Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine

Суд Босне и Херцеговина

Case Number: **S1 1 K 014550 15 Krž 8**

Date of Appellate Panel session: **30 September 2015**

Before the Appellate Panel composed of:

Judge Redžib Begić, Presiding Judge

Judge Dragomir Vukoje (LLD), member

Judge Meddžida Kreso, member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

THE ACCUSED DRAGAN ŠEKARIĆ

SECOND INSTANCE VERDICT

Prosecutor for the Prosecutor's Office of Bosnia and Herzegovina: Seid Marušić

Defense Counsel for the Accused Dragan Šekarić: Attorney Mirsada Beganović-Žutić

Number: S1 1 K 014550 15 Krž 8
Sarajevo, 30 September 2015

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division composed of Judge Redžib Begić, as the Presiding Judge, and Judge Dragomir Vukoje (LLD) and Judge Meddžida Kreso, as members of the Panel, with the participation of Legal Advisor Medina Džerahović, as the record-taker, in the criminal case conducted against the Accused Dragan Šekarić for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraphs (a), (d), (e), (g), (i) and (k) of the Criminal Code of Bosnia and Herzegovina (CC B-H), all as read with Article 180(1) of the CC B-H, having decided on the Appeal by the Prosecutor's Office of B-H, No. T20 0 KTRZ 0006581 13 of 24 April 2015, and the Appeal by the Accused Dragan Šekarić of 21 April 2015 from the Verdict of the Court of B-H No. S1 1 K 014550 14 Kri of 13 February 2015, following a public session of the Appellate Panel held in the presence of Seid Marušić, Prosecutor for the Prosecutor's Office of B-H, the Accused Dragan Šekarić and his Defense Counsel, Attorney Mirsada Beganović-Žutić, pursuant to Article 314(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H), on 30 September 2015, rendered the following:

V E R D I C T

The Appeal by the Prosecutor's Office of B-H is hereby **partially granted** and the Verdict of the Court of B-H No. S1 1 K 014550 14 Kri of 13 February 2015 **revised** in the part relative to the criminal sanction **by imposing** on the Accused Dragan Šekarić **the sentence of imprisonment for a term of 17 (seventeen) years** for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraphs (a) and (g) of the CC B-H, all in conjunction with Article 180(1) of the CC B-H, of which he was found guilty, with the time the Accused will have spent in custody since 6 October 2014 to be credited towards the imposed sentence, pursuant to Article 56 of the CC B-H,

whilst the Appeal by the Accused Dragan Šekarić is hereby **refused as unfounded**, whereby the rest of the Trial Verdict remains unchanged.

Reasoning

I. PROCEDURAL HISTORY

A. TRIAL VERDICT

1. By the Verdict of the Court of B-H No. S1 1 K 014550 14 Kri of 13 February 2015 the Accused Dragan Šekarić was found guilty that with the acts described in the convicting part of the enacting clause he committed the criminal offense of Crimes against Humanity, in violation of Article 172(1)(h), as read with Sub-Paragraphs (a) and (g) of the CC B-H, all as read with Article 180(1) of the CC B-H. Hence, pursuant to Article 285 of the CPC B-H and Articles 39, 42 and 48 of the CC B-H, he was sentenced for the referenced criminal offense to imprisonment for the term of 14 years. Pursuant to Article 56 of the CC B-H, the time the Accused will have spent in custody from 6 October 2014 is to be credited towards the imposed sentence.

2. Under the same Verdict, pursuant to Article 284(1)(c) of the CPC B-H, the Accused was acquitted of the charges that with the acts described in Sections II.1, II.2 and II.3 of the enacting clause of the Verdict he committed the criminal offense of Crimes against Humanity, in violation of Article 172(1)(h), as read with Sub-Paragraphs (a), (d), (e), (i) and (k) of the CC B-H.

3. Pursuant to Article 188(4) and Article 189(1) of the CPC B-H, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings. Pursuant to Article 198(2) of the CPC B-H, the injured party Šefket Jamak and witness *S-1* were instructed to pursue their claims under property law in civil action. With respect to the acquitting part of the Verdict, all injured parties were instructed to pursue their claims in civil action, pursuant to Article 198(3) of the CPC B-H.

B. APPEALS

4. Prosecutor for the Prosecutor's Office of B-H and the Accused Dragan Šekarić filed Appeals from the Trial Verdict within the statutory deadline, while the Appeal by Attorney Mirsada Beganović-Žutić, Defense Counsel for the Accused, was dismissed as late by the decision of the Presiding Judge of the Trial Panel dated 17 June 2015.

5. The Prosecutor filed an appeal on the grounds of essential violations of the criminal procedure provisions, referred to in Article 297(1)(k) of the CPC B-H, incorrectly or incompletely established facts, referred to in Article 299 of the CPC B-H, and the decision on the sanction, referred to in Article 300 of the CPC B-H, and moved the Appellate Panel to fully grant the Appeal as well-founded and to revoke the contested Verdict with respect to Counts 1, 2 and 4 of the amended Indictment and schedule a new hearing, and to revise the Verdict with respect to Count 3 of the amended Indictment in the decision on criminal sanction and costs of the criminal proceedings by imposing on the Accused a longer imprisonment sentence and an obligation to cover the costs of the proceedings.

6. In his Appeal, the Accused Dragan Šekarić contests the Trial Verdict in the convicting part referring to the grounds for appeal set out in Article 296(a) of the CPC B-H – essential violations of the criminal procedure provisions, and Article 296(c) of the CPC B-H - incorrectly or incompletely established facts, as read with Article 299 of the CPC B-H, and moves the Appellate Panel to revoke the Trial Verdict in the referenced part and render a new acquitting decision.

7. The Prosecutor's Office of B-H filed a Response to the Appeal by the Accused, moving the Appellate Panel to refuse it as unfounded.

8. The Accused Šekarić and his Defense Counsel filed Responses to the Prosecution Appeal, moving the Appellate Panel to refuse it as unfounded.

9. At a public session of the Appellate Panel held on 30 September 2015, pursuant to Article 304 of the CPC B-H, the Appellants maintained their appeal grounds and responses to appeals presented in writing. The Accused reiterated that he was not guilty of the acts as charged, which he did not deny had happened, but claimed that he had not been present that day at the place concerned, and that the statements of the witnesses were concocted and synchronized with a view to having the Accused convicted at any cost. The whole

Verdict was based on the statement of one witness, that is, protected witness under pseudonym *S-1*, and, according to the Accused, when the Court was rendering a decision to order him into custody no witness was examined, but everything was initiated by an electronic mail (*e-mail*) sent from the Liberal Party, as they wanted to eliminate him as a political opponent since he was politically active in the region of Goražde.

II. GENERAL CONSIDERATIONS

10. 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 B-H, must include the grounds for contesting the verdict and the reasoning behind the appeal.

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

12. In that respect, the appellant must specify the 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.

13. 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 will dismiss, without further consideration, the uncorroborated and unclear appeal arguments, pursuant to the established practice of Appellate Panels.

14. When adjudicating on legal disputes, courts establish certain decisive facts (state of facts), and to the state of facts so established they apply certain legal rule (legal norm). In that way the courts first solve a matter of fact and then a matter of law. When arguing some legal defect in an appeal and when it is evaluated by a Panel of the Appellate Division, a certain factual basis must always be the starting point. This means that one cannot contest a legal defect without first being certain that the state of the facts on which the legal norm was applied was properly established. The appellant must clearly determine whether the

defect was caused by an erroneous application of law on the properly established state of the facts or by proper application of law on the erroneously established state of the facts. An Appellate Panel must also establish this when reviewing the defects of a verdict.

15. Naturally, the foregoing applies provided that in a verdict that is contested by an appeal there is no essential violation of the criminal procedure provisions that the appeal argues. If the appeal argues it, then a panel of the Appellate Division/second instance court must first review the appeal grievances, and if the panel/court establishes that they are well-founded it cannot evaluate the matter of fact and the matter of law.

16. Therefore, the existence of essential violations of the criminal procedure provisions is the first thing that is reviewed upon the appeal arguing the violations.

A. CRITERIA FOR REVIEWING ALLEGED ERRORS – GENERAL CONSIDERATIONS

17. In a number of their decisions the Panels of this Appellate Division – Section I took the legal view that the appellate proceedings are of *corrective nature*, therefore, not "an opportunity to reconsider a case *de novo.*"[1]

18. The party arguing that errors of fact were made must present arguments corroborating the averments, and explain in which way these errors render the relevant decision invalid. The Appellate Panels also recalled on a regular basis that they would not easily change the conclusions on facts rendered in the first instance proceedings given that the judges in the first instance proceedings were in a better position than an Appellate Panel to determine the reliability and credibility of a witness and the probative value of the evidence adduced at a trial.

19. When it comes to this type of errors, the Appellate Panel applies the so-called criterion of "reasonableness" with respect to the contested conclusion. Only in cases where it is obvious that no reasonable trier of facts would have accepted the evidence that the Trial Panel relied on, or where the evidence was evaluated completely incorrectly, shall the Appellate Panel change the factual conclusions.

20. When filing an appeal, the Defense must prove that no reasonable trier of facts *could reach the conclusion* on guilt beyond any reasonable doubt. However, when a Prosecutor files an appeal, given that the burden of proof at the trial lies with the Prosecutor, the error of fact that caused the miscarriage of justice acquires a special importance when the Prosecutor is the one who claims that the error occurred. The Prosecutor has a more difficult task to prove that there does not exist the slightest reasonable doubt concerning the guilt of the Accused when the errors of fact made by the Trial Panel are taken into account.

21. In addition, the Appellant must clearly present his own grounds and arguments in the appellate proceedings and precisely indicate for the Appellate Panel the parts of the appellate proceedings file that he refers to in support of his averments. It shall not suffice if the Appellant merely contested the Verdict to demonstrate that the Trial Panel's inferences are not accurate. Therefore, it shall not be acceptable for the Appellate Panel if the Appellant only contested the Trial Panel's inferences and proposed a different evaluation of evidence. If the Appellant does not state what makes the Trial Panel's evaluation of evidence erroneous and unreasonable, then the Appeal has not complied with the required burden of proof for the allegations of errors of fact.

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

A. STANDARDS OF REVIEW

22. A Verdict may, pursuant to Article 296 of the CPC B-H, be contested on the grounds of essential violations of the criminal procedure provisions. The essential violations of the criminal procedure are prescribed under Article 297 of the CPC B-H.

23. As to the gravity and significance of the procedure violations, the CPC B-H differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced verdict (absolutely

[1] See, also, *Prosecutor v. Milorad Krnojelac,* ICTY Appeals Panel, Judgment, 17 September 2003, paras. 5 – 20, and *Erdemović* (para.16), *Tadić* (paras. 238-326), *Aleksovski* (para. 63), *Furundžija* (paras. 35-37), *Čelebići* (para. 435).

essential violation), and such violations regarding which it us 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).

24. Absolute essential violations of the CPC B-H are listed in Article 297(1)(a) through (k) of the CPC B-H.

25. 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 B-H, except in the cases referred to in Article 314(1) of the CPC B-H.

26. 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.

27. 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 violation, the Appellate Panel will conclude that Article 297(2) of the CPC B-H was not violated.

B. PROSECUTION APPEAL – ACQUITTING PART OF THE VERDICT

1. The Trial Verdict does (not) contain reasons on decisive facts

28. Within this appeal ground the Prosecution appeal stresses that there was an essential violation referred to in Article 297(1)(k) of the CPC B-H in the acquitting part of the contested Verdict since the Verdict does not contain reasons on decisive facts, that is, it does not contain a clear description with respect to each piece of evidence, although the Trial Panel should have presented its views clearly when evaluating all adduced evidence, especially the pieces of evidence the Panel did not accept as credible and reliable. The

Appeal argues that the reasoning of the contested Verdict: (1) merely notes the Prosecution exhibit -- Plan of attack on Goražde (T-1-10), with attached sketch, while there is absolutely no evaluation on the non-acceptance of the contents of this exhibit or evaluation of witness *S-4's* statement at the main trial; and (2) provides only generalized conclusions with respect to the evidence adduced by the Court *ex officio* – the confronting of witness Dženita Muhić with protected witness *S-2*.

29. In that respect the Prosecution considers that it was the Trial Panel's duty to present the opinion about each piece of adduced evidence to the extent in which it was necessary to explain its decision and evaluation whether each piece of evidence corroborated or challenged the judicial decision, which the Trial Panel failed to do.

(a) Findings of the Appellate Panel

30. The Appellate Panel considers the referenced grievances to be completely unfounded.

31. A *prima facie* analysis of the contested Verdict, as required by the standards of review on the grounds of essential violations, does not suggest the existence of the described essential violation. The Trial Panel fully acted in line with Article 290(7) of the CPC B-H, which sets out that the Trial Panel is obliged to state the *facts* it relies on. In that respect, it is important to emphasize that such an approach does not mean that when making inferences in the Verdict on decisive facts the Trial Panel had to make reference to each piece of evidence, as the Appeal erroneously states, but that the Panel listed and presented the contents of the evidence that was of prevailing importance in making inferences on the decisive facts. Therefore, from the aspect of formal correctness of the contested Verdict, the Appellate Panel concludes that the Trial Panel presented sufficient and absolutely acceptable reasons for its views and factual conclusions, having relied on the relevant evidence that corroborated those views, which will be discussed in more detail further in the reasoning.

32. The Appellate Panel is of the opinion that, with respect to the event closely described in Count 1 of the amended Indictment (attack on the civilian population in the settlement of Lozje – Kokino selo that took place on 22 May 1992), the Trial Panel substantially presented the relevant evidence in the contested Verdict and then made proper conclusions

as to the facts. With respect to the testimony of witness *S-4* concerning Count 1 of the amended Indictment, it is obvious from the Verdict and the transcript of the main trial of 6 October 2014 that this witness did not testify about the described event. Therefore, the Prosecution appeal grievances that the Trial Verdict did not provide an evaluation of this witness' evidence at the main trial are rendered unfounded once the contents of the evidence adduced at the main trial are inspected.

33. With respect to the Prosecution's appeal grievance that the reasoning of the contested Verdict lacks evaluation of the contents of the Prosecution exhibit T-1-10 (Plan of attack on Goražde, signed by Chief Jovo Mitrović, authorized by Territorial Defense Commander Brane Petković), the Appellate Panel considers that through this piece of documentary evidence the Trial Panel provided a general picture of the events at the relevant time concerning the attack against the civilian population in the region of Goražde. However, on this occasion the Appellate Panel notes that in the propaedeutic (introductory) part of the Verdict, the Trial Panel provided sufficient elements required for identification of the conditions necessary for the existence of a widespread and systematic attack as an essential element of the criminal offense of Crimes against Humanity in violation of Article 172 of the CC B-H, whereupon the Trial Panel evaluated the (non)fulfilment of the conditions required for the existence of such an attack in light of the evidence adduced with respect to this Count of the Indictment.

34. The fact that this essential element of the relevant criminal offense was not proved with respect to the acquitting part of the Verdict will be elaborated on when deliberating on the appeal ground of erroneously and incompletely established state of the facts.

35. With respect to the Prosecution's appeal grievances regarding essential violations of the criminal procedure provisions in violation of Article 297(1)(k) of the CPC B-H and, consequently, the factual findings relative to Section 2 of the enacting clause of the acquitting part of the Verdict concerning the events in the settlement of Dušće (murder of Behija Zukić and enforced disappearance of Džemail and Faruk Zukić), according to which the Trial Verdict gives only generalized conclusions about the evidence adduced *ex officio* by the Court – the confronting of witness Dženita Muhić with protected witness *S-2,* the Appellate Panel concludes as follows.

36. The examination of a witness by way of confrontation is set forth under Article 86(9) of the CPC B-H. Witnesses may be confronted if their respective testimonies disagree with respect to *important* facts.[2]

37. First of all, the Appellate Panel had in mind the fact that in paragraph 471 of the Trial Verdict the Trial Panel explained in detail why it accepted the statement of witness Dženita Muhić as relevant and trusted it. On the other hand, the Trial Panel evaluated in detail the statement of witness *S-2* in paragraphs 472-502, pointing at numerous inconsistencies and contradictions in her testimony both with respect to the statement she had given in the investigation stage and the statement at the main trial, but also with respect to the statement of Dženita Muhić as a credible witness.

38. With respect to the manner of evaluation of evidence, methodology-wise the Trial Panel acted correctly in all aspects, as Article 281(2) of the CPC B-H ordains. When it comes to evaluation of Prosecution's allegations relative to the identification of the Accused as a person that was allegedly present in Milan Lukić's group during the described event in the village of Dušće, the Trial Panel first analyzed critically the statements of witnesses who testified about that circumstance, by evaluating individually respective statements of Dženita Muhić and witness *S-2*, and then evaluating their correspondence to each other before making a definitive conclusion that there was no sufficient evidence that the Accused Šekarić committed the incriminated acts closely described under Count 2 of the Indictment, that is, in paragraphs 501 and 502 of the acquitting part of the Trial Verdict.

39. The injured party Dženita Muhić[3] resolutely testifies that she did not recognize anyone from Milan Lukić's group[4] that was present at the site on the occasion concerned and that she did not know the Accused Šekarić either, although her family members were killed on the day concerned. Witness *S-2*, on the other hand, was the only one who identified the Accused Dragan Šekarić as the perpetrator of the referenced acts. In such a situation, the Trial Panel properly concluded that it could not base a conviction relative to

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[2] Unlike the adversarial (accusatory) system, the *common law* system is not familiar with the procedural possibility of confronting witnesses. Nevertheless, the question remains how productive the witness confronting really is, given that in the majority of cases no witness backs down on his original statement. See, *OKO War Crimes Reporter*, No. 11, 2010, p. 9.

[3] Transcript of Dženita Muhić's testimony at the main trial dated 22 December 2014, pp. 17,18.

[4] The majority of the examined witnesses said with respect to the event described in Count 1 of the amended Indictment that they did not see anyone of the uniformed Serb soldiers.

this Count of the amended Indictment on the basis of the latter witness' statement alone, which, *inter alia*, was motivated by personal and private reasons. This Panel also concludes that such motives of witness *S2* seriously challenge the credibility of her testimony.

40. Therefore, the appeal grievance that the evidence adduced by the Court -- the confrontation of witness Muhić with the protected witness *S-2* -- contains generalized conclusions is uncorroborated and contrary to the thorough analysis and examination of the referenced subjective evidence, as properly done in the Trial Verdict, just as the testimony of witness *S-2* remains isolated, not corroborated by the other adduced evidence. Not even the appeal grievance that protected witness *S-4*[5]*,* who is witness *S-2's* husband, testified consistently with the witness can lead to a different conclusion.

41. This Panel concludes that the impugned Verdict is *prima faciae* focused on the examination and evaluation of the adduced evidence on the basis of which the Trial Panel made its conclusion that the guilt of the Accused was not proven, which will be addressed in more detail in the part relative to the Prosecution appeal from the acquitting part of the Trial Verdict on the grounds of the erroneously and incompletely established state of the facts.

IV. GROUNDS OF APPEAL UNDER ARTICLE 299 OF THE CPC B-H: ERRONEOUSLY OR INCOMPLETELY ESTABLISHED FACTS

A. STANDARDS OF REVIEW

42. The foundation of every verdict is the state of facts. Only on a proper and completely established state of facts can the criminal code be properly applied. A second instance panel/panel of the Appellate Division shall review a verdict only insofar as it is contested by an appeal, as explicitly set forth in Article 306 of the CPC B-H. This limitation determines the scope within which the Appellate Panel shall review a contested Verdict if the state of the facts is challenged by specific averments. It follows from the foregoing that the Appellate Panel shall not review the truthfulness of all facts contained in the contested part of the Verdict.

[5] Appeal by the Prosecutor's Office of B-H, para. 2, p. 7.

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

44. 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.

45. 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.

46. 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.”

47. 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 (European Convention on Human Rights).[6] However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel’s factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

[6] *M.Š.*, AP-661/04 (Constitutional Court of B-H), Decision on Admissibility and Merits, 22 April 2005, para. 36.

48. In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the Trial Panel raise a reasonable doubt about the guilt of the Accused.[7] In order for the Prosecutor to prove a miscarriage of justice, s/he must demonstrate that, considering the errors of fact made by the Trial Panel, any reasonable doubt of the Accused's guilt is eliminated.[8]

B. PROSECUTION APPEAL – ACQUITTING PART OF THE VERDICT

49. The Prosecutor's Office argues within the Appeal ground of erroneously and incompletely established state of the facts that the Trial Panel did not, although it should have, provide a reasonable explanation in the Trial Verdict[9] why the Prosecution did not prove beyond any reasonable doubt the existence of a widespread and systematic attack as an essential element of the criminal offense of Crimes against Humanity in violation of Article 172 of the CC B-H.

50. The Prosecution argues in the Appeal that the Trial Panel erred because in the acquitting part of the Verdict it reviewed separately each of the individual events referred to in the Counts of the Indictment, in which case not one attack could have the character of a systematic attack whose principal characteristic is its regular repetition that cannot be regarded as a coincidence, and which attack is not very likely to have been committed at random. The Prosecution considers such an approach of the Trial Verdict to be erroneous, as all attacks in the territory of Goražde Municipality undertaken in the period from May to September 1992 should have been viewed in their totality and within the context of the phrase of "widespread and systematic attack"[10].

51. The Trial Panel answered negatively to the Prosecution's arguments with respect to the factual averments of: (1) the existence of a widespread and systematic attack on Goražde and its environs in the period prior to the attack on Kokino Selo on 22 May 1992,

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[7] *Stupar et al.,* Appellate Verdict, 9 September 2009, para. 328.
[8] *Ibid.*
[9] Trial Verdict, paras. 393, 394.
[10] Appeal by the Prosecutor's Office of B-H, No. T 20 0 KTRZ 0006581 13, 24 April 2015, para. 3, p. 3. Here the Appellate Panel notes that the Appeal misquotes the provision of Article 172 of the CC B-H by using the conjunction "and" instead of the conjunction "or", therefore, by using and establishing the relation of connectivity, instead of the relation of alternativity, as laid down in the statute.

and (2) the Accused's presence and participation in the attack on Kokino Selo. Therefore, the Trial Panel found that the Prosecution did not prove the existence of incriminations under Count 1 of the amended Indictment in both aspects of Crimes against Humanity, that is, the existence of its essential element[11], as well as the existence of underlying individual incriminations that the Accused might be found guilty of. The Trial Verdict rendered proper conclusions on those issues, which only the Prosecution Appeal found disputable, after a comprehensive evaluation of the adduced evidence, which conclusions the Appellate Panel accepts completely as its own.

52. The Trial Panel reviewed whether the required conditions were met for the existence of essential element of the relevant criminal offense in application of the criterion of "sufficient evidence", from the aspect of both the quality and the quantity of evidence. The Trial Panel also had in mind the totality of the adduced evidence, not focusing exclusively on the evaluation of Prosecution exhibit T-1-10, which the Prosecution Appeal argues. In the opinion of this Panel, it was only in that way that the Trial Panel could render a proper conclusion, as paragraph 394 of the Trial Verdict reads:

> "The Panel notes that it was not satisfied based on the evidence submitted by the Prosecution that this essential element was fulfilled, because the Prosecution did not adduce *sufficient* evidence about this circumstance. The Panel thus notes that the Prosecution witnesses were mostly examined about the attack that took place on 22 May 1992, which the Indictment singled out as an individual incrimination as the underlying element of the crime, whereas the witnesses presented far fewer facts and circumstances relevant to establishing the existence of a widespread and systematic attack, as an essential element of the criminal offense."

53. The fact that no detailed analysis of the acceptance of the contents of the referenced evidence was provided does not *a priori* mean that the evidence was not evaluated and accepted. On the contrary, in the case at hand it means that the impugned Verdict, having applied the method of analytical presentation of the contents of both the Prosecution and the Defense evidence, *implicitly* accepted the said evidence as credible. There was no

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[11] See Sub-Ground (a) of the acquitting part of the Trial Verdict, *The non-existence of a widespread and systematic attack in Goražde*, pp. 86-88; Sub-Ground (b), *Underlying individual incrimination*, pp. 88-90; Sub-Ground (c), *The failure to prove the Accused's presence in Kokino Selo and participation in the attack*, pp. 91-96.

need to state individually whether or not a piece of evidence was credited, since with a joint comprehensive evaluation of the credibility of the referenced statements of the examined witnesses and the tendered documentary evidence the Trial Panel, in terms of methodology, presented in a proper way the sufficient and absolutely acceptable reasons for its findings.

54. The Trial Panel did not claim in the Verdict at all that it did not trust a particular witness who testified about the beginning of the conflict in Goražde, or that it did not accept a particular piece of documentary evidence, as follows from the presented conclusions. However, having evaluated a complete body of evidence, the Trial Panel could not make a reliable inference on the events concerned, which would have meant that the Prosecution's averments on the existence of a widespread and systematic attack in that area at the time relevant to the amended Indictment were proven beyond reasonable doubt.

55. In other words, in the convicting part of the Verdict the Trial Panel established a standard of proof of the existence of a widespread and systematic attack by the Army of Republika Srpska (VRS) against the non-Serb civilian population of the Višegrad Municipality, which standard the Trial Panel also consistently applied to the decisive facts relative to the events in the area of Goražde. However, this time the Panel properly established that there did not exist a sufficient quantity of relevant evidence to conclude that the events that took place in that area could be regarded as a widespread and systematic attack.

56. The Trial Panel also did not fail to state that the Prosecution witnesses were mostly examined about the circumstances of the attack that took place on 22 May 1992, which was singled out in the Indictment as an individual incrimination, and much less about the circumstances important for the establishing of the attack as an essential element of the criminal offense of Crimes against Humanity. In that respect, the Trial Panel properly stated in Paragraph 402 of the Verdict that the Prosecution did not adduce sufficient evidence about the existence of a joint operation of the army, police and paramilitary units of Republika Srpska in that area with a view to implementing certain policy, as a sub-element of widespread and systematic attack on the civilian population.

57. Such a reasoning in the formal sense is also supported by this Panel, especially in the part where the Trial Panel concludes in Paragraph 392 of the contested Verdict:

> "Given that, having evaluated the adduced evidence, the Panel did not find proven the Accused's guilt for the commission of individual incrimination that constitutes the underlying element of the offense, the Panel did not explain in further detail why the essential elements of the offense of Crimes against Humanity in violation of Article 172 of the CC B-H were not proven. Nevertheless, in the further text the Panel will touch briefly on the evaluation of the adduced Prosecution evidence concerning the widespread and systematic attack in the territory of Goražde at the time of the commission of the attack, 22 May 1992."

58. In the Trial Verdict the Trial Panel properly took as the starting point the notion that it could not establish beyond any reasonable doubt the existence of a widespread and systematic attack in Goražde at the time relevant to the amended Indictment but prior to the attack on Kokino Selo on 22 May 1992, which was primarily caused by the deficit of the evidence adduced by the Prosecution. In other words, the Prosecution witnesses mainly testified about the underlying individual incriminations of Crimes against Humanity, but they did not testify about the relevant facts and circumstances relevant to establishing the elements of a widespread and systematic attack.

59. This Panel too finds that the Defense documentary evidence (O-17, Certificate issued by the RS Disability and Pension Fund) shows that the Accused was employed all the way to 9 May 1992; therefore, it cannot be said that any serious deterioration of the security situation in Goražde and its surroundings had occurred before that date, as it is established in the first instance Verdict (para. 397 of the first instance Verdict). Besides, the Prosecution failed to prove that the Muslim population of Goražde and its surroundings had been subjected to a pattern of violent activities, continuously and over a fairly long period, which included: seizure of personal property, restriction of movement, imprisonment and confinement in inhumane conditions, dismissal from work on the grounds of ethnic belonging, and so on, and that such a situation had existed before the armed attack.

60. In that regard, the Appellate Panel notes that the Appeal merely listed the legal elements of the criminal offense of Crimes against Humanity, and simply referred to the elements of that criminal offense as established in the ICTY jurisprudence, which are taken over by the panels of this Court and incorporated in its jurisprudence. However, this cannot substitute the lack of Prosecution evidence in support of the existence of the general

element of the criminal offense of Crimes against Humanity in the territory of Goražde and its environs during relevant period.

61. The Prosecution Appeal attempts to show that the first instance court erred by failing to view all attacks on Bosniak civilians in the area of Goražde Municipality from May to September 1992 in the context of a widespread and systematic attack, instead opting to address those attacks on an individual basis, and, by fragmenting them, the Panel destroyed their unity, thereby excluding the existence of the general element of the referenced criminal offense.

62. The Appellate Panel dismisses such a reconstituent approach of the Appeal as misplaced, since it is the duty of the first instance panel to always examine the facts as they are presented under the counts of the indictment. Counts 1 through 3 of the (amended) Indictment relative to the events in Goražde *tempore criminis* do not contain either facts or factual circumstances that could lawfully satisfy one of the requirements for the existence of a widespread and systematic attack.

63. The Appellate Panel supports this conclusion by referring to the account of facts of the (amended) Indictment and mentions just as an example the absence of simply one of the requirements necessary for the applicability of the criminal offense of Crimes against Humanity, in respect of the offenses described in the amended Indictment. This element concerns the state of mind of the perpetrator, that is the *mens rea* requisite. In this regard, the Appellate Panel refers to the position taken by the ICTR in the case: *Prosecutor v. Kayushema*[12]*:*

> The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. [] Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and

[12] *Prosecutor v. Kayushema and Ruzindana,* Judgment, 21 May 1999, para. 133-4.

pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.

64. The Prosecution offered no evidence to prove the general (*chapeau*) element of Crimes against Humanity; instead they rested contented with a general statement that the First-Instance Panel should have perceived all attacks in the area of Goražde and its surroundings in the relevant period as one whole and subsumed them under the notion of a widespread and systematic attack. In so doing, the Prosecution disregarded the principle of specificity, which foresees that criminal law norms, therefore the elements of a criminal offense, have to be as specific and precise as possible – *nulla poena sine lege certa.* Ultimately, the appeal cannot *implicite* burden the Court with the work that the Prosecution should have done.

65. The Appeal alleges that the First-Instance Panel viewed the relevant incidents as isolated events, consequently, not a single attack in the area of Goražde and its surroundings could be assessed as a systematic attack, which is incorrect. Contrary to such prosecution's inversion in developing the general element of the criminal offense codified under Article 172 of the CC of BiH, the Appellate Panel is satisfied that the First Instance Panel reached a correct conclusion in paragraph 394 of the contested Verdict by finding that a pattern of violent behavior should have continuously existed in the area of the town of Goražde and its surroundings before the attack of 22 May 1992, but that had not actually happened.

66. This is additionally supported by the fact that the attack was charged as an individual incrimination in the amended Indictment, and the prosecution witnesses did not at all testify about the facts pertinent to the general context in which the event had occurred, which would entail the existence of a widespread and systematic attack on the civilian population of the Goražde Municipality.

67. It clearly follows from the above that the first instance Panel correctly reasoned and supported its conclusion that the Prosecution had failed to prove the existence of the general element of the referenced criminal offense, which renders out of merit the Prosecution's appellate averment that the First Instance Panel had reached an arbitrary conclusion.

1. Individual charges: Section 1 of the acquitting part of the Verdict

68. With regard to the appellate allegations about the unproved presence of the Accused in Kokino Selo and his participation in the attack, the Appeal, on pages 5-6, gives a summarized testimony of the following witnesses: Izet Dragović (whose testimony was read out at the main trial), S-6, Elvid Ćulov, Paša Živojević, Haris Duhović, Alija Smajović, Ramiza Uhota, S-6, Adem Smajović and S-5. The Appeal also outlines the consequences of the attack on Kokino Selo of 22 May 1992, the facts that no one disputes, and merely notes that the presented evidence "should have been taken by Court to reach a firm conclusion about the presence of the Accused Dragan Šekarić at the time and in the place of the commission of the crime."

69. In that regard, the Appellate Panel dismisses as unsubstantiated the allegation of the Appeal that the first instance Court, *vice verso* to the allegations of the Appeal, could not have reached a conclusion about the presence of the Accused and his participation in the attack beyond a reasonable doubt, since this part of the acquitting Verdict begins with the analysis of the testimony of the above listed Prosecution witnesses.

70. On page 91, Section V.1.c), the Verdict gives *in fine* a detailed analysis of the testimony of witnesses before concluding that it was impossible to establish decisive facts beyond a reasonable doubt, specifically that the accused Šekarić was present on the scene at the time when the attack on the civilian population took place – on 22 May 1992, and that he had directly participated in the attack on the inhabitants of Kokino Selo.

71. In addition to other subjective evidence, this conclusion is also corroborated by a firm testimony of Sejdo Močević[13], who was clear in stating that he had known Dragan Šekarić a.k.a. "Pive" very well even before the (armed) conflict broke out. The witness did not see the Accused at the relevant time, either immediately before, or during the attack, nor did anyone among the local people mention after the incident that Šekarić had participated in the attack. The testimony of Zineta Pleh was similar,[14] since she stated at the main trial that she had not had the opportunity to see the Accused on the day of the attack on Kokino Selo, nor had she heard anyone among the local people mentioning him in their later

[13] Transcript of the trial hearing of 31 March 2014, p. 9-28.
[14] Transcript of the trial hearing of 31 March 2014, p. 34-44., 46-47.

conversations about the event. Witnesses Nura Močević[15], Paša Živojević[16], Elvid Ćulov,[17] Haris Duhović[18], Alija Smajović[19] gave a similar account of the events in their testimony.

72. As opposed to this group of witnesses, witnesses S-5[20] and S-6[21] had indirect information about the presence of the accused Šekarić on the scene at the relevant time. Witness S-6 did not want to reveal the identity of her informant, so that the First Instance Panel was unable to verify the credibility of her information. Similar was the testimony of witness Ramiza Uhota[22], who had not known the Accused prior to the attack on the village, and her basically vague testimony relied on a hear-say information on which a convicting verdict may not be based, at least not exclusively.

73. Contrary to the Prosecution's appellate arguments, the Appellate Panel holds that the Trial Panel, as the Defense too stated correctly in their response to the Prosecution Appeal,[23] examined each and every segment of the body of evidence presented at the main trial before rendering the Verdict, evaluated every piece of the presented evidence and stated which of them the Trial Panel did not find credible and reliable, and which was accepted as credible and why.

74. Due to the above stated reasons, the Appellate Panel dismisses as unfounded and unsubstantiated the appellate allegations that the acquitting part of the Trial Verdict made essential violations of the criminal procedure set forth in Article 297(1)(k) of the CPC of BiH.

75. It follows from the first instance Verdict that witness Zineta Pleh firmly stated at the main trial that she had known the Accused very well even from his boyhood, but she had not seen him on the day of the attack on Kokino Selo (para 420). Similar was the testimony of Nura Močević, who also knew the Accused well, but she resolutely stated that, on the

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[15] Transcript of the trial hearing of 24 March 2014, p. 23-34, 36-37, 39-40.
[16] Transcript of the trial hearing of 7 April 2014, p. 23, 25-30.
[17] Transcript of the trial hearing of 21 April 2014, p. 09-19.
[18] Audio record of the trial hearing of 14 April 2014, 13 min, 15:22-16:00 min, 17:38-17:52 min, 18:15-18:47 min, 22:31-23:27 min, 30:30 min, 32:30 min.
[19] Audio record of the trial hearing of 14 April 2014, 43:09-43:51 min, 44:43-45:07 min, 48:30-49:07 min, 49:19-50:00 min, 56:30-56:38 min, 1:00:15-1:1:27, 1:02:44-1:03:00, 1:09:24-1:12:34, 1:12:50-1:13:49, 1:15:00-1:17:36.
[20] Audio record of the trial hearing of 14 April 2014, 1:48:51-1:52:49, 1:54:51-1:54:57, 1:57:06-1:58:00.
[21] Transcript of the trial hearing of 21 April 2014, p. 22, 23.
[22] Transcript of the trial hearing of 7 April 2014, p. 36-47.
[23] Response to the Appeal filed by defense counsel Mirsada Beganović-Žunić, dated 1 June 2015, p. 2.

day of the attack, she had not noticed any Serb army soldiers or people in uniforms, nor had she seen the Accused (para. 422).

76. A number of witnesses testified about the incident associated with the attack on Kokino Selo, but only three of them mentioned the Accused, vaguely and without any possibility of verification, or provided indirect information (for instance, the testimony of witness S-6). Based on this, the Appellate Panel is satisfied that the Trial Panel was correct in concluding that the testimony of those witnesses was not of such quality as to allow a conviction on the charges under this Count of the Indictment (para. 432-435). Due to these reasons, the Prosecution's appellate allegation relevant to the incident charged under Count 1 of the amended Indictment had to be dismissed as unsubstantiated.

2. Individual charges: Section 2 of the Enacting Clause of the acquitting part of the Verdict

77. With regard to Section 2 of the Enacting Clause of the acquitting part of the Verdict, which concerns the incident in the village of Dušće in late May 1992, the Prosecution argues that the Trial Panel incorrectly evaluated, or completely failed to evaluate, the presented Prosecution's evidence referred to in paragraphs 436-469 of the first instance Verdict by finding unproven that the Accused participated in the incident when Džemail Zukić and Faruk Zukić were taken away, and Behija Zukić killed.

78. In raising this argument in the Appeal, the Prosecution disagrees with the evaluation of evidence by the Trial Panel since, in their opinion, the Court erred by not accepting as credible the testimony of witness S-2, finding it unsubstantiated by other evidence, self-contradictory and inconsistent with the testimony of Dženita Muhić, whose evidence was accepted by the Trial Panel.

79. However, even a brief look at the acquitting part of the Verdict relevant to Count 2 shows that the Trial Panel thoroughly and carefully analyzed the testimony of the key Prosecution witnesses, whose testimony stood in opposition not only to Dženita Muhić, but also to witness S-2. The Trial Panel examined the testimony individually and in correlation, and, when evaluating their probative value, the Panel explained in detail why they gave credence to Dženita Muhić, but not to witness S-1 and the associated witness S-4. In paragraphs 498-499 of the Verdict, the Trial Panel gave clear and entirely convincing

reasons in support of their opinion that witnesses S-2 and S-4 were willing to groundlessly incriminate the Accused. The Appellate Panel upholds those reasons as completely substantiated, and there is not need to repeat them here.

80. When addressing the testimony of these witnesses, the Prosecution Appeal more or less merely reproduces the relevant portions of the Trial Verdict, and does not enter into the merits of a single decisive fact, or any of the supporting facts, whose quality could undermine the conclusion of the First Instance Panel. This primarily concerns the testimony of Dženita Muhić, which is, contrary to the allegations of the Appeal, consequent to all crucial elements of the incident she testified about both under the investigation and at the main trail.

81. First of all, there are no objections to the premise upon which the Trial Panel based its opinion about the testimony of witness Dženita Muhić, namely that, unlike witnesses S-2 and S-4, she was an eye-witness to the incident. The Trial Panel was completely justified in concluding that witness S-2 attempted to secure for herself the status of a direct witness by claiming that she had spent around 4 hours on the scene, and in the opinion of this Panel too, add to the credibility of her testimony.

82. Credibility of witness Dženita Muhić follows from the fact that she had very strong reasons to incriminate the Accused, since her closest relatives were victims of the relevant incident, but, being an honest person as she is, she did not do that. Unlike her, witnesses S-2 and S-4 did precisely that in their testimony. At first, these two witnesses were on friendly terms with the Accused, but over time their relationship developed into hostility, which led the Trial Panel to conclude that the testimony of witness S-2 was motivated by personal reasons, therefore a biased one. Witness S-4 testified about the participation of the Accused in the war-time events on the basis of information allegedly obtained by the Accused himself. This fact alone cautioned the First Instance Panel to be very careful in evaluating this testimony, same as the Panel did when evaluating the testimony of witness S-2, taking into account that those two witnesses were spouses.

3. Individual charges: Section 4 of the Enacting Clause of the acquitting part of the Verdict

83. The Prosecution Appeal argues that the first instance Verdict incorrectly applied Article 276, in conjunction with Article 261 of the CPC of BiH,[24] by failing to accept the entire Prosecution's Motion for presentation of additional evidence, thereby affecting a proper rendering of the Verdict.

84. Aiming to explain these allegations, the Appeal outlines the chronology of proposing the evidence. In the Indictment, the Prosecution proposed the examination of witness VG/025 under his full name since at that time they were not aware that it was a witness who testified before the ICTY in the case of *Prosecutor v. Milan and Sredoje Lukić,* and who was granted protective measures. Upon learning that information, the Prosecution immediately filed a motion with the Tribunal, asking for a variation of the protection measures and accordingly informed the Trial Panel of the Court of BiH. The Prosecution was informed at that point that the removal of protective measures was a procedure lasting 3 (three) months, of which the Trial Panel was also informed.

85. However, as the Appeal alleges, the Trial Verdict ignores that, and states in Paragraph 533 that the beating of witness VG/025 by Dragan Šekarić in the *Uzamnica* camp was not proved since the injured party was not examined as a witness due to a procedural failure of the Prosecutor's Office of BiH to file a motion with the Tribunal to remove the protective measure of non-disclosure of the identity granted to this witness. The

[24] Article 276(1): After the presentation of evidence, the judge or the presiding judge shall ask the parties and defense attorney if they have additional evidentiary motions.
(2) If the parties or the defense attorney has no evidentiary motions, the judge or the presiding judge shall declare the evidentiary proceedings completed.
Article 261: (1) Parties and the defense attorney are entitled to call witnesses and to present evidence.
(2) Unless the judge or the Panel, in the interest of the justice, decides otherwise, the evidence at the main trial shall be presented in the following order:
a) evidence of the prosecution;
b) evidence of the defense;
c) rebutting evidence of the prosecution;
d) evidence in rejoinder to the Prosecutor's rebutting evidence;
e) evidence whose presentation was ordered by the judge or the Panel
f) all relevant information that may help the judge or the Panel in fashioning appropriate criminal sanction, if the accused is found guilty on one or more counts in the indictment.

Prosecution's Appeal argues that the Trial Panel made an arbitrary conclusion, which placed the Prosecutor in an unfavorable position and forced him to abandon the presentation of this piece of evidence.

86. With regard to the motion for additional presentation of evidence – examination of witness Adem Berberović, the Appeal notes that the Prosecution filed a motion for international legal assistance on 10 December 2014, requesting the examination of this witness via video link. Still, the Trial Verdict in its para. 532 states that the Prosecution failed to timely comply with the procedure of requesting legal assistance in the examination of this witness, although the witness was available to the Prosecution since he testified via video link in other cases of the Court of BiH. Thus, since the examination of this witness before the Trial Panel could not be arranged, the Prosecutor was eventually forced to abandon this witness.

87. The Appeal argues that witnesses VG/025 and Adem Berberović were material witnesses who, as the amended Indictment alleges, were beaten up by the accused Šekarić. Dismissal of those proposed pieces of evidence resulted in the incompletely established account of facts by the Court. Such a deficient factual basis resulted in the incorrect conclusion of the Court that there was no sufficient evidence to prove the culpability of the accused Dragan Šekarić for the charges under Count 4 of the amended Indictment. Therefore, it follows from this allegation of the Appeal that the Trail Panel did not hear the evidence that should have been heard, important for a correctly established state of facts, whereby the provisions of Article 299 of the CPC of BiH were violated.

(a) Conclusion of the Appellate Panel

88. In alleging in the Appeal the violation of the principle of fairness (that is, the right to a defense) by the Trial Panel, the Prosecution argues that the Trial Panel did not apply or incorrectly applied the provisions of Article 276 in conjunction with Article 261 of the CPC of BiH, which was important and had a negative impact on the correctness and completeness of the state of facts.

(3) During the presentation of the evidence, direct examination, cross-examination and redirect examination

89. According to the Appeal, the Trail Panel completely dismissed the Prosecution's Motion for a supplement to the evidentiary procedure by examining the proposed witness VG-025, or to wait for a completion of the procedure of removing the protective measure of non-disclosure of the identity before the ICTY pursuant to their Rules of Procedure and Evidence. As a result, the Prosecution had to abandon this piece of evidence. A different outcome would have allowed the Prosecution to examine the proposed witness VG-025 and prove that the accused Šekarić had beaten up the witness in the *Uzamnioca* camp. The Prosecution ended up in the same situation with its additional witness Adem Berberović, but this witness too had to be abandoned since his testifying was not arranged in due time.

90. With regard to the appellate allegations on this ground, the Appellate Panel is satisfied that the circumstances surrounding the failure of the Prosecution to enforce the relevant procedure of removal of the protective measures granted to witness VG-025 cannot be attributed to the Trial Panel. The Appellate Panel recalls the provisions of Article 13 of the CPC of BiH,[25] which provide that the accused/suspect shall be entitled to be brought before the Court in the shortest reasonable time period and to be tried without delay. Also, Article 239(2) of the CPC of BiH[26] expressly provides that the Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings.

91. In the opinion of the Appellate Panel, the Trial Panel entirely adhered to these legal provisions at the main trial in reaching their procedural decisions about the evidence proposed by the Prosecution. Furthermore, the Trial Panel provided a complete and clear reasoning in support of their decisions thereof, as outlined in sections 87-101 of the Trial Verdict, which cannot be at all questioned by the appellate objections raised by the Prosecution.

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shall be allowed. The party who called a witness shall directly examine the witness in question, but the judge or the presiding judge may at any stage of the examination ask the witness appropriate questions.

[25] Article 13(1): The suspect or accused shall be entitled to be brought before the Court in the shortest reasonable time period and to be tried without delay; (2) The Court shall also be bound to conduct the proceedings without delay and to prevent any abuse of the rights of any participant in the criminal proceedings; (3) The duration of custody must be reduced to the shortest necessary time.

[26] Article 239(2): It is the duty of the judge or the presiding judge to ensure that the subject matter is fully examined, that the truth is found and that everything is eliminated that prolongs the proceedings but does not serve to clarify the matter.

92. In that respect, the Trial Panel found in para. 101 of the Verdict that the inability to accommodate the Prosecution's Motion for the removal of a protective measure in a three-month period by the ICTY, in this specific case amounted to an undue delay of the proceeding to the detriment of the Accused, since he was in custody. In addition, when examining the possibility of obtaining the testimony of witness VG-025, the Trial Panel was correct in finding that the witness was capable of testifying directly and orally before the court, which *eo ipso* did not fulfil the requirements set forth under Article 273(2) of the CPC of BiH for reading out the statement of this witness given during the investigation. The Prosecutor himself, probably faced with such a procedural situation, abandoned calling this witness at the main trial.

93. With regard to the examination of witness Adem Berberović, as it follows from para. 110 of the first instance Verdict, the Trial Panel left the possibility to the Prosecutor to secure the presence of this witness at the main trial; being unable to do so, the Prosecutor abandoned this witness.

94. Due to all the above reasons, the Appellate Panel dismisses the allegations of the Appeal that the Trial Verdict made an essential violation of the principle of fairness, which resulted in the incompletely established account of facts, since the Prosecutor himself abandoned the evidence he proposed. In such a legal situation, the Appellate Panel upholds as correct the conclusion of the Trial Panel that the Prosecutor failed to prove that the Accused had committed the offenses in the *Uzamnica* camp which were charged under Count 4 of the amended Indictment.

C. APPEAL OF THE ACCUSED DRAGAN ŠEKARIĆ – CONVICTING PART OF THE VERDICT

1. Essential violations of the criminal procedure

95. Having examined the Accused's Appeal, the Appellate Panel notes that the appellate allegations related to the essential violation of the criminal procedure and erroneously and incompletely established facts are intertwined. For the sake of systematicity, the Panel classified the objections per those two grounds for appeal, and analyzed and assessed their contents. In line with the legally prescribed primacy in their examining, the Panel will present them in this Verdict.

96. In his Appeal, the Accused argues that the Trial Panel accepted, in the scope of established facts, the ICTY Judgment in the case of *Mitar Vasiljević* and the conclusions therein, as the generally accepted fact. However, the Trial Panel was not consistent in accepting the positions taken in that Judgment. In spite of the fact that Bakira Hasečić was discredited in the ICTY Judgment as a witness who testified about the events in Kosovo Polje, her testimony was nevertheless evaluated as credible and relevant in the appealed Verdict.

97. The Accused objects to the lawfulness of the procedural action of identification of the Accused on the bases of photographs (attached to Exhibits T-3 and T-4), since it was not documented by audio records, which implies that the witnesses S-1 and Bakira Hasečić were previously coached by the persons who were also behind the tendentious adding of the *Goraždak* nickname to the Accused's name in his Personal File. In the opinion of the Accused, it should have been the witness S-3 who should have identified him at the main trial, as she was an eye-witness of the incidents in Kosovo Polje. She did not do that, however, explaining that she did not remember the perpetrator. In this respect, the Appeal points out the discrepancies between the statements of this witness and other witnesses-eye-witnesses when they described the Accused and the details relevant to his participation in the offenses charged.

98. None of the witnesses saw the very act of rape of witness S1, so the conviction may not be based exclusively on the testimony of the protected witness.

99. The Appeal also alleges the violation of the principles of justice and the CPC provisions in this proceeding, since the Accused was taken away and examined on the Prosecution premises by prosecutor Džermin Pašić and his associate Lejla Smajlović, who is a daughter of the President of the Court Panel that issued the first instance Verdict that found the Accused guilty. Such a course of action, the Appeal alleges, casts serious doubt on the impartiality and objectivity of judge Mira Smajlović, the President of the Panel, in particular because the Prosecution exerted certain pressure on the Accused and blackmailed him through this judge.

(a) Conclusions of the Appellate Panel

100. The Appellate Panel dismisses these allegations as unfounded.

101. First of all, having correctly analyzed and applied Article 15 of the CPC of BiH, Article 4 of the Law on the Transfer of Cases, and the Criteria for deciding about the facts established by the jurisprudence of the ICTY and the Court of BiH, the Trial Panel found that the BiH Prosecution Motion No. T 20 0 KTRZ 0006581 13 of 11 March 2014 was partly founded, so that the facts established under the ICTY first-instance Judgments in the case of *Milan and Sredoje Lukić* (IT-98-32/1-T) of 20 July 2009 and in the case of *Mitar Vasiljević* (IT-98-32-T) of 29 November 2002, were accepted as established.

102. This renders incorrect the appellate averment that the Trial Judgment in the case of *Mitar Vasiljević* was completely accepted as an established fact. Besides, the relevant provisions and the established criteria did not allow such a course of action, so that only specific facts from the ICTY Judgment were accepted and they were precisely listed in the Annex to the Decision of 14 April 2014 and Annex I of the appealed Verdict. Also, it was noted that the accepted facts were used in the proceeding only when they were supported by other presented evidence and assessed in accordance with the principle of free evaluation of evidence, as prescribed by the national criminal law.

103. Addressing the appellate objection to the identification of the Accused on the basis of photographs (attached to Exhibits T-3 and T-4) by witnesses S1 and Bakira Hasečić, the Appellate Panel notes the following: Article 85(3) and (4) of the CPC of BiH prescribes the method and procedure of identification of a person by witnesses in order to establish his/her identity. In this case, Witness Examination Records and the relevant photo documentation for S1 (T-3) and Bakira Hasečić (T-4) who were examined in the Prosecutor's Office were admitted in the case file. It was noted that both witnesses recognized the Accused on the photographs as the perpetrator of the criminal offenses. In the opinion of the Appellate Panel, such recognition does not represent the procedural action aimed at obtaining evidence within the meaning of the stated legal provision, and it was evaluated exclusively in connection with the testimony of those two witnesses in accordance with the principle of free evaluation of evidence. The fact that the two witnesses identified the Accused on the photographs on the relevant occasion did not bear either a decisive importance or any probative value when evaluating the evidence directly presented at the main trial, since the Panel evaluates this body of evidence exclusively when deciding about the decisive facts and the culpability of the Accused.

104. In addressing the appellate allegation relevant to the protective measures granted to witness S1, the Appellate Panel has taken into account Article 23 of the Law on the Protection of Witnesses under Threat and Vulnerable Witnesses that reads: "*The Court shall not base a conviction either solely or to a decisive extent on evidence provided according to Articles 11, or 14 through 22 of this Law.*" Article 3(1) of the same Law defines 'a witness under threat' as *"[…] A witness … whose personal security or the security of his family is endangered through his participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his testimony.* Article 14 of this Law defines hearing of a protected witness: "*In exceptional circumstances, where there is a manifest risk to the personal security of a witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given, or is likely to be aggravated by the testimony, the Court may conduct a witness protection hearing in accordance with Articles 15 through 23 of this Law."*

105. The first instance Verdict correctly grants the witness – aggrieved party S1 the status of "a witness under protective measures", and not the status of "a protected witness". Otherwise, the First Instance Panel should have examined the injured party pursuant to the provisions of Articles 15 through 23 of the Law on the Protection of Witnesses, which was not done in the specific case. Since the Trial Panel based its decision *inter alia* on the testimony of witness S1 as a witness under protection measures, whose identity was disclosed to the Defense, not as a "protected witness", no essential violations of the criminal procedure were made within the meaning of Article 297(1) of the CPC of BiH, that is, the appealed Verdict was not based on evidence that may not be used as the basis of a verdict under the provisions laid down in the procedural Code.

106. In the opinion of this Panel, the allegations concerning the essential violations of the criminal procedure arising from the prejudiced and biased conduct of Judge Mira Smajlović as the President of the Trial Panel, have no merit, since they are unsupported by either legal or factual basis of this case. This conclusion is additionally corroborated by the relevant jurisprudence of the Court of BiH and the decisions of the Constitutional Court of BiH which addressed the same objections.

107. In fact, no requirements were satisfied in the specific situation for a disqualification of the judge seized with the case pursuant to Article 29(b) and (f) of the CPC of BiH, which provides that a judge cannot perform his duties as a judge "*if the suspect or accused, his*

defense attorney, the Prosecutor, the injured party, his legal representative or power of attorney is his spouse or extramarital partner or direct blood relative to any degree whatsoever, and in a lateral line to the fourth degree, or relative by marriage to the second degree," or if "*circumstances exist that raise a reasonable suspicion as to his impartiality*." First of all, the Appellate Panel notes that expert associates are not included in the provision of Article 29(b) of the CPC of BiH, which would constitute the reason for the disqualification of the judge on the case. Furthermore, Article 29(f) of the CPC of BiH foresees general, not fixed reasons for disqualification, it gives the broadest possible formulation which allows a disqualification of a judge whenever there are any reasons that can raise reasonable (reasonable, but not the slightest) suspicion in a judge's impartiality. Article 20(g) of the CPC of BiH, which applies in this case, provides that "expert associates as well as investigators working for the Prosecutor's Office of Bosnia and Herzegovina under the authorization of the Prosecutor shall also be considered as authorized officials." Therefore, an expert associate, as an authorized official within the Prosecutor's Office of BiH, is duly authorized to work under the authority of the Prosecutor to whom he is subordinated, in accordance with the Rulebook on Internal Organization of the Prosecutor's Office of BiH. The duties of an expert associate are governed by the orders of the Prosecutor on the case, so an expert associate cannot act completely independently, nor can he/she made any final decisions in relation to investigations, indicting, and so on. Therefore, the fact that the daughter of the President of the Trial Panel in this criminal matter works as an expert associate in the Prosecutor's Office of BiH, cannot *per se* constitute the basis for a conclusion about the alleged partiality of the judge, while such partiality is not obvious. Furthermore, she was assigned as an associate to Prosecutor Džermin Pašić in another case in which the Accused had been examined, as he himself said. This conclusion is supported by the position taken by the Constitutional Court of BiH when deciding about the Appeal filed in the case of *Azra Miletić* (*Decision no. AP 1758/15 of 30 June 2015).*

108. Besides, pursuant to Article 32 of the CPC of BiH, the Accused was entitled to move for a disqualification of the judge should he believed that the circumstances existed that suggested the judge's impartiality. However, the Accused did not do that, nor did he provide any evidence in support of his allegation that he was subjected to certain pressure and extortion by the Prosecution precisely through judge Mira Smajlović. Therefore, the Appellate Panel dismisses these allegations as entirely illogical and unsubstantiated.

2. Erroneously or incompletely established facts

(a) Witness credibility, military engagement and identity of the accused Dragan Šekarić

109. The accused argues in his appeal that the state of facts the Trial Panel established by their free evaluation of evidence was erroneous and incomplete, and is based solely on the statements of witnesses, without being substantiated by a single piece of documentary evidence.

110. In that regard the accused argues that the First-Instance Panel actually did not accept defense witness statements in any segment, completely dismissing the testimony of the accused's uncle Miljko Topalović, and the testimony of his wife Branka Šekarić. The accused's wife gave her statement under oath at the main trial, and the Prosecutor did not in any way whatsoever bring into question the veracity of her statements, so that, according to the appeal, concerning such an evaluation made by the court one may legitimately raise the issue of the very legal possibility for the accused's relatives to testify at all. Thus, the court dismissed as unacceptable the testimony of Miljko Topalović, individually and in relation to the statements of witnesses S1, S3 and Mujesira Oprašić, which is wrong, for the statements of witnesses S1 and S3 are not fully consistent with regard to decisive facts concerning the recognition and identification of the accused as the perpetrator of the offenses in question.

111. Regarding the aforementioned, the appeal also raises the issue of witness Bakira Hasečić's credibility in relation to her claims that she saw the accused for the first time in 2005, which indicates that such a “sudden“ identification is a result of suggestion and imposition by the same opposing camp which threw witness S-1 into confusion. In support of the foregoing, the appeal refers to Bakira Hasečić’s statement given before the ICTY (O-6), in which there is not a single detail concerning the event in Kosovo polje on 3 June 1992, which would have been logical since her family was in that house, her mother and her brother with his family, not some acquaintances whose fates she might not remember.

112. The appeal goes on to say that the First-Instance Panel reasoned its dismissal of the alibi by the fact that witnesses Miljko Topalović and Branka Čarapić mentioned certain dates in their statements at the main trial, which, according to the accused, should have been accepted as a greater sign of probability, not a lesser one, since after twenty-three

years following the war witnesses can realistically only remember certain events and situations that happened around the dates that are important to them. Also dismissed is the testimony of witness Sejdo Močević in the part where he said the accused had told him that his uncle had arrived to pick him up and take him to Višegrad, on the grounds that it was a hear-say evidence since the accused was not obliged to tell truth to the witness.

113. The appeal challenges the facts related to the military role and identity of the accused, more specifically the conclusion made by the First-Instance Panel that during the critical period the accused participated in the attack on Višegrad, and that at the time of perpetration of the crimes in the settlement of Kosovo polje (municipality of Višegrad) he was engaged in the military. Particularly noted is Prosecution Exhibit T-20, Personnel File for Dragan Šekarić, with a handwritten note "Goraždak", which, in all fairness, as the accused himself said, the first-instance panel did not take into account while making its decision, but the Exhibit nonetheless served for further misuses of the investigation and false suggestion to the witnesses to identify the accused as the perpetrator of criminal offenses. In support of the aforementioned is the statement given by witness S-1 (Exhibit O-2), in which she said that MUP Goražde inspector, Šehović, had told her that "Goraždak's" real name, since she only knew his nickname, was Dragan Šekarić, which, according to the appeal, brought this witness into confusion.

114. In that regard, the conclusion of the challenged verdict in Para 366 is wrong, since, according to the defense, thousands people from Goražde – Serbs, were already populating Višegrad in the month of May, and each of them could have been nicknamed "Goraždak". Also, Almir Aljić was not heard as a witness, so it remained unknown how he came to learn that information, so as to convey it to the witness Hajrudin Ahmetspahić later on.

115. It follows from the documentation presented by the defense that since 1999 the accused was actually continuously moving between Novo Goražde and Goražde, that he was active as a president of the association of returnees "Zdravo komšija (Hello Neighbor)", and that he has returned to his house where the association's seat was undoubtedly located, that throughout that period he worked with other associations of returnees, with numerous governmental and non-governmental organizations, all of which begs the question as to how he was able to do all that, meaning to be exposed to the eyes of the public all the time, to the victims and the media, that have been paying attention to the

return of refugees, had he indeed committed the criminal offense he has been charged with. In support of the aforementioned, the accused refers to the testimony of Miljko Topalović, who clearly said that the accused returned to the Goražde war theater by a Mali Zvornik-Sokolac detour, via Rogatica, all the way to Goražde, only to be wounded after some time, on 25 June 1992 (which is beyond dispute).

116. The appeal stresses that the conviction handed down by the court is based on the statements of witnesses S1, S3, Bakira Hasečić and Amela Međuseljac, and no documentary evidence whatsoever, so that all the events in the settlement of Kosovo polje on the relevant day, as well as the accused's participation therein, remain on the level of suspicion with regard to the accused, which should have resulted in an acquittal. The mentioned witnesses are mutually related, either by blood or by marriage, and are members of the "Žene žrtve rata" Association, under strict supervision of Bakira Hasečić as association president.

(b) Appellate Panel's conclusions

117. Analyzing the challenged verdict, the Appellate Panel finds ill-founded the appellate claims that the First-Instance Panel erred when it did not credit, in any segment whatsoever, the statements made by defense witnesses, completely rejecting the testimony of the accused's uncle Miljko Topalović and wife Branka Šekarić. It is true, as the appeal claims, that the accused's wife gave her statement under oath at the main trial; however, that fact alone is not a guarantee that the witness was sincere. The thing is that in situations when close relatives of accused persons use their legal possibility and testify directly at the main trial, it is necessary, while evaluating the veracity and credibility of such testimony, to approach it with special attention, especially with regard to the evaluation of their motives.

118. In that regard, the Trial Panel properly evaluated the testimony of Branka Šekarić, bringing it into connection with other control evidence, which did not corroborate the statements given by the witness; on the contrary, the control evidence seriously brought them into question in all important segments. The Defense did not support the witness's claims about an alleged meeting at the Novi Grad municipality building by any documentary evidence, possibly a transcript from the meeting, nor was the presence of the accused and witness Hasečić at the meeting supported by statements of other persons that were present there (Blagoje Petrović and Himzo Bajrović), although it is visible from the testimony of

Branka Šekarić that current whereabouts of those two people are known. This means they were available to the Defense, but it never really proposed that they be heard concerning the circumstance in question.

119. Also, besides the claim that her husband's war duties were not known to her, the witness said decidedly at the main trial that immediately after reading the amended Indictment she knew who the protected witnesses S-2 and S-4 were, given their longtime acquaintance since 1999. Bearing in mind that the mentioned witnesses stated at the main trial that the accused often talked with his friends about his wartime activities in Višegrad, and that together with them he was engaged in providing assistance in securing defense witnesses for the accused Milan Lukić, that, according to this Panel too, renders completely logical the conclusion that the witness must have had information about the wartime activities of her husband Dragan Šekarić. Although the Trial Panel did not credit the statements of witnesses S-2 and S-4 in the part related to the charges pertaining to the village of Dušće, of which the accused was acquitted, it correctly found, bearing in mind that they had had friendly relations for years before the war, that the accused indeed used to describe his wartime activities in the territory of Višegrad during 1992. The Appellate Panel concludes that those statements are logical and convincing, and as such were used for the purpose of checking the testimony of witness Branka Šekarić.

120. The Panel has no dilemma about the motives of witness Miljko Topalović to testify to the benefit of the accused, by trying to provide the accused with an alibi for the period when the attack on Kokino selo took place, but also for the events that took place in Višegrad, as described in Counts 2 and 3 of the amended Indictment. Contrary to the appeal's grievances, the Trial Panel properly concluded that the testimony of this witness is in contravention of the other adduced evidence, especially the consistent evidence given by witnesses S-1, S-3 and witness Mujesira Oprašić, which beyond doubt identify the presence of the accused in the settlements around Višegrad on 25 May and 3 June 1992, while the Prosecution witnesses do not identify the accused in the village of Lozje on 22 May 1992 (the acquitting part of the verdict).

121. The appeal unsuccessfully insists on the claims that the statements made by witnesses S1 and S3 are not fully consistent with regard to the decisive facts about the identification of the accused as the perpetrator of the crimes in question.

122. The Panel will later on address the issue of witness–victim S1's credibility, while it will now present reasons for which it upheld the position taken by the Trial Panel that the testimony of witness Miljko Topalović, the accused's uncle, is biased and unconvincing. In building an alibi for the accused, witnesses Miljko Topalović and Branka Čarapić mentioned certain events which they linked to specific dates, precisely describing and setting the accused's stay in the territory of Serbia exactly during the period covered by the amended Indictment, which, according to the Appellate Panel, cannot be accepted as a sign of higher probability, or as a fact that twenty-three years after the war the witnesses can realistically only remember certain events and situations that took place around certain dates important to them, as the appeal groundlessly emphasizes.

123. It is true that during their testimony witnesses evoke the past and link certain events from the past with the dates important to them; however of crucial importance in evaluating whether such testimony is credible or not is the manner of presentation, as well as the details that provide sincerity and credibility to the description of details the witness presents. In that regard, the Trial Panel has properly concluded that the mentioned witnesses tactically presented details of certain events, and immediately after the mentioned dates, without any prompting question by defense counsel, they themselves elaborated on the reasons why they remember the accused's stay in Serbia, trying to use any possible avenue to prove that the accused could not have been present in the territory of Višegrad in late May 1992 or early June of that year, which is the time of commission of the crime he has been found guilty of. The Appellate Panel, contrary to the appellate arguments, concluded that their testimonies in that regard were prepared and coached beforehand, especially if compared to the convincing and consistent testimonies of eye-witnesses to the crimes in question, who clearly confirmed the accused's presence in the territory of Višegrad, specifically in the village of Kosovo polje during the critical period.

124. The Trial Panel has properly found that statements by witnesses S1 and S3 were convincing and objective, mutually consistent, and in important segments well-corroborated by witnesses Bakira Hasečić, Amela Međuseljac and Mujesira Oprašić. Although to a lesser extent there are certain discrepancies and departures with regard to the physical description of the accused, which is a fact the appeal unsuccessfully insists on as being decisive in undermining their credibility, the Appellate Panel concludes that in that regard the witnesses provided a reasonable and logical explanation.

125. The appeal points to certain discrepancies in the statements of witness S1, specifically that in one of her statements[27] she said that the person who raped her had "greyish hair", only to repeatedly change that statement about the color of his hair, from completely grey, greyish, to completely dark hair, which is what she stated at the main trial. During the cross-examination by defense counsel at the main trial, the witness provided an acceptable and logical explanation for such minor departures in her description of the accused, maintaining the person was of medium height, with short haircut, 25-30 years old, in a camouflage uniform, armed with an automatic rifle, and a pistol. She earlier said he had had *"some grey hairs",* which she explained by testifying that *"Come to think of it, his hair was dark, whether it was brown or black I was not able to see at the moment … I was depressed … If you had been there in my place maybe his hair would have looked red to you."*

126. In that regard, the challenged verdict, Paras. 308-324, convincingly explained why it credited this witness. Before it was presented in the verdict, following a thorough and careful analysis of the evidence, the First-Instance Panel made an evaluation of its substance, according to which the witness not only provided a positive identification of the accused as the perpetrator of the heinous crime, but also said that her testimony is consistent in decisive elements, detailed, objective, impartial, and thus convincing. The Appellate Panel upheld this evaluation made by the First-Instance Panel without any dilemma.

127. In so concluding, the Appellate Panel additionally bore in mind that the victim not only described in detail the chronology and the venue of the events, but also described her inner experience before and after the event. Notable are her descriptions of the events and her condition immediately before the encounter with the accused himself and the rape, when a "bearded soldier entered the house," and, pointing an automatic rifle, demanded money and gold from the witness, cursing her "*Balija* mother." The witness gave the following description: "*He started yelling when he saw there was no money, he cursed and shouted, the kids got hold of his legs and begged him not to kill me, he just tossed them away so they hit the doorstep. At one moment I felt as if I was losing conscience, and the*

[27] **O–2** Transcript of examination of Witness S-1, State Investigation and Protection Agency, No. 17-04/2-04-.2-598/06 dated 17 October 2006.

next thing I remember was that I came to all soaked, him standing by the kitchen sink, probably having thrown some water on me.“

128. The witness described the details of the very act of rape by saying: “*I begged him not to do that to me, I cursed him with all the curses, I was not able to do anything, I did not have any strength left in me. I was shivering, I did not have any life left in me. I was thinking why the younger son was crying, I thought God knows what just happened. A button fell off as he was turning me around, and then he yelled at me to hurry up and take off my trousers, but as I did not have any strength to do that he took them off himself. He pushed me into a horizontal position and raped me ... while holding my chin and forcing me to watch him in the face and kiss him ... which I did not want to do.”*

129. This Panel too believes that the presented oral evidence is sufficiently illustrating, plastic in details and ultimately correct, so as not to raise and doubt into the veracity of descriptions of the course of events, exactly in the manner as the witness described, while additional weight to her statement is given by the words only a victim of such a horrible act may say: ”*I have it all written down in my soul, all of it … it’s as if I am watching all that again, and it will never leave me for as long as I live … never!”*

130. Ultimately, in all her statements, including those given at the main trial, the witness categorically claimed that the accused had himself told her that his nickname was “Goraždak.” She also explained that in the state of fear in which she was at the time she might have missed the color of his hair, not being able to tell with certainty whether it was grey for sure or whether she only thought so due to the specific circumstances she found herself in, allowing that his hair might have been of a different color altogether; from her point of view that detail was simply not so important at the moment, which is why minor departures in the physical description of the accused, according to this Panel too, do not take anything away from the value of her testimony and her identification of the accused. In support of the identification of the accused by the direct victim is the fact that already for the investigation record she identified him from the presented photo documentation[28].

[28] **T–3 –** Record of examination of witness S-1 TBiH No. T20 0 KTRZ 0006581 13, dated 29 November 2013, with attached photodocumentation, TBiH, No. T20 0 KTRZ 0006581 13, dated 20 November 2013.

131. Contrary to the appeals claims, both witnesses S1 and S3 gave an identical description of the soldiers arrival and their behavior in front of the house, as the verdict stated in detail in Para. 232 and 233. The fact that witness S-3 cannot with certainty pinpoint the exact moment when she found out that the person nicknamed “Goraždak” was actually the accused Dragan Šekarić, describing in her investigative statement[29] that she had learned the information that same day, does not compromise her statement regarding the identification of the accused. In that context, understandable and logical are minor discrepancies in the statements of the mentioned witnesses, since on the critical day witness S3 too was raped, but by another soldier, not by the accused Dragan Šekarić, and that, logically, she could not have physically been present during the rape of the other victim. Witness S3 said that at the moment when she was forced outside of the house she found witness S1's children there, lined up against the wall, while S1 was just descending from the upper floor of the house, all in tears, begging them not to harm her and her children.

132. Possible minor discrepancies between the statements given by witnesses S1 and S3 are exclusively a consequence of the variability of human perception, as well as the place where a particular witness was located when the critical event took place. This can only be expected given the state of fear and uncertainty in which the victims found themselves, having stayed in the house with their minor children and mother-in-law, and who were, as such, completely vulnerable and unprotected, left to the mercy of the accused and the group of soldiers with whom he arrived. That S3 did not recognize the accused at the main trial is understandable given the lapse of time and the fact that she was not a direct victim of his offenses, but witness S1, who herself, for the sake of illustration testified about the state of witness S3 on the given occasion, stated that S3 was trembling with fear while the soldiers were laughing at her, saying there was no need to plug the coffee grinder into the socket for she was shaking so much that she could grind the coffee by herself.

133. The Panel finds ill-founded the accused’s persistent insistence in his appeal that the grounds for his indictment and conviction in the proceedings was Prosecution Exhibit T-20, Personnel File for Dragan Šekarić, where there was a handwritten note “Goraždak,” which, in all fairness, as the accused himself said, the First-Instance Panel did not take into

[29] **O- 4-** Record of examination of witness S-3, TBiH, No. T20 0 KTRZ 0006581 13, dated 25 December 2013.

account while making its decision, but the Exhibit nonetheless served for further misuses of the investigation and false suggestion to the witnesses to identify the accused as the perpetrator of criminal offenses.

134. First of all, the first-instance verdict provided a detailed analysis of the statements of all witnesses who have identified the accused as the person who at the critical time used the nickname of “Goraždak” and participated in the attack on Višegrad. It is possible that many Serbs from Goražde, already during May 1992, were settled in Višegrad, and that any one of them could have been nicknamed “Goraždak”; however only one, specifically identified, “Goraždak” was a member of Milan Lukić's group, which in those days committed crimes against Muslims. It is exactly this “Goraždak” that the witnesses identified as Dragan Šekarić, and not only because they somewhere heard that information, but they recognized him as the person who on 3 June 1992 committed the act of rape against victim S1 and the murder of victim Fatima Jamak.

135. Witness Mujesira Oprašić[30] testified that the accused was present in the territory of the Višegrad municipality during that period. The Trial Panel properly credited her testimony as a corroborating one, since she identified the accused under the mentioned nickname and as a member of Milan Lukić’s group, providing a detailed description of the situation when on 25 May 1992, a couple of days before the events in Kosovo polje, a group of soldiers arrived in the village of Hanište, some 1.5 km from Višegrad, which included Milan Lukić, a person they called “Goraždak”, Brano Čubrilović and Budo Kovačević, both from Višegrad. The witness identified the accused in the courtroom by saying *“Yes you are him, in flash and blood!”.*

136. In that regard the Panel fully credits the argumentation the challenged verdict presented in Paras. 341-344, where the Trial Panel provided its reasons why it credited the testimony of Mujesira Oprašić, finding it credible and convincing, which is a conclusion that could not have been brought into question by the fact that the witness could not identify Milan Lukić on the photo shown by the accused’s defense counsel. The Defense tried to support its arguments by stressing that defense witness Branka Čarapić did manage to identify Milan Lukić on the same photo, which, according to this Panel, was but logical,

because as a resident of Višegrad she was able to see him for a while, unlike witness Oprašić, who remembers him by the traumatic event. Before her testimony, witness Čarapić was surely contacted by the Defense, and the photograph in question could have been shown to her beforehand.

137. Witness Hajrudin Ahmetspahić also testified about the presence of the accused in the territory of Višegrad. He too mentioned a soldier nicknamed "Goraždak," whose identity he learned only subsequently from his friend Almir Aljić. The Defense challenged these allegations, arguing that it remained unknown just how Aljić learned that information so as to convey it to witness Hajrudin Ahmetspahić later on. However, although this is an indirect piece of information, the testimony of this witness was properly used only as corroborating evidence in relation to the other evidence. The Panel was satisfied that this was a genuine witness who told the truth and who, despite the ordeal he and his close family members went through (his sister and mother were killed), did not want to incriminate the accused at all cost, based on his claims when, during the examination by the prosecutor, he said "*While I was in the camp, he never visited there."* Therefore, the witness is categorical that he had not once seen the person he knew as Dragan Šekarić a.k.a. "Goraždak" at the Uzamnica camp, while in his investigative statement he also said he did not know whether that person beat up any inmate in the camp while he was detained there.

138. The Panel will here address the appellate grievances aimed at undermining the credibility of witness Bakira Hasečić and her daughter Amela Međuseljac. The issue here is not a "sudden" identification of the accused by witness Hasečić no sooner than in 2005, as the accused argues, but the very process of identifying the perpetrator throughout a long period of time, as the witness explained in detail. She said she had learned information about the accused exactly through her engagement at the Association for the Return of Displaced Persons in the territory of Višegrad, and in that capacity she collected pictures, data and information from her Serb friends about persons she suspected of having committed crimes in Višegrad, whom she has been "tracking down" since 1998. She said that that year, for the first time, with a person of Serb ethnicity acting as an intermediary, having seen the accused, she became sure that Dragan Šekarić a.k.a. Goraždak and "Pive"

[30] Rebuttal witness Mujesira Oprašić testified at the hearing held on 12 November 2014, when she was directly examined by the prosecutor, while her cross-examination took place on 26 November 2014.

is actually the person who on the critical occasion was part of the group of soldiers in front of Bakir Kos's house.

139. The Appellate Panel, contrary to the appellate arguments that she had never before mentioned the critical event in Kosovo polje, finds credible her testimony at the main trial, in which she claimed that that was not the only statement she gave to the investigators and that the statement presented at the main trial was not complete. On the other hand, the Defense did not manage to make at least less probable the fact that it was an authentic statement, since it was not signed or verified by the ICTY, while at the main trial defense counsel himself, as properly noted and appreciated by the Trial Panel, was not able to say decidedly how he came into possession of the mentioned statement, saying only that it was a public document and that it is available at the ICTY web page.

140. The ICTY Chamber was satisfied, in the Judgment in *Mitar Vasiljević,* that the credibility of witness Bakira Hasečić (who testified under protective measures granted in the case) was so undermined during the course of the trial that her evidence of identification of the Accused (Mitar Vasiljević) should not be relied upon (para 164. of the Judgment No. IT-98-32). According to the Appellate Panel, the foregoing cannot affect the present criminal matter in any way. In particular, such a finding cannot be accepted as an established fact, as the appeal unreasonably indicated, since it has not met the admissibility criteria for the proposed established facts, listed in the *Prosecutor v. Momčilo Krajišnik*[31] and accepted in the case law of this Court. Pursuant to the principle of free evaluation of evidence, the Court has evaluated this witness's evidence in relation to the concrete Accused and the concrete acts charged against him. Therefore, any other court's subjective evaluation of the evidence and credibility of the same witness and other circumstances and persons too, can be of no significance in this case.

141. The Appellate Panel has held that witnesses Hasečić and Međuseljac presented, in a very convincing way, their observations of the critical occasion when a group of armed men had arrived in front of Bakir Kos's house, and the subsequent events to the extent to which they could see them, given the position where they had been in hiding – Bakira Hasečić hid in the "upper (part of the) garden", or near the outdoor kitchen, and Amela

Međuseljac first in the “upper garden” too and thereupon below the landing (the stairs). In this regard, the Trial Panel properly credited the testimonies of witnesses Hasečić and Međuseljac. The Trial Panel found that, from the place where they had been in hiding, the witnesses could clearly see and hear the events about which they testified. The testimonies of the referenced witnesses do not contradict each other, and they are consistent with regard to the part of the events about which they testified. The Appellate Panel has completely accepted the findings of the contested Verdict relating to the referenced circumstances, as presented in paras 294 and 295:

> “... Witness Međuseljac did not say that, at the beginning of the events that took place in front of Bakir Kos’s house, when she was in the garden together with the other villagers, her mother was in the garden too. This is logical given the fact that this is the time during which witness Bakira Hasečić had been in hiding behind the outdoor kitchen in the immediate vicinity of her house, as she testified.”
>
> “No sooner than soldiers took the injured party Fatima Jamak towards her house, when she heard two shots, did witness Hasečić flee again towards the garden, and reached a barn, which was around ten meters away from the place where she had been in hiding initially, while her daughter stayed hidden below the landing near the house, when the Accused returned to the front of Bakir Kos’s house, demanding that witness S-1 bring him a glass of water.”

142. In support of these findings, the Trial Panel noted it too had visited the crime scene. The Trial Panel was satisfied that, from the place were witness Hasečić had stood, according to her testimony, the parts of the buildings she mentioned in her testimony could be seen, and that from this very place, she could watch, in part, the major parts of the event developing in front of Bakir Kos's house. Witnesses S-1 and S-3 testified very comprehensively and consistently about the criminal act of rape and the events preceding the rape, including Fatima Jamak’s apprehension and execution. In addition to the foregoing, this witness’s testimony was evaluated exclusively as corroborative evidence, rather than the piece of evidence on which the convicting verdict against the Accused is based. The Appellate Panel has noted that, even without the testimonies of witnesses

[31] Case No. IR-00-39-T, Decision on the Prosecution's Motion to accept the adjudicated facts and the witnesses' written statements pursuant to Rule 92 *bis*, of 28 February 2003.

Hasečić and Međuseljac, the Court would still have drawn the same conclusion, namely that the Accused is guilty of the criminal acts committed in Kosovo Polje.

143. In this regard, the Accused's averments, that the convicting Verdict is based on no documentary evidence and on the statements of witnesses S1, S3, Bakira Hasečić and Amela Međuseljac, who are mutually related either by blood or marriage, and who are members of the "Women-War Victims" Association and who are directly controlled by Bakira Hasečić as the President of the referenced Association, are pretentious and ill-founded. Highlighted throughout the whole appeal is an alleged conspiracy and fabrication of the charges against the Accused. Specifically, the appeal stated that witness S-1 and Bakira Hasečić were coached by the persons (who were) behind the tendentious attributing of the nickname "Goraždak" to the Accused's name on his Personnel File, including one Šehović, inspector of the MoI Goražde.

144. The Appellate Panel has not accepted such allegations as convincing. In addition, the Appellate Panel has not accepted the Accused's efforts to exculpate himself through the activities of the "Zdravo komšija" Association of Citizens-Returnees („Hello Neighbor"), as its President. On the contrary, the Appellate Panel has held that, in addition to the commonly known fact that one's physical appearance changes over the elapsed period of time, the Accused's acts or his conscious exposure to the public, victims and the media which covered the return of refugees, directly aimed at the conscious building of his alibi for the referenced war events. Logically, who would believe that the person actively engaged in the process of return of displaced persons and their reconciliation might be a person who perpetrated crimes in 1992.

145. As to the Accused's military engagement, his unit and personnel record showed that the Accused was formally and legally engaged in the military post 7094 Goražde (as a member of the Goražde Brigade, during the period from 4 May 1992 to 28 August 1992). According to this Panel too, it ensues beyond a doubt that during the critical period the Accused was present in the territory of the Višegrad municipality, where he was nicknamed "Goraždak" exactly for the fact that he had arrived from the Goražde territory. Such a proper reasoning of the Trial Panel cannot be brought into question by the Accused's statement that, after May 19, the Goražde – Višegrad and Višegrad – Republic of Serbia roads were closed. In this regard, credited was the testimony of witness Sejdo Močević. At the main trial, witness Močević gave objective and unbiased evidence about the events which had

occurred in the Kokino village on 22 May 1992. In a part of his testimony, witness Močević denied that, on the referenced date, the Accused was present in Goražde. The witness stated that exactly the Accused told him once that, in late May 1992, his uncle had brought him to Višegrad. The testimony of witness Močević was properly correlated with the testimony of witness Mujesira Oprašić. Witness Oprašić also connected the presence of the accused Dragan Šekarić's in the territory of the Višegrad municipality precisely with the period of late May, or early June 1992 (as reasoned in this Verdict).

146. In view of all the foregoing, the Appellate Panel has fully upheld the Trial Panel's findings regarding the Accused's identification, as presented in paras 323 and 348 of the Trial Verdict:

> "The Panel finds it useful to note that the Accused was not identified exclusively based on the testimonies of these two witnesses, but rather based on the evaluation of all the evidence adduced to this effect."

> "Regardless of the referenced fact, the Panel has already explained which evidence was the footing for its finding that the Accused used the nickname "Goraždak" at the time when he acted with a group of soldiers, not only when he committed the crime of which he was found guilty, but rather in other situations too, which the witnesses Mujesira Oprašić and Hajrudin Ahmetspahić described in their evidence, and correlated the Accused's physical appearance and full name with the referenced nickname too."

(c) <u>The rape of witness S1 and the murder of Fatima Jamak</u>

147. The appeal stated that the Trial Panel erred in finding the Accused guilty of the rape of witness S1 and the murder of Fatima Jamak, because the Prosecution neither disposed of nor offered sufficient evidence from which such a finding would ensue beyond a doubt. To this effect, the appeal reiterated that the testimonies of witnesses S1, S3, Amela Međuseljac and Bakira Hasečić are adjusted to a large extent, but in relation to the irrelevant facts, while they are completely uncoordinated in relation to the decisive facts. This is so because both offenses are, in fact, subsumed only to the testimony of witness S1.

148. According to the appeal, the Trial Panel did not at all consider the statement of witness S3, in the part where she stated that the person who had killed Fatima Jamak came to the water fountain, washed his face and said *„It hasn't been so hard for me since the Croatian battlefield!“.* According to the Accused, this clearly contradicts the testimony of witness Amela Međuseljac. Witness Međuseljac presented what she had allegedly heard being hidden below the stairs, which certainly was not the quoted wording. The presence of witness Bakira Hasečić at the crime scene on the critical day is highly questionable, because neither witness Šefket Jamak nor witness S3 mentioned she was present there on 3 June 1992. In addition, witness Jamak stated he had met her (witness Hasečić) for the first time several days after the critical incident. According to the Defense, witness Jamak stated that Bakira Hasečić's brother, Bakir Kos, told him a couple of years ago that the person who had killed his wife Fatima Jamak had been convicted.

(d) Conclusions of the Appellate Panel

149. The Appellate Panel will first deal with the crime of rape of the injured party S1 committed by the accused Dragan Šekarić.

150. It was established beyond a reasonable doubt that, during the period preceding the critical incident, the Accused was indeed present in the territory of the Višegrad municipality and in Bakir Kos's frontyard too on the very day of 3 June 1992. The foregoing fact, in addition to many other facts and the circumstances relating to the events which had occurred before the critical incident, in the course of and after the incident itself, the way in which the Trial Verdict presented them, in their entirety, regardless of the extent to which they were established based on circumstantial evidence, and primarily the testimony of the injured party S1, provided the necessary viability and the absolute belief that the rape was indeed committed in the way the injured party described (paras. 218-227 of the Verdict). In addition to the crucial factual details, there are sufficient factual details of supporting and controlling significance, preventing the presentation of the incident as fabricated, contrary to what was presented by the injured party as the direct victim of the perpetrator of rape, or what could be attributed to the victim's false testimony, on which the appeal persisted. According to the Appellate Panel, the Accused's appeal in this context unreasonably contests the validity of the Trial Verdict's circumstantial findings.

151. The Panel has already addressed the credibility of witness S1. The Panel has concluded that the accused Dragan Šekarić was undoubtedly identified by witness S-1 as the person who had, on the critical day, introduced himself as Dragan, used the nickname "Goraždak" and that he was none other than the accused Dragan Šekarić. The referenced fact was crucial for the establishment of the Accused's guilt given the fact that the Defense did not contest at all that the injured party S1 was raped, but by some other soldier rather than the Accused. According to the Panel, an important detail is the witness S-1's statement that, after she had returned from her mother-in-law's place, one of the soldiers approached her, asking her why she was frightened and trembling. Thereupon, this soldier told her she should feel no fear, that his name was "Goraždak" and that he was "in charge" there. Witness S-1 begged him not to harm the children. She told him they could kill her but not to touch the children. The Accused responded that no one would harm them and that he was a commander there. He also added he was originally from Goražde, but escaped from the area because the "Balijas" had mistreated him, wherefore came to Višegrad to seek revenge.

152. The other characteristic detail from witness S-1's testimony, regarding her condition during the very act of rape, should be added to the foregoing too: "*I trembled; there was no life in me anymore. I was thinking why my younger son was crying. I thought God knows what had happened."* Witness S-1 also stated that, after the rape, she went out from the house. Soldiers had their coffee, and one of the present persons offered her a cigarette. She could neither hold it in her mouth nor lit it up. The witness remembered it was exactly Dragan who said: "*Stop it, woman! Stop trembling and shaking! Let me lit up the cigarette!"*

153. It is established beyond a doubt that, on the critical occasion, or during the very act of rape, the only present person in addition to the Accused was the injured party S-1. According to this Panel too, the foregoing fact does not at all reduce the probative value of the credibility of this witness's testimony for the purpose of convicting the Accused on the referenced charges. Specifically, even if the appellate complaint, that the Verdict was, in this part, based exclusively on her testimony which contradicts the Accused's one, were accepted, it would not diminish the quality of the evidence at issue. The Appellate Panel has noted that the court is inherently entitled to establish the facts pursuant to the principle of free evaluation of evidence, and in accordance with deep personal belief of each judge individually. This is a wide discretionary power subjected to a limited number of restrictions.

However, no modern continental law system refers any more to the principle reflected in the Latin maxim of *unus testis nullus testis* (one witness does not suffice)[32] which requires testimonial corroboration of a single witness's evidence as to a fact in issue.[33] Accordingly, the decisive standard for establishing the relevance of facts is the quality of testimony, rather that the mere number of the pieces of evidence.

154. Such a finding is also supported by the view of the International Criminal Tribunal for Rwanda (ICTR). Having applied Rule 96 of the ICTY's and ICTR's Rules of Procedure and Evidence, the Trial Chamber found that *„the Chamber can rule on the basis of a single evidence provided such testimony is, in its opinion, relevant and credible."*[34]

155. In addition, the other witnesses too, particularly witness S3, corroborated the testimony of the injured party (paras 227-231 of the Verdict).

156. Considering such a state of facts, the Appellate Panel has held that the Accused's appellate complaints, relating to the proper nature of the factual basis of the contested Verdict, are ill-founded, and that the Trial Panel properly found, beyond a reasonable doubt, that the Accused's acts have satisfied the underlying elements of the criminal offense of rape under Article 172(1)(g) of the CC BiH.

157. The Trial Panel properly found, on the basis of the tendered Prosecution's evidence, that the Accused is guilty of the murder of Fatima Jamak too. The Trial Panel found that the rule of *in dubio pro reo* could not apply, namely that there was no suspicion *in favorem* of the Accused, so no acquittal could be rendered. The contested Verdict comprehensively reviewed the testimonies of all the witnesses who had been present near the Bakir Kos's

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[32] See the ICTY's case Prosecutor v. *Duško Tadić aka Dule,* before the Trial Chamber, Opinion and Judgment of 7 May 1997, para. 537.

[33] *Ibidem*, para. 536: "The general principle which the Rules require the Trial Chamber to apply is that any relevant evidence having probative value may be admitted into evidence unless its probative value is substantially outweighed by the need to ensure a fair trial32. Rule 96(i) alone deals with the issue of corroboration, and then only in the case of sexual assault, where it says that no corroboration is to be required. The function of this Sub-rule is stated in *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* by Virginia Morris and Michael P. Scharf. It is explained that this Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something long denied to victims of sexual assault by the common law. Thus what the Sub-rule certainly does not do is to justify any inference that in cases of crimes, other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary."

[34] Trial Judgment in *Akayesu*, paras. 134 and 135.

house and who presented their observations. With regard to the decisive facts, the Trial Panel evaluated each piece of evidence, individually and in combination.

158. Witness S1, who had eye-witnessed the whole incident, described the details of the death of the injured party Fatima Jamak. The crucial part of her testimony is presented in para. 257 of the contested Verdict:

> "They brought her to the front of the door. She cried: "Please, don't do this". I promptly stopped to watch what followed: there was a burning fire; they pushed her into that fire; one of them stood on the one side, and the other on the other side of her; Dragan stood behind her back. They pushed her into the hallway, into the fire...I have never known in my life that a human being can burn so fast...believe me...she gave...help... She cried for help: "Please, save me!" She lifted her hands in this way. She was turning around... I saw flames burning on her hands, flames were all around her as she turned around and burnt...However, that Dragan (nicknamed) "Goraždak" fired two rounds from his pistol...and that burning fire just got down on the ground...down on the ground...and she was gone."

159. Witness Šefket Jamak did not see the very act of forcing his wife into the burning house and her murder, as he had been in hiding in a shed near the house. He testified, however, that their house was torched, that he saw smoke and heard soldiers' voices and his wife's voice, and, shortly thereafter, he heard a shot too. Witnesses S-1, S-3 and Amela Međuseljac mentioned a detail that followed this murder. Specifically, they stated the Accused stood at the wash tub, washing his face and saying that (what he did this time) was the most difficult for him than ever. According to the Panel, witness S-3's averment, that on the critical occasion the Accused stated that *it had never been more difficult for him, not since the Croatian battlefield,* is not decisive, given the fact of how quickly the whole incident occurred, and given the fear the witness felt on the referenced day. Witness S-3 was certain and decisive that, on this occasion, "Goraždak" kept repeating that the injured party Fatima Jamak "*was her own judge!".* The Defense's Exhibit O-17[35], to which the appeal referred, and whose columns contained the true information about the Accused's salary, insurance status and allowances calculated for the period from 1 March 1992

[35] Certificate of the Institute for Insurance of Retired and Disabled Persons of Republika Srpska, Branch Office Istočno Sarajevo, number 000691/2014 of 4 February 2014, with attached Review of the Data Registered in the Register of Insurees of the ERC ZIPO – Sarajevo, personal number 0001209155902.

through 9 May 1992, is not significant to the extent to which it could contest this witness's averments. This is so particularly considering the fact that neither the Prosecution nor the Defense dealt with the Accused's possible, previous military engagement, proving or contesting it, but rather exclusively dealt with the critical period. Therefore, the referenced fact from witness S-3's testimony is of no crucial significance.

160. The Defense argued that, on the critical day, witness Bakira Hasečić was in no case present at the crime scene, and therefore could not have seen the referenced incidents. In support of the foregoing, the Defense underlined the fact that Šefket Jamak did not mention she had been present there. Witness Jamak himself, however, stated that he had never spoken about these events with either witness S-1 or Bakira Hasečić. According to this Panel, the foregoing reflects his mental state after his wife was murdered and his house torched, rather than his denial of witness Hasečić's presence. In this regard, it should be taken into account that, instead of searching for the perpetrator, the persons who experienced the loss of their bellowed ones accept this fact by accepting their destiny, and falling into the state of listlessness, or even numbness. Such a state of the witness is confirmed by his description of what he saw after coming out from the shed. The witness stated: "*I lost my mind when I saw that".* The witness subsequently learned from his conversations with the villagers, concretely with Bakir Kos that "*The man from Goražde, who had killed your wife, was arrested!"* but he paid no significant attention to it, because he had lost his house and the wife.

161. In view of all the foregoing, the Appellate Panel has concluded that the Trial Panel justifiably found the Accused guilty, as the direct perpetrator of the crime at issue. This is so considering that it was exactly the Accused who had pushed the injured party into the torched house, having used the fact that the two other soldiers held her hands, and thereupon, firing at point blank range from his fire weapon, killed the injured party Fatima Jamak, that is, by undertaking, with direct intent, the above described acts, he satisfied all the elements of the charges under Article 172(1)(a) of the CC BiH.

V. GROUNDS OF APPEAL UNDER ARTICLE 300 OF THE CPC BIH – SENTENCING AND THE DECISION ON THE COSTS OF PROCEEDINGS

A. STANDARDS OF REVIEW

162. Prior to addressing the concrete appellate grounds, 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.

163. 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. 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.

164. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all relevant legal provisions. Rather, the Appellate Panel will only reconsider the decision on sentence if the appellant establishes that the failure to apply all relevant legal provisions occasioned a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice resulted, the Appellate Panel will determine the correct sentence on the basis of Trial Panel's factual findings and the law correctly applied.

B. THE APPEAL FILED BY THE BIH PROSECUTOR'S OFFICE

165. The Prosecution's appeal stated that, by taking into account the purpose of punishment set forth in Article 39 of the CC BiH, and complying with the general rule for meting out the punishment under Article 48 of the CC BiH, the Trial Panel also bore in mind the manner in which the crime was committed, and the fact that the Accused acted with direct intent, as a form of guilt, in both instances. Having considered all the extenuating and aggravating circumstances on the part of the Accused, the Trial Panel found that the imposed sentence is proportionate to the gravity of the committed offense and its consequences, and that the purpose of punishment will be achieved by the sentence imposed.

166. The Prosecution, however, argued that the imposed sentence resulted from the over-evaluation of the extenuating circumstances found on the part of the Accused, with no adequate consideration and evaluation of the aggravating ones, particularly of the way in which the crime was committed and the degree of the Accused's criminal responsibility. The Accused showed a great degree of cruelty in the commission of the crime at issue, as a result of which the offense is characterized as a crime exceeding the general notion of the crime, and the Accused as a perpetrator with a high degree of guilt, wherefore the imposed sentence does not even reach a half of the magnitude of the legally prescribed punishment. The Prosecutor particularly raised the issue of motive for which the offense was committed, arguing that the purpose of punishment, in terms of both special and general deterrence, will not be achieved.

167. For the foregoing reasons, the Prosecution believes that the referenced circumstances clearly point to the fact that the Trial Panel did properly establish the facts pertaining to the crime and the Accused's guilt, but erred by finding, from the properly established facts, that the purpose of sentence could be achieved by the imposed sentence. The Prosecution therefore proposed that a sentence of long-term imprisonment for even a longer period of time be imposed, and that the Accused be ordered to reimburse the costs of criminal proceedings.

1. Conclusions of the Appellate Panel

168. In reviewing the decision on sentence insofar as contested by the Prosecution's appeal, the Appellate Panel took into account the Trial Panel's evaluation of the circumstances affecting the magnitude of punishment, as set forth in Article 48 of the CC BiH (general rules on meting out the punishment). Concretely, the Trial Verdict took into account the legal framework for sentencing concerning the crime at issue, the general rules relating to the selection of the type and length of sentence, the purpose of punishment, particularly the degree of the Accused's criminal liability, the circumstances in which the offense was perpetrated, the degree of danger or injury to the protected object, the past conduct of the perpetrator, his personal situation, his conduct after the perpetration of the criminal offense and motives for perpetrating the offense.

169. In the sentence individualization process, the Trial Panel took into account all the aggravating and extenuating circumstances on the part of the Accused. However, the Appellate Panel has held, as the Prosecution properly noted, that the extenuating circumstances in the concrete case were over-evaluated in relation to the aggravating ones. Thus, in addition to evaluating as the aggravating circumstances the degree of the Accused's liability and the fact that the Accused acted with the direct intent in both cases, as a form of guilty mind, the contested Verdict should have given special significance to the fact that such a form of intent is the gravest form of guilt in our legislation in terms of the intellectual and voluntary element. This is so because the Accused was aware of the gravity of all individual acts he had undertaken, he wanted both their commission and the consequences thereof, which certainly entails the imposing of the most stringent sentence.

170. The examination of particular charges has showed that the Accused obviously acted with a particular cruelty and ruthlessness by causing severe mental pain and suffering to his victims. Having used his domination and powers, on the one side, and the civilians' helplessness on the other side, the Accused committed the offenses directed against universal human values, as the protected object, which are the values constituting both the requirement and the basis for a common and human treatment, protected under numerous international conventions and documents. The particular gravity of these acts is also apparent from the fact that such acts are not subject to the statute of limitation.

171. The foregoing is obvious from the fact that the very act of rape was committed with the aim to humiliate, discriminate against and degrade the injured parties as persons, women and mothers. This transpires from the overall context of the situation in which the incriminating acts occurred, the way in which soldiers came to the front of her house, the way in which they treated the injured parties and their children, the insults and threats they hurled at them, the way they treated the elderly mother-in-law and, lastly, the accused Dragan Šekarić's relation with the injured party. This is so because, having taken advantage of the difficult situation of the injured parties and their minor children, who were alone and unprotected in the house, left to the mercy of a group of soldiers, the Accused abused his position of a member of armed formations, and forced witness S-1 into sexual intercourse.

172. The Accused showed particular cruelty by killing the injured party Fatima Jamak, whom he personally and forcibly pushed into a house, previously set on fire, using the words "*The old hag wants to buy off a car, with paying not even one mark! Well, now, you'll burn!"* After the injured party was consumed by the flames, the Accused fired a round into her. Therefore, the Appellate Panel too concluded that the injured party Fatima Jamak was killed in an extremely horrifying and brutal way, as the injured party's husband described in his testimony.

173. The perilous nature of the crime should also be viewed through the particular relation of the perpetrator towards the victim. This segment particularly allows for drawing conclusions about the special, greater danger of the crime, depending on who the victim of the committed crime actually is.

174. All the foregoing points to the extraordinary circumstances in which the crime was committed, and to the fact that the crime was committed by succumbing to base instincts – humiliation, violation of human dignity, retaliation and property gain. According to the Appellate Panel, all the foregoing augments the degree of subjective criminal responsibility on the part of the Accused.

175. The Trial Panel properly evaluated as extenuating circumstances the facts that the Accused is a family man and father of two children. However, in terms of quality and quantity, these facts do not qualify as facts that may result in imposing a more lenient sentence. Despite the foregoing, the Trial Panel did the opposite, and over-evaluated these

facts, that is, attributed excessive significance to them. Ultimately, there is no item of evidence proving that the Accused indeed expressed any remorse for the acts he committed, or that he in any way provided help to any of the victims after he committed the crime, which would show any remorse and wish for resocialization on his part.

176. Accordingly, the Appellate Panel granted, in part, the Prosecutor's appeal, and revised the Trial Verdict, in its sentencing part, by imposing on the Accused, for the committed crime, the sentence of imprisonment for a term of 17 (seventeen) years. The time the Accused spent in custody, running from 6 October 2014 onwards, shall be credited towards the imposed sentence. The Appellate Panel is satisfied that this sentence is proportionate with all the circumstances surrounding the concrete case, which affected the duration of the imposed sentence, that this sentence is just, and that the purpose of punishment, set forth in Article 39 of the CC BiH, will be thereby achieved as well.

177. Considering that the Accused's appeal was filed on the grounds of incorrectly and incompletely established state of facts, also appealed was the decision on criminal sanction, as set forth in Article 308 of the CPC BiH (extended effect of the appeal). However, due to the above presented reasons with regard to the decision on sentence, and in relation to the Prosecution's appeal, the Defense's appellate grounds advanced to this effect became irrelevant.

(a) Decision on the costs of criminal proceedings

178. In the Appellate Panel's view, the Prosecution's appellate argument, that the Trial Panel erred by relieving the Accused of the duty to reimburse the costs of criminal proceedings, is ill-founded.

179. Concretely, having properly applied Article 188(4) of the CPC BiH in the present case, the Trial Panel relieved the Accused of the costs of the proceedings in the part in which he was found guilty. The Appellate Panel took into account that the Accused is indigent, as obvious from his personal details contained in the case record. In addition, the Accused received a long-term imprisonment under the present, non-final Verdict, and objectively, he will be prevented from earning any income in the forthcoming period. The Appellate Panel accepted, in whole, the presented reasons, as well as the fact that, in the

course of the hitherto proceedings, the costs of (the Accused's) representation through an *ex officio* defense attorney were paid from within the Court's budget appropriations, wherefore a decision that the Accused must reimburse the costs of proceedings would jeopardize the support of the Accused and members of his family. Therefore, the Appellate Panel dismissed these Prosecution's appellate arguments as ill-founded.

180. In view of the foregoing, and pursuant to Article 310(1), as read with Article 314(1) of the CPC BiH, it was decided as stated in the Enacting Clause of the Verdict.

MINUTES-TAKER:	**PANEL PRESIDENT**
Legal Advisor	**J U D G E**
Medina Džerahović	***Redžib Begić***

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