criminal Code of Bosnia and Herzegovina

(CC of BiH), in conjunction with Article 29 and Article 180(1) of the CC of BiH.

2. Pursuant to Article 189(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), the Accused was relieved of his duty to reimburse the costs of the criminal proceedings, and those costs shall be paid from the Court's budget appropriations.

3. Pursuant to Article 198(3) of the CPC of BiH, the aggrieved parties: Omer Kmetaš, Suljo Kmetaš, Đula Kmetaš, Đula Ravnjak, Zlata Ravnjak, Edina Kmetaš, Đula Šabić, Zlata Ruvić, Zilka Zahirović, Fatima Kmetaš, Rahima Zahirović, Vahida Kmetaš, Zina Šabić, and protected witnesses "S1", "S2" and "S3", may pursue their claims under property law in a civil action.

## **B. APPEAL**

4. The Prosecutor's Office of Bosnia and Herzegovina (Prosecution) filed an Appeal from the Verdict on the grounds of, respectively, essential violations of criminal procedure provisions under Article 297(2) of the CPC of BiH and erroneously or incompletely established facts under Article 299(1) of the CPC of BiH, petitioning the Appellate Division Panel of the Court of BiH to grant the Appeal, revoke the Verdict of the Court of BiH no. X-KR-09/783 (S1 1 K003433 09 Krl) of 26 April 2011 and hold a trial.

5. Attorney Zlatko Milović, Counsel for the Accused Darko Dolić, submitted a Response to the Prosecution Appeal, petitioning therein that the Appeal be refused as unfounded and that the Verdict of the Court of BiH no. S1 1 K003433 09 Krl (re: X-KR-09/783) of 26 April 2011 be affirmed in its entirety.

6. At a session of the Appellate Division Panel (Appellate Panel) held on 1 December 2011 pursuant to Article 304 of the CPC of BiH, the Prosecution explained the Appeal and the Defense explained its Response to the Appeal, maintaining their written submissions. The Accused Darko Dolić joined the submissions of his Counsel.

7. Having reviewed the impugned Verdict insofar as contested by the Appeal, in accordance with Article 306 of the CPC of BiH, the Appellate Panel has ruled as set forth in the operative part herewith for the following reasons:

## II. GENERAL CONSIDERATIONS

8. Prior to addressing each ground for appeal, the Appellate Panel notes that an appeal, pursuant to Article 295(1)(b) and (c) of the CPC of BiH, must include the grounds for contesting the verdict and the reasoning behind the appeal.

9. Given that the Appellate Panel shall review the verdict insofar as it is contested by the appeal, pursuant to Article 306 of the CPC of BiH, an appellant is required to draft his appeal in such a way that it may serve as a basis for reviewing the verdict.

10. In that respect, the appellant must specify grounds on the basis of which he contests the verdict, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

11. Referring to appeal grounds in general terms only and arguing the alleged irregularities in the first instance proceedings without specifying which appeal grounds the appellant refers to, do not constitute a valid basis for reviewing the First Instance Verdict. For that reason, the Appellate Panel refused the uncorroborated and unclear appeal arguments as unfounded.

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

### A. STANDARDS OF REVIEW

12. A verdict may, pursuant to Article 296 of the CPC of BiH, be contested on the grounds of an essential violation of the criminal procedure provisions. Article 297 of the CPC of BiH defines essential violations of the criminal procedure provisions.<sup>1</sup>

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<sup>1</sup> Article 297. **Essential violations of criminal procedure provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge who did not participate in the main trial participated in pronouncing the verdict 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 required by law, or if in the main trial the accused, defense attorney or the injured party, in spite 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

13. As to the gravity and significance of the procedure violations, the CPC of BiH differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced verdict (absolutely essential violation), and such violations regarding which it is up to the Court to assess, in each specific case, whether they have or could have affected the validity of the verdict (relatively essential violation).

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

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

16. 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.

17. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper verdict, it is not sufficient for the appellant to simply assert that the procedural violation could have *hypothetically* affected the rendering of a lawful or proper verdict. Rather, the Appellate Panel will only find a violation of the principles of criminal procedure when the appellant shows that it is of substantial character and impossible to conclude that the alleged violation did not affect the rendering of a lawful or proper verdict. Further, where the Appellate Panel is satisfied that a lawful and proper verdict was rendered notwithstanding a non-substantial procedural

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excluded from the main trial, f) if the Court violated the rules of criminal procedure on the question whether there existed an approval of the competent authority, g) and 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 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.

violation, the Appellate Panel will conclude that Article 297(2) of the CPC of BiH was not violated.

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

**1. Sub-ground one: Article 297(2) of the CPC of BiH – Prosecution submits that the Court has not applied or has improperly applied CPC of BiH provisions in rendering the verdict, which affected the rendering of a lawful or proper verdict**

(a) The Appellate Panel finds that the Trial Panel applied CPC of BiH provisions properly and there is no essential violation of criminal procedure provisions under Article 297(2) of the CPC BiH.

(i) Prosecution appeal arguments

18. According to the Prosecution Appeal, an essential violation of criminal procedure provisions arises from Trial Panel's actions in violation of Article 281(2) of the CPC of BiH<sup>2</sup> and is reflected in the fact that in the Verdict's reasoning, in relation to determining decisive facts, the Trial Panel merely referred to witness testimony at the main trial, without adducing what witnesses testified in relation to decisive facts; in addition, the Trial Panel merely referred to the cited witness testimony without adducing and evaluating that testimony. Accordingly, the Verdict does not cite reasons supporting the decisive facts.<sup>3</sup> To that end, the Prosecution singled out the testimony by witnesses Suljo Kmetaš and Omer Kmetaš.

19. Prosecution further submits that a violation of criminal procedure provisions under Article 297(2) of the CPC of BiH exists in respect of Article 14 of the CPC of BiH as well, this provision imposing an obligation on all the parties to the proceedings, including the

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<sup>2</sup> Article 281(2) of the CPC BiH: "The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, conclude whether the fact(s) have been proved."

<sup>3</sup> Prosecution Appeal, p. 2.

Court, to study and establish with equal attention facts that are exculpatory as well as inculpatory for the accused.<sup>4</sup>

20. According to the Prosecution Appeal, the Trial Panel committed an essential violation of criminal procedure provisions under Article 297(2) of the CPC of BiH in paras. 104, 105 and 106 of the impugned Verdict, because the Court failed to give proper weight to a piece of evidence presented pursuant to Article 273(2) of the CPC of BiH – the reading of Witness Zlatif Kmetaš's statement. To wit, in the Verdict's reasoning the Court adduced facts from the cited statement, but failed to comment on the issue of reliability raised by Prosecution's questions made in accordance with the cited provision of the CPC of BiH.<sup>5</sup>

a. Appellate Panel's findings

21. First, the Appellate Panel notes that an essential violation of criminal procedure provisions under Article 297(2) of the CPC of BiH requires that an appeal indicates not only actions and omissions reflecting a non-application or misapplication of a particular provision of the procedural law but also how and why that affected or could have affected the rendering of a lawful and proper verdict. Otherwise, a review of whether there is a relatively essential violation of criminal procedure provisions would turn into an ex officio review.<sup>6</sup>

22. In that regard, this Panel finds that the Prosecution Appeal was not successful in demonstrating that the Trial Panel issued an unlawful and improper verdict as a result of the omission alleged in the Appeal. For that reason, the Prosecution appeal arguments are refused as unfounded.

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<sup>4</sup> Prosecution Appeal, p. 2.

<sup>5</sup> Prosecution Appeal, p. 6.

<sup>6</sup> See Commentary on the CPC of BiH, p. 776.



(i) Alleged violations of Article 281(2) CPC BiH

23. Having considered the appeal argument that the Trial Panel failed to properly evaluate the presented evidence in accordance with Article 281(2) of the CPC of BiH, which particularly pertains to the testimony by witnesses Suljo Kmetaš and Omer Kmetaš, the Appellate Panel finds that the impugned Verdict cites reasons concerning decisive facts relevant to adjudicate the present criminal matter, and provides a detailed and comprehensive analysis of all the evidence individually and in relation to all other testimony.

24. As noted above, the impugned Verdict cites reasons concerning the decisive facts as well as evidence that served as a basis for the decision. In that regard, this Panel emphasizes that the entire witness testimony need not be included in the verdict, as unjustifiably claimed in the Appeal, but only those sections that are relevant to the determination of decisive facts.

25. The Trial Panel therefore provided a detailed analysis in respect of the key issue of this criminal proceeding pertaining to the perpetrator's identity, and presented its position regarding the reasons the Panel was guided by in its decision to acquit the Accused Darko Dolić, thus rendering irrelevant the reasoning of other elements and individual charges.

26. With respect to the testimony by witnesses Suljo Kmetaš and Omer Kmetaš, the Appellate Panel's review of the case record and analysis of the impugned Verdict has shown that the Verdict is neither flawed nor incomplete, as unjustifiably claimed by the Prosecution. The Trial Panel did not evaluate the referenced witness testimony in a manner favoring Prosecution; rather, the impugned Verdict is clear and focused on decisive facts relevant to adjudication. In the Appellate Panel's view, this does not amount to a violation of CPC of BiH provisions by the Trial Panel.

27. The Appellate Panel accordingly finds that the Trial Panel considered all the evidence adduced by the Prosecution and Defense, assessing the conflicting evidence and providing arguments in support of proved facts as well as facts not proved by the Prosecution beyond any reasonable doubt. Moreover, the Trial Panel was mindful of supplying clear and articulate reasons as a basis for its decision.

28. The Appellate Panel therefore concludes that these appeal grounds are ill-founded.

(ii) Alleged violation of Article 14 CPC BiH

29. Furthermore, this Panel finds that the Prosecution appeal argument suggesting that the Trial Panel did not evaluate with equal attention the exculpatory and inculpatory evidence is not well-founded either.

30. Article 14 of the CPC of BiH, invoked by the Prosecution, imposes an obligation on the Court, the Prosecutor and other bodies participating in the proceedings to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.<sup>7</sup> Thus, in respect of both types of facts studied and established *in peius* and *in favorem*, the statutory provision is based on the *equality of arms* standard. The facts being studied and established must be relevant to the criminal proceedings.

31. Upon examination of this argument, the Appellate Panel concluded that the impugned Verdict did not violate the methodological approach to studying and establishing decisive facts referred to in the cited statutory provision, pertaining to the *equality of arms* standard, as the Trial Panel paid equal attention to all the facts and did not overlook a single fact relevant to adjudication.

32. It should also be noted that the Trial Panel is in the best position to assess witness credibility, which the Trial Panel did and provided adequate and sufficient reasons in that regard. The fact that the Trial Panel did not establish facts to the Accused's detriment, that is, facts suggesting that the charges have been proved does not, *per se*, constitute a basis to infer that the parties to the proceedings received a different treatment.

33. At trial, the statement of Defense witness Zlatif Kmetaš (who had died prior to trial) was introduced/read into the record. The Appellate Panel notes that the Prosecution did

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<sup>7</sup> Article 14. **Equality of Arms** (1) *The Court shall treat the parties and the defense attorney equally and shall provide each with equal opportunities to access evidence and to present evidence at the main trial.* (2) *The Court, the Prosecutor and other bodies participating in the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused.*

not object to the presentation of the evidence,<sup>8</sup> which was adduced pursuant to Article 273(2) of the CPC of BiH, and concludes that valid reasons warranted the admission of the witness's statement.

34. However, the Prosecution argues that the Court did not take into consideration the questions put by the Prosecution with regard to this witness statement. Having considered the appellate grievance, this Panel notes that the Trial Panel allowed the Prosecution to put the questions that would have been put to the witness had he been present at the trial.<sup>9</sup> Furthermore, the Trial Panel evaluated the questions in determining the weight of the statement and as to whether they undermined or diminished its probative value.<sup>10</sup> The fact that those questions are not explicitly referred to in paras. 104, 105 and 106 of the impugned Verdict does not mean that they were not evaluated, which can be clearly seen in the analysis and evaluation of this piece of evidence given in the Reasoning of the Verdict.

35. It should also be noted that the Trial Panel's decision is not based on this piece of evidence to a decisive extent. Rather, the decision has been corroborated by ample other evidence, so the Court's reliance on this evidence would simply have been cumulative. In the Reasoning of its verdict, Paragraph 65, the Trial Panel explicitly said that the deceased witness statement was not considered as "decisive evidence".

36. The Appellate Panel has found upon consideration that the cited Prosecution appeal arguments alleging essential violations of criminal procedure provisions are unfounded for the reason that the Prosecution Appeal was not successful in demonstrating that CPC of BiH provisions were violated in the first instance proceedings or that an improper verdict was delivered.

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<sup>8</sup> Trial transcript, 1 July 2010, p. 51.

<sup>9</sup> Trial transcript, 1 July 2010, p. 53, (...) *In what way does the witness whose statement has just been read out know that the person in question is Mario Dolić? When giving the statement, did he identify that person, name Mario Dolić? Did he know Mario Dolić? Or how, in what way did he learn the name Mario Dolić? (...)*

<sup>10</sup> See Commentary on the CPC BiH, p. 694.

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

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

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

38. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond any 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.

39. 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.

40. 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."

41. The Constitutional Court of Bosnia and Herzegovina, 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>11</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 proved beyond any reasonable 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 BY THE PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

**1. Sub-ground one: Article 299(1) of the CPC of BiH – Prosecution submits that the Court established the facts erroneously or incompletely because the Court has erroneously established some decisive fact or has failed to establish it**

(a) The Appellate Panel concludes that the facts in the impugned Verdict were properly and fully established.

(i) Prosecution appeal arguments

42. The Prosecution argues that facts in para. 108 of the impugned Verdict's reasoning have been established erroneously and incompletely, because it is alleged that Witness Bahrija Karadža testified that soldiers addressed one another using names "Đoka", "Dole", "Konje", and that "Dole" raped S1, and she described him as a person shorter than the "Đoka" who had raped her. In the courtroom the witness identified the accused as "Dole", clarifying that she knew him by sight because they attended the same school. According to the Prosecution, this position by the Court is erroneous and incomplete because it does not take into account Witness Bahrija Karadža's trial testimony.<sup>12</sup>

43. The Prosecution contends that even a cursory review of Bahrija Karadža's testimony shows that Ms. Karadža knew the Accused by the name of Darko Dolić and that she told this identity of his to witnesses S1 and S2.<sup>13</sup>

44. They further argue in the appeal that erroneously established facts in paras. 109 and 110 of the impugned Verdict are also a result of the Trial Panel's erroneous evaluation

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<sup>11</sup> M.Š., AP-661/04 (BiH Constitutional Court), Decision on Admissibility and Merits, 22 April 2005, para. 36.

<sup>12</sup> Prosecution Appeal, pp. 6-7.

and analysis of the testimony by witnesses S1 and S2. This error stems directly from erroneously established facts pertaining to Witness Bahrija Karadža's testimony.<sup>14</sup>

45. Prosecution further contends that a review of the transcript and a proper analysis of S-3's evidence clearly show that the portion of her testimony referred to in para. 112 of the Verdict was taken out of context (the comment indicating that she did not know who raped her). Rather, the witness explained that she believed that when giving her statement to HVO formations at "Unis" one day after she was raped, there was no point in telling the name of her rapist to the persons interviewing her because she considered the members of the HVO /Croat Defense Council/ were all the same and she believed that the person interviewing her may be a brother or a relative of the person who had raped her.<sup>15</sup>

46. The Appeal further alleges that in para. 113 of the Verdict the Trial Panel merely took into consideration the testimony by Witness S4, but did not evaluate it. The Court's reference to the Accused's positive attitude towards the Muslim population is based on the testimony of a single witness who received help from the Accused at some point. It is the view of the Prosecution that evidence is evaluated erroneously because it relies on two isolated incidents (attitude towards Witness S4 and Abaz Alajbegović) to serve as a basis for the inference on the Accused's attitude towards a population.<sup>16</sup>

47. The Prosecution contends that the Trial Panel erroneously established the facts in paras. 115, 116 and 117 of the Verdict because it found that Darko Dolić was not the person who committed rapes in the area of Prozor. In this case, the Trial Panel has entirely disregarded trial witness testimony. Rather, the Trial Panel considered certain facts (information from four persons who are neither witnesses nor aggrieved parties in these proceedings) and a wartime decision to conduct an investigation (mentioning over 50 persons from Prozor and constituting initial investigative information, but contains no reference to Darko Dolić) to infer that Darko Dolić was not the person who committed rapes in the area of Prozor.<sup>17</sup>

48. The Prosecution submits that it is impermissible for the Trial Panel to consider the issue of uniform in relation to the determination of identity. They support their argument

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<sup>13</sup> Prosecution Appeal, p. 8.

<sup>14</sup> Prosecution Appeal, p. 9.

<sup>15</sup> Prosecution Appeal, p. 12.

<sup>16</sup> Prosecution Appeal, p. 12.

based on the fact that it is common knowledge that uniforms changed depending on the period and the season, and that back then each house had two or three uniforms.<sup>18</sup>

49. The Appeal also alleges that the Trial Panel erred in taking a position in Section B of the Verdict – physical appearance of the perpetrator of offense – that there is no basis for a reliable conclusion about the identification of the Accused Darko Dolić as the perpetrator of the offense in question. The Trial Panel made this inference on the basis of the fact that witnesses Suljo Kmetaš and Omer Kmetaš confirmed similarities between Darko Dolić and Mario Dolić, disregarding in the process the portions of the testimony by those witnesses where they said to have known both Darko Dolić and Mario Dolić and were able to tell them apart. In particular, the Prosecution notes that those two witnesses as well as other witnesses (S1, S2, S3, Bahrija Karadža, Zlata Ruvic) identified the Accused in the courtroom as the perpetrator of the offense.<sup>19</sup>

50. Regarding Section C of the Verdict – Report by the State Investigation and Protection Agency of BiH (SIPA) No. KU-1/09 of 16 January 2009 – the Prosecution argues that the report contains facts not relevant to these proceedings because criminal offense perpetration reports may not be used as evidence in criminal proceedings.<sup>20</sup>

51. The Prosecution further argues that the facts in Section E of the Verdict – presence of the Accused at the time and in the place of perpetration of the offense – have been established erroneously and incompletely because the Trial Panel made inferences concerning this decisive fact (presence of the Accused at the time and in the place of perpetration of the offense) on the basis of a mere listing of Defense witnesses who testified about those facts.<sup>21</sup>

52. According to the Prosecution, the Trial Panel also established facts erroneously and incompletely in respect of a piece of evidence – Records of Deployment of the *Jastrebovi* Sabotage Platoon of the Brigade in July and August 1993 – because it entirely disregarded the fact that the records showed that Milenko Dolić was entered as being

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<sup>17</sup> Prosecution Appeal, pp. 12-13.

<sup>18</sup> Prosecution Appeal, p. 13.

<sup>19</sup> Prosecution Appeal, p. 13.

<sup>20</sup> Prosecution Appeal, pp. 13-14.

<sup>21</sup> Prosecution Appeal, p. 14.

deployed to the frontline, whereas in fact he was wounded at the time and did not take part in the activities of the *Jastrebovi* unit.<sup>22</sup>

53. As argued in the Prosecution Appeal, facts have been additionally established erroneously in respect of the testimony by Witness Miroslav Dolić who kept those records; but conceded that the entries were not made immediately but 10 to 15 days later. The Trial Panel disregarded this fact and gave full credence to the account of this witness and the records that he kept.<sup>23</sup>

54. Furthermore, the Prosecution argued that the Trial Panel established the facts erroneously for failing to evaluate the Report by Expert Davorin Kozomara, MD. That is, the Court failed to explain why it gave credence to the report but merely rephrased the expert's report, entirely disregarding the expert's admissions made during cross-examination. Moreover, the Trial Court failed to recognize that the witnesses had no doubts whatsoever as to the physical appearance of the perpetrator and that they could not have mistaken Darko Dolić for Mario Dolić based on the physical appearance.<sup>24</sup>

a. Findings of the Appellate Panel

55. Having reviewed the Prosecution's appellate contentions arguing that the facts in the contested Verdict were erroneously and incompletely established, having thoroughly analyzed the contents of the contested Verdict and having inspected the case record, the Appellate Panel is satisfied that those contentions are not supported by evidence. This Panel also concludes that the facts were correctly and comprehensively established and that the contested Verdict provides valid and acceptable reasons concerning all the decisive facts that served as the basis for the acquittal of the accused Darko Dolić.

56. The contested Verdict was structured in the manner that the evidence concerning the identity of the crime perpetrator was primarily evaluated in order to determine this decisive fact with certainty. Consequently it includes the following segments: (1) Name of

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<sup>22</sup> Prosecution Appeal, p. 14.

<sup>23</sup> Prosecution Appeal, p. 14.

<sup>24</sup> Prosecution Appeal, p. 15.



the Accused; (2) Physical Appearance of the Perpetrator of the Offense; (3) SIPA Report on the Perpetrated Crime No. KU 1/90 dated 16 January 2009; (4) The wounding; (5) The Uniform Worn by the Perpetrator of the Offense; (6) Presence of the Accused at the Time and in the Place of Perpetration of the Offense; (7) Accounts of witnesses S4 and Abaz Alajbegović about the Personality of the Accused.

57. The Appellate Panel is also satisfied that the issue of identity of perpetrator of the offense, as one of the key issues of the criminal proceeding, is a decisive fact which must be established beyond any reasonable doubt. This Panel also concludes it is not necessary to separately consider the remaining issues and the existence of other elements of the crime if the identify of the crime perpetrator was not established beforehand, and that on this key issue the Trial Panel has ruled in favor of the Accused.

58. In this regard the Appellate Panel finds that the Trial Panel has heard evidence from a number of witnesses concerning the identification of the Accused in relation to the crime for which he is charged.

59. Indeed, it is the opinion of the Appellate Panel that, in evaluating the evidence, the Trial Panel correctly applied the *in dubio pro reo* principle, due to numerous inconsistencies in the testimony of witnesses who are also the aggrieved parties and eyewitnesses to the crimes. Consequently, this Panel also finds that the participation of the Accused Darko Dolić in the relevant acts was not proven beyond any reasonable doubt.

60. The presumption of innocence is an ancient principle of criminal law. Related to the presumption of innocence is the principle that the Prosecution must prove the crime with all of its elements, beyond any reasonable doubt. Besides, the issue of identification of the perpetrator of the alleged crime also must be proven beyond a reasonable doubt.

61. The Appellate Panel is satisfied that the Trial Panel, having identified the issue of contradictory statements and inconsistencies, applied the correct standards to assess the credibility of these witnesses. In this regard they applied from the *Kupreškić et al.* case the factors which are widely used by the appellate courts of many countries as relevant to

determine whether a fact finder's decision to rely upon identification evidence was unreasonable<sup>25</sup>.

62. Consequently, this Panel finds that the contested Verdict provides a clear, logical and convincing reasons, having analyzed and evaluated all the presented evidence pertaining to the issue of identity of the Accused Darko Dolić, and concludes that the Prosecution did not proffer evidence on which to prove, beyond a reasonable doubt, that the Accused is the person who committed these crimes.

63. In this regard, the Trial Panel first and foremost started with the evaluation of the documentary evidence, specifically the investigative records of witness interviews before the Investigative Judge of the Court in Jablanica (Department of the Higher Court in Mostar) in 1995<sup>26</sup> and the statements of witnesses recorded by SIPA in 2008 and 2009<sup>27</sup>. A review of these statements indicates that these witnesses identified Mario Dolić rather than Darko Dolić, as the perpetrator of the relevant crime. Thereafter, in their statements given in 2009 to the Prosecutor's Office of Bosnia and Herzegovina, the same witnesses recanted their earlier statements by identifying the Accused Darko Dolić as the crime perpetrator, which, as the Prosecution's Appeal correctly indicated, they categorically reiterated at the trial.

64. The Trial Panel correctly pinpointed all inconsistencies concerning the identification of the crime perpetrator, paying special attention to the evidence of witnesses Omer and Suljo Kmetaš, because they personally knew Darko and Mario Dolić. This Panel notes that the Trial Court could have reasonably determined that their inconsistency and uncertainty

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<sup>25</sup> Prosecutor v. Kupreškić et al., IT-95-15-A, Appeals Judgment 23 October 2001, p. 15, para. 40: „identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.“

<sup>26</sup> Statement of Witness Suljo Kmetaš, 28 July 1995, Higher Court in Mostar, Exhibit O-5; Statement of Witness Edina Kmetaš, 21 July 1995, Higher Court in Mostar, Exhibit O-2; Statement of Witness Omer Kmetaš, 21 August 1995, Higher Court in Mostar, Exhibit O-11;

<sup>27</sup> Statement of Witness Edina Kmetaš, number 17-13/3-1-04-2-185/08, 15 October 2008, State Investigation and Protection Agency, Exhibit O-3; Statement of Witness Suljo Kmetaš, number 17-13/3-1- 04-2-225/08, 16 December 2008, State Investigation and Protection Agency, Exhibit O-6; Statement of Witness Omer Kmetaš, number 17-13/3-1-04-2-222/08, 14 December 2008, State Investigation and Protection Agency, Exhibit O-10;

with regard to the person who committed the crime was a significant factor since the other witnesses had only indirect knowledge of the name of the perpetrator<sup>28</sup>.

65. Witness Suljo Kmetaš told the court that he used to see Darko Dolić, his father Jozo (an office messenger in the Municipality), and his brother Milan (whom he had known as a waiter at the coffee bar which he had frequented). He also knew that Milan sometimes had addressed Darko as Dario, and at other times as Braco /*Little Brother*/. The witness reasoned all discrepancies between his testimony and his earlier statement where he had identified Mario Dolić instead of Darko Dolić, as a mere slip of the tongue. According to this witness, he may accidentally have been mistaken about the name but he had never forgotten his face<sup>29</sup>.

66. Similarly, Witness Omer Kmetaš also told the Trial Panel that the Accused Darko Dolić was the person who had committed the crime and that he may have forgotten his name, but not his physical appearance which he remembered very well<sup>30</sup>. With regard to the discrepancies in the statements concerning the name of the perpetrator, the witness explained that after providing his initial statement, he subsequently checked and inquired in the town, because having come across Mario he observed that he had a slightly darker complexion than the perpetrator, and that he had thus realized that he had mistaken Mario for Darko.

67. In order to completely eliminate any doubts about the evidence of this witness, and in view of the friendly terms between witness Omer Kmetaš and the Accused's father Jozo Dolić, the Trial Panel acted correctly when it allowed their confrontation. On that occasion Jozo Dolić categorically denied that he knew Omer Kmetaš or that they had ever performed any construction works together. Omer Kmetaš, however, still maintained his statement.

68. Even though the Trial Panel acknowledged that witness Jozo Dolić (the Accused's father) had the interest to present evidence in his son's favor, it could still find that witness Omer Kmetaš had been insecure and inconsistent about the crime perpetrator's identity.

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<sup>28</sup> E.g. Witnesses Đula Kmetaš, Edina Kmetaš, Rahima Zahirović, Vahida Kmetaš, Zlata Ravnjak.

<sup>29</sup> Trial Transcript, 27 May 2010, pp. 46-47.

<sup>30</sup> Trial Transcript, 10 June 2010, pp. 19, 21.

69. Accordingly, this Panel is satisfied that the Trial Panel acted reasonably in determining that the inconsistencies in the evidence of Omer and Suljo Kmetaš and their earlier statements concerning the identity of the crime perpetrator raised serious doubts as to the credibility and truthfulness of their evidence, so that a conviction of the Accused Darko Dolić cannot be based on such evidence.

70. The Appellate Panel notes that these witnesses, as well as the other aggrieved parties, identified the Accused Darko Dolić in the court as the perpetrator of the incriminated activities. However, the Panel is satisfied that, since in-court identification is of a corroborative nature, pursuant to Article 85 of the CPC of BiH, it is not mandatory<sup>31</sup>. Accordingly, the in-court identification of an Accused was part of the witness testimony, so it did not represent an identification in terms of the special evidentiary procedures, thus rendering this appeal ground ill-founded.

71. Finally, the Appellate Panel notes that the appellate contentions suggesting that the Trial Panel failed to refer to the evidence of Suljo and Omer Kmetaš or other witnesses in its entirety is without merit and since the identity of the crime perpetrator was not determined, it was therefore unnecessary to determine the other elements of the offense.

72. Furthermore, the Trial Panel also properly found that the evidence of witnesses Bahrija Karadža, S1, S2 and S3, concerning the rapes they had experienced includes a number of gaps, contradictions and arbitrary conclusions. In addition, since the remaining presented evidence did not corroborate the substantial parts of these statements, more precisely does not corroborate the facts given in the Indictment, wherefore the Trial Panel could have reasonably determined that the identity of the perpetrator was not established beyond a reasonable doubt.

73. With regard to these circumstances, witness Bahrija Karadža stated that the soldiers called each other by names „Đoka“, „Dole“, „Konje“, and that „Dole“ raped S1. She described Dole as a person shorter than „Đoka“ (who was unknown to her), who had raped her. She also said that the third soldier, also unknown to her, who had raped S2, was of a medium height. In the courtroom, this witness identified the Accused as the person nicknamed „Dole“, and indicated that she had known him by sight because they

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<sup>31</sup> *Prosecutor v. Fatmir Limaj et al.*, IT-03-66-A, Appeals Verdict, 27 September 2007, para. 27. (The Appeals Chamber notes that „no probative weight should be attached to in-court identifications“).

had attended the same school. In addition, the Witness stated that she had identified Darko Dolić on a set of photographs in the photo-board presented to her by SIPA officers.

74. With regard to the pretrial identification, the Trial Panel heard the evidence of witnesses Miran Krišto and Dalibor Tubić, who worked on the case as official persons and conducted witness interviews. They testified that they had made mistakes in the process of collecting and verifying evidence, particularly while undertaking the evidentiary process of identification and drafting the records in this regard. Also, the Head of the SIPA Regional Office Mostar, Rašid Palić, said that upon obtaining information that two names of perpetrators were mentioned in the specific case (Mario and Darko) he requested that the matter be investigated in the manner stipulated by law. According to the witness, identification was carried out based on photographs, but no mandatory and usual record was made; nor were the photographs submitted into the case record together with the criminal report and witness statements; nor was the witness positive whether the photographs were shown to all the witnesses.

75. The Appellate Panel therefore concludes that the Trial Panel could not, based on these unlawful evidentiary actions, justifiably draw any certain conclusions in terms of perpetrators of the crimes in the villages of Družinovići and Lapsunj.

76. With regard to the names the soldiers used to address each other, the protected witness S1 said she had heard them calling out “Dole”, but the first time she learned his full name was while she was giving the statement to the BiH Prosecutor's Office<sup>32</sup>.

77. Witness S2 likewise stated that she had learned the names of the offenders from Bahrija Karadža based on their height. At trial she identified the Accused Darko Dolić, without any explanation or reason as to the basis for identifying him as the perpetrator.

78. Based on the foregoing and the appellate contentions suggesting that the Trial Panel erroneously evaluated the evidence of these witnesses, the Appellate Panel is satisfied that the contested Verdict provides valid and comprehensive reasons since it gave a detailed analysis of the accounts of these witnesses, individually and in their mutual correlation, and drew proper conclusions in terms of their credibility and reliability.

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<sup>32</sup> Trial Transcript, 19 March 2010, pp. 14-15.

79. Thus the Trial Panel could have reasonably found that witness Bahrija Karadža knew the Accused only by sight, addressing him as „Dole“, while the Prosecution failed to offer to the court valid evidence to corroborate her contentions concerning the pretrial identification of the Accused with the police. In addition, the Trial Panel could have reasonably found that protected witnesses S1 and S2 had not known the Accused, whom they identified in the courtroom as the perpetrator, based on the nickname used by Bahrija Karadža, and that witness S2 could not clarify on what basis she identified the Accused as the perpetrator.

80. For the foregoing reasons, the Trial Panel could have reasonably determined that it could not regard the evidence of these witnesses as credible, especially in view of the fact that at the time of the offense's perpetration the Accused was only 20 and that his physical appearance has changed over the past 16 years.

81. When rendering the decision, the Appellate Panel especially acknowledged that it is perfectly understandable that witnesses could not recall all the details about an event in view of the time interval, that is, the lapse of time between the moment when the incident took place and the date the Witness took the stand. This Panel also recognizes that each witness' ability to recall minor details concerning the incident will vary, especially since these witnesses are also the aggrieved parties who have gone through an extremely traumatic experience. Nevertheless, this Panel finds that, in this case, inconsistencies in the witnesses' statements do not pertain only to details, which might be justified in some cases, but the statements differ in substantial and decisive parts relative to the identity of the crime perpetrator, and thereby raise serious doubts as to the guilt of the Accused.

82. Consequently, the Appellate Panel concludes that the Trial Panel could have reasonably found that the facts concerning the identification of the perpetrator were not proven with certainty. Rather, the above-indicated witness evidence indicates only the possibility, that is, a certain degree of likelihood that these rapes took place in the manner described in the Indictment, which is not sufficient pursuant to the *in dubio pro reo* principle.

83. Furthermore, as far as the circumstances of the rape of protected witness S3 are concerned, the witness Zina Šabić testified that on the relevant occasion S3 had told her that she had been raped by „Dole“. Witness S3 told the court that this fact was also

confirmed by the rapist himself by saying: „*You'll see how Dole f...*“<sup>33</sup>. This Witness also said that, while staying at her sister's and watching through the window soldiers passing by, she thought she saw the rapist and that Ajka Gelić told her that it was Darko Dolić<sup>34</sup>. Witness Zina Šabić corroborated the evidence, saying that Ajka Gelić had identified the Accused through the window, that he was the son of Jozo and that she had known Darko since childhood. In addition to these witnesses, witness Hava Kmetaš also said that she was with witness S3 when the latter reported the rape and when she gave a statement to the police, and that she heard witness S3 reporting that she was raped by „Dole“.

84. Nevertheless, at the main trial, answering the question put to her by Defense Counsel if Darko Dolić had raped her, witness S3 responded: „*Perhaps it was not him, but it was his brother perhaps....it was all the same for me back then*“<sup>35</sup>. The Trial Panel could have reasonably found that this answer suggests that the witness was not sure about the true identity of the person who had raped her, and that as far as she was concerned all HVO members were indiscriminately guilty of the pain and humiliation she had suffered because of the rape. Moreover, the Trial Panel could have reasonably found that, consciously or not, this witness, probably out of wish that somebody be held accountable for her rape, which for her must have been a rather painful and tragic experience, convinced herself in something that is not corroborated by evidence and is not tenable.

85. Consequently, the Trial Panel could have reasonably found that the Prosecution's interpretation of this statement of the aggrieved party along the lines that the aggrieved party did not dare say in public who had raped her out of fear that the person interviewing her was related to the rapist is unfounded and arbitrary.

86. Despite the fact that witnesses S3 and Ajka Gelić, pointing at the Accused, stated that they were sure that he was the perpetrator of the crime, the Prosecution failed to fully clarify which of the Dolić brothers witness S3 had actually reported as the perpetrator, and this conclusion is determined by the Appellate Panel to be reasonable. Accordingly, since the Prosecution failed to offer to the Court clear and unambiguous evidence based on which the Trial Panel could establish with certainty that it was the Accused Darko Dolić, rather than anyone else with the same last name, who was guilty of the criminal acts; thus

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<sup>33</sup> Trial Transcript, 22 April 2010, p. 11.

<sup>34</sup> Trial Transcript, 22 April 2010, p. 13.

<sup>35</sup> Trial Transcript, 26 August 2010, p. 20.

the Trial Panel could have reasonably and properly determined that the issue of identity was not established beyond a reasonable doubt.

87. Furthermore, the Appellate Panel finds ill-founded the Prosecution's allegations to the effect that the contested Verdict does not include the reasons on the credibility of the evidence of witness Zlatif Kmetaš.

88. As already indicated above, the Trial Panel did not commit any essential violation of the criminal procedure provisions by granting the Defense's motion to read the investigative statement of this Witness pursuant to Article 273(2) of the CPC of BiH since the witness had died. In addition, the Trial Panel presented clear and unequivocal reasons substantiating the credibility of the statement of witness Zlatif Kmetaš, who was a direct participant of the incident described under Paragraph 1 of the contested Verdict, where he named soldiers Zoran Čališ aka "Đoka" and Mario Dolić as the soldiers who had raped his daughter-in-law Edina Kmetaš, and never mentions the first name, last name or nickname of Darko Dolić at all in the context of these incidents.

89. In this regard, the Trial Panel acknowledged that Zlatif Kmetaš was interviewed seven months following the incident which took place in early August 1993, at a time when his memory about the relevant incident was still fresh and complete, unlike the remaining witnesses who were interviewed two or more years later. Omer and Suljo Kmetaš also named Mario Dolić in their original statements, while a few years later they recanted their statements, and named Darko Dolić as the perpetrator instead.

90. Accordingly, the Appellate Panel is satisfied that the statement of Zlatif Kmetaš justifiably augmented the Trial Panel's suspicion concerning the evidence of his sons Omer and Suljo Kmetaš, which ultimately led to the reasonable conclusion that the Accused Darko Dolić cannot be linked to the relevant incident with certainty.

91. In order to substantiate the factual findings in terms of the perpetrator's identity, contrary to the Prosecution's appellate contentions, the Trial Panel justifiably referred to the three reports by The Hague Wartime Investigation Commission. These documents include statements relative to the events in the village of Lapsunj<sup>36</sup>, statements by expelled

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<sup>36</sup> Report by the Hague Wartime Investigation Commission relative to the events in the areas of Družinovići and Lapsunj in 1993. Rapes of women and young girls from the village of Lapsun – O44; Report by the Hague Wartime Investigation Commission relative to the events in the areas of Družinovići and Lapsunj in



residents of that village (audio-video recordings with statements given by women)<sup>37</sup>, and the Decision to Conduct an Investigation, by the Higher Court in Mostar number Ki. 14/95 dated 26 June 1995<sup>38</sup>, which nowhere name Darko Dolić as the perpetrator but rather a person by the name of Mario Dolić. Supporting this conclusion of the Trial Panel is the fact that witness S4 said at the trial that she had taken statements from around 30 women, victims of rape, some of them protected witnesses, and none of them mentioned Darko Dolić as the perpetrator. The witness remembers quite well that S3, among others, said she had been raped by Mario Dolić.

92. In this regard, the Appellate Panel dismissed Prosecution's suggestion that the Trial Panel improperly relied on this evidence since this is just one among the body of evidence which does not incriminate the Accused Darko Dolić and, in addition, it did not have any decisive bearing on the rendering of acquittal, but is rather a cumulative piece of evidence.

93. Since the physical appearance is one of the crucial criteria in relation to identification, the Trial Panel thoroughly and seriously approached this issue, determining the physical features of the perpetrator of the crime charged against the Accused Darko Dolić.

94. A large number of witnesses testified about the physical appearance of the perpetrator, and the Trial Panel correctly identified a number of inconsistencies in their evidence. Specifically, as the Verdict correctly indicates, the witnesses confirmed that Zoran Čališ was a tall and sturdy soldier, and that the other soldier, whom the witnesses associate with the Accused, was shorter than Čališ, had a dark complexion, black-hair and was chubbier (except for witnesses Vahida Kmetaš and S1 who described him as a lean person). The Defense witness Miroslav Dolić described him as an extremely skinny person of a dark complexion, just like most of the Dolić clan, while the Defense witness Ljubomir Galić said that the Accused had a conspicuously baby face. Witnesses Suljo Kmetaš, Rahima Zahirović, S1 and Bahrija Karadža maintained that the soldier Zoran Čališ was of an average height for a man, around 185 cm, while the soldier who was with him was

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1993 – Rape of Zlatif Kmetaš's daughter-in-law – O-45; Report by the Hague Wartime Investigation Commission relative to the events in the areas of Družinovići and Lapsunj in 1993 - Inflicting serious injuries on Zlatif Kmetaš– O-46;

<sup>37</sup> Exhibit O-22.

<sup>38</sup> Book – Extracts from the book entitled *Prozor - 1992/1995, a chronicle of crimes*, authored by Mesud Hero, p. 235.

shorter, about 175 cm. In this context the Trial Panel properly noted in the Verdict that, while presenting his closing speech, Defense Counsel noted that the Accused Darko Dolić is 186 cm tall (which could have been observed by the Panel).

95. The Panel finds that the Trial Panel analytically and thoroughly evaluated all of the evidence in this case. As part of this analysis, the Trial Panel noted that the name of Mario Dolić was repeatedly mentioned (as opposed to Darko Dolić). In this context the witnesses described the perpetrator as a short, chubby soldier, about 175 cm tall, of a dark complexion, with dark hair. Witnesses Suljo and Omer Kmetaš confirmed that Darko and Mario Dolić look similar, except that Mario was shorter, darker and chubbier than Darko Dolić.

96. The Trial Panel directly observed that the Accused is evidently taller than 180 cm, and drew a reasonable conclusion that not even on the basis of the physical appearance could it be concluded with certainty that the individual described by the witnesses as the perpetrator was the Accused Darko Dolić. As the Verdict reasonably indicated, the rendering of such a decision was also affected by the fact that the evidence of the witnesses was based on the resemblance between Darko and Mario Dolić, rather than on the features which would differentiate them and make them identifiable, which was precisely the evidence that would convince the Court that none other than the Accused committed the relevant crime.

97. In addition, the Trial Panel also took into account the evidence concerning the wounds sustained by Darko and Mario Dolić in 1992, in order to determine the identity of the perpetrator. The Appellate Panel concludes that this analysis was reasonable and proper.

98. The Trial Panel noted that the witnesses testified that they had seen a scar (that is, a “wound dressing”) on the perpetrator of the offense in the village of Družinovići at the relevant time. In that regard, witness Zlata Ravnjak testified that the shorter soldier had “a *wound*” on his stomach, whereas witness Vahida Kmetaš said in her initial statement given to SIPA in 2009 that the person in question showed her “a *scar*” on the stomach; during her testimony at trial, she explained that it was a “wound *dressing*” on the stomach. Witness Edina Kmetaš was unable to recall if any of the soldiers had a wound or if a wound was dressed.

99. The Defense also presented evidence in relation to all these

circumstances, thus witness Ljubomir Galić, who met the Accused Darko Dolić on Makljen on 1 August 1993, testified that the Accused showed him scars resulting from a wound in the area of the buttocks as well as a scar from a surgical abdominal wound. The Defense also called a medical expert to state his opinion regarding the type and time of healing of the wounds sustained by the Accused Darko Dolić and Mario Dolić in 1992.

100. Based on the Report by Medical Expert Davorin Kozomara<sup>39</sup>, the Trial Panel could have found that Darko Dolić and Mario Dolić were wounded in 1992, that Darko Dolić had a surgical wound on the abdominal wall and posterior, whereas Mario Dolić was wounded in the right temporal area, in the right chest, the right upper arm, the right fist and the right upper leg.

101. By correlating this with the respective accounts of witnesses Zlata Ravnjak and Vahida Kmetaš concerning the scar and the dressing that they observed, the Expert Witness did not respond with certainty as to Trial Panel's questions whether the Accused, who was wounded on 10 September 1992 (and his wounds healed within one month), could be identified as a perpetrator of the offense committed in 1993; or if the offense was perpetrated by Mario Dolić with respect to whom the Expert Witness said that it was possible that his wound took more time to heal but could not specify that time or if that time stretched to include the time when the relevant incident occurred. Under such circumstances, the Trial Panel could not reasonably use this evidence to conclude beyond any reasonable doubt that the Accused was the perpetrator of the incriminated acts.

102. The Appellate Panel does not find well-grounded the Prosecution's appellate contention that the Report of Expert Witness Kozomara indicates that Mario Dolić, by the nature of his wounds, cannot be the perpetrator, and consequently the Accused Darko Dolić must have committed these crimes.

103. With regard to these circumstances, the Expert Witness stated in relation to Mario Dolić that the wound he had sustained in his right temporal area was surgically treated and that the temporal bone was broken in that area, that the fragments of the bone were wedged towards the cranial cavity, and that they were subsequently removed, which left a

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<sup>39</sup> Medical expert report by mr. sc. dr. Davorin Kozomara dated 16 October 2010, Exhibit O-61;

scar. He also stated that during plastic surgery the bone was reconstructed with an artificial material and that a part of hair may have been missing there too<sup>40</sup>.

104. Consequently, the Trial Panel found that the described injury of Mario Dolić's head was conspicuous and memorable, and that the witnesses could not fail to see it if they had been in close contact with him. It does not follow, however, that the Accused Darko Dolić had committed the crime.

105. Contrary to the Prosecution's contentions that the contested Verdict focused too much on the uniform of the person who had perpetrated the crime, the Appellate Panel finds that this issue is also substantial for clarification of the overall incident and identification of the perpetrator. Thus the appellate contentions to this effect are unfounded.

106. The Trial Panel was not in a position to determine with certainty, based on the presented evidence, that the Accused is the person who had perpetrated the crime, since the witness testimony was not consistent in terms of the descriptions of uniforms and insignia worn by the perpetrator. Irrespective of the fact that this criterion did not contribute to establishing the decisive fact as to the perpetrator's identity, it does not imply that the Trial Panel should not have considered this evidence.

107. The Appellate Panel does not find well-grounded the Prosecution's contentions pertaining to the credibility of the evidence of the witness Miroslav Dolić. The contested Verdict clearly says that the Trial Panel acknowledged the kinship between this Witness and the Accused Darko Dolić. Furthermore, since at the relevant time the Witness was the Leader of the *Jastrebovi* Sabotage Platoon of the Rama Brigade, to which the Accused belonged, a document<sup>41</sup> he compiled in this capacity was also taken into consideration. The Trial Panel took into account that this witness did not make daily entries in the records but did so every 10-15 days, based on the notes in his diary.

108. When these reasons are taken into consideration along with the fact that the evidence of witness Miroslav Dolić was corroborated by the other Defense witnesses, namely: Slavko Burić, Ljubomir Galić, Marinko Zelenika, Nikica Peran, Vlado Beljo, Marko

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<sup>40</sup> Trial Transcript, 2 December 2010, p. 12.

Dedić, Dragan Đorđo and Vlado Barišić, as well as handwriting expert Zlatko Dugančić, then the Trial Panel's factual findings prove to be reasonable and proper. Therefore, the Prosecution's appellate contentions are unfounded.

109. Accordingly, the Appellate Panel concludes that the Trial Panel could have reasonably given credence to the account of witness Miroslav Dolić.

110. Finally, due to the lack of evidence proving the Accused's presence in the area, the Trial Panel could have reasonably concluded that the Accused Darko Dolić was not in the areas of the villages of Družinovići and Lapsunj in July and August 1993 when the war crimes against civilians indisputably occurred.

111. Furthermore, as part of the Defense evidence the witnesses S4 and Abaz Alajbegović were examined in relation to the Accused's character and the assistance he provided to the Muslims during the armed conflict.

112. Witness S4 described Darko Dolić as a person who helped him and his mother after they were expelled from Prozor and gave them accommodation in the Dolić family house; Marko and Darko Dolić provided them with blankets, cigarettes and food.

113. Likewise, the Defense witness Abaz Alajbegović testified that he knew all members of the Dolić family because he was a school teacher, adding that the Accused Darko Dolić and Zdenko Dolić helped him by taking the goods from his store and then returning all of them to him after the war. Jozo Dolić, the Accused's father, also helped the witness when the latter was hiding in Fadil Tuće's house.

114. For the foregoing reasons the Appellate Panel concludes that the Trial Panel reasonably and properly evaluated the statements of these two witnesses. This evidence was not evaluated independently but was rather considered in light of all the other presented evidence, which, as the Verdict properly established, did not clearly, precisely and unequivocally prove that the Accused Darko Dolić is the person who had committed the relevant criminal offense. Accordingly, the Prosecution's appellate contentions are not well-grounded in this regard either.

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<sup>41</sup> Records of Deployment of the *Jastrebovi* Sabotage Platoon of the Rama Brigade for July and August 1993, Exhibit O-19.

115. Finally, the Appellate Panel concludes that the Trial Panel acted reasonably in determining that there were serious discrepancies in this case regarding witness testimony in terms of the name, physical characteristics and appearance of the Accused at the time of the relevant event; that the witnesses were unsure and inconsistent and altered their statements regarding the identity of the perpetrator; that most of the witnesses did not know the perpetrator or knew him only superficially; that the victims had but a fleeting glance during the traumatic event or saw him 18 years after the incident; and that they learned his name(s) from others, which left the charges in the Indictment unsubstantiated.

116. Since the burden of proof of an offense's essential elements, on the issue of accused's guilt and perpetrator's identification, lies exclusively with the Prosecution, and since the evidence offered by the Prosecution in this case to prove the participation of the Accused in the relevant incident is not of such weight to prove beyond a reasonable doubt that the Accused Darko Dolić committed the crime in the manner, at the time and in the place as charged under the indictment, by applying the *in dubio pro reo* principle the Trial Panel rendered a reasonable and proper decision acquitting the Accused Darko Dolić

117. Having considered all Prosecution appeal grievances, the Appellate Panel concludes that the Trial Panel's findings regarding the decisive facts are well-founded and corroborated with arguments, and accepts them as such.

118. Accordingly, pursuant to Article 313 of the CPC of BiH, the decision was rendered as stated in the Operative Part herein.

**Record-Keeper:**

Neira Kožo

**PRESIDING JUDGE**

Azra Miletić

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