

Bosna i Hercegovina

Босна и Херцеговина



**Sud Bosne i Hercegovine
Суд Босне и Херцеговине**

Case No. S1 1 K 014365 15 Krž 4

Rendered on: 8 February 2016

**Before the Appellate Panel composed of Judges: Mirko Božović, Presiding
Tihomir Lukes, Rapporteur
Mirza Jusufović, member**

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Vitomir Racković

SECOND INSTANCE JUDGMENT

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

Mr. Dževad Muratbegović

Counsel for the Accused:

Mr. Petko Pavlović, Attorney

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Number: S1 1 K 014365 15 Krž 4

Sarajevo, 8 February 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting in the Appellate Division Panel of Section I for War Crimes composed of Judge Mirko Božović, as the Panel Presiding, and judges Tihomir Lukes and Mirza Jusufović, as members of the Panel, with the participation of legal officer Ena Granić as the minutes-taker, in the criminal matter of the accused Vitomir Racković, for the criminal offense of Crimes against Humanity under Article 172(1)(h), as read with sub-paragraphs e), g) and k), in connection with Article 29 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina, deciding upon the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and Mr. Petko Pavlović, Defense Attorney of the accused Vitomir Racković, from the Judgment of the Court of Bosnia and Herzegovina, No. S1 1 K 014365 14 Kri of 11 May 2015, after a public session of the Appellate Panel held in the presence of Mr. Dževad Muratbegović, Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, the accused Vitomir Racković and his Defense Attorney, Mr. Petko Pavlović, pursuant to Article 310(1), as read with Article 314 of the Criminal Procedure Code of Bosnia and Herzegovina, on 8 February 2016, handed down the following:

J U D G M E N T

Granting in part the appeal filed by Counsel for the accused Vitomir Racković, **revising** the Judgment of the Court of Bosnia and Herzegovina, number S1 1 K 014365 14 Kri of 11 May 2015, **in the sentencing part**, and imposing on the accused Vitomir Racković, for the criminal offense of Crimes against Humanity under Article 172(1)(h) (persecution) of the Criminal Code of Bosnia and Herzegovina, as read with subparagraphs e), g) and k), all in connection with Article 180(1) and Article 29 of the same Code of which the Trial Judgment found him guilty, pursuant to the referenced provisions as well as to Articles 39, 40 and 48 of the Criminal Code of Bosnia and Herzegovina, **the sentence of**

imprisonment for a term of 10 (ten) years, and dismissing as ill-founded the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina.

The Trial Judgment shall remain unaltered in the remaining part thereof.

Reasoning

1. The Judgment of the Court of Bosnia and Herzegovina (the Court of BiH), No. S1 1 K 014365 14 Kri of 11 May 2015, found the accused Vitomir Racković guilty of committing, by the acts described in the Operative Part of the contested Judgment, the criminal offense of Crimes against Humanity under Article 172(1)(h) (persecution) of the Criminal Code of Bosnia and Herzegovina (CC BiH), namely under sub-paragraph e) in relation to Section 1 and Section 2 of the Operative Part, under sub-paragraph g) in relation to Section 3 of the Operative Part and under sub-paragraph k) in relation to Section 1 and Section 4 of the Operative Part, all in connection with Article 180(1) of the CC BiH, while in relation to Sections 1, 2 and 4 of the Operative Part also in connection with Article 29 of the CC BiH. Thus, for the referenced criminal offense, pursuant to Article 285 of the Criminal Procedure Code (CPC BiH) and applying Articles 39, 40 and 48 of the CC BiH, the Trial Panel sentenced the accused to imprisonment for a term of 12 (twelve) years.

2. Pursuant to Article 284(c) of the CPC BiH, the same Judgment acquitted the accused Vitomir Racković of the charges that, by the acts described in the acquitting part of the Operative Part of the Judgment, he committed the criminal offense of Crimes against Humanity under Article 172(1)(h) (persecution) by imprisonment and other severe deprivations of physical liberty in violation of the fundamental rules of international law and other inhumane acts, all in connection with Article 29 and Article 180(1) of the CC BiH.

3. Pursuant to Article 188(4) of the CPC BiH, the accused was relieved of the obligation to reimburse the costs of the criminal proceeding, while pursuant to Article 198(2) of the CPC BiH, the injured parties were instructed that they may pursue their claims under property law in a civil action.

4. The referenced Judgment was timely appealed by the Prosecutor's Office of Bosnia and Herzegovina (Prosecution of BiH/Prosecution) and Mr. Petko Pavlović, Counsel for

the accused Vitomir Racković.

5. The Prosecution of BiH filed its appeal on the ground of sentencing and moved the Panel of the Appellate Division of the Court of BiH to grant the appeal by altering the contested Judgment in its convicting part, and thus impose on the accused Vitomir Racković a lengthier prison sentence for the committed crime, proportional with the degree of his criminal responsibility, the motives for which he committed the offense and the degree of danger to the protected value.

6. Counsel for the accused Vitomir Racković filed his appeal on the ground of essential violations of the criminal procedure provisions (Article 297(1)(d), (i) and (k), and subparagraph 2 of the CPC BiH), violation of the criminal code (Article 298(1)(d) of the CPC BiH), incorrectly or incompletely established state of facts (Article 299 of the CPC BiH), sentencing and claims under property law (Article 300(1) of the CPC BiH), violation of Article II/3 E of the Constitution of BiH, and violation of Article 6(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR). Counsel moved the Appellate Panel to grant the appeal as well-founded and alter the contested Judgment of the Court of BiH in its convicting part by acquitting the accused Vitomir Racković of the charges, or by revoking the appealed Judgment in its convicting part and ordering a hearing to be held before the Appellate Panel of the Court of BiH.

7. Both the Prosecution and the Defense submitted their respective responses to the filed appeals and proposed that the appeal filed by the respective opposing party be dismissed as ill-founded.

8. , Pursuant to Article 304 of the CPC BiH, on 8 February 2016 the Appellate Panel held a session that was attended by Mr. Dževad Muratbegović, Prosecutor of the Prosecution of BiH, the accused Vitomir Racković and his Counsel, Mr. Petko Pavlović.

9. During the public session, the Prosecutor, Counsel for the accused and the accused all stood by their respective written appeals and proposals.

10. In addition, both the Prosecution and the Defense stood by their respective responses to the appeals filed in writing.

11. Pursuant to Article 306 of the CPC BiH, the Appellate Panel reviewed the contested Judgment within the grounds and arguments of the appeal, and decided as stated in the

Operative Part herein for the reasons that follow:

I. CONVICTING PART OF THE JUDGMENT

A. APPELLATE GROUND OF ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

1. Appeal filed by Counsel for the accused Vitomir Racković

(a) Essential violation of the criminal procedure provisions under Article 297(1)(d) of the CPC BiH – violation of the right to a defense

12. According to Counsel, the Trial Panel made the referenced violation of the criminal procedure by a series of procedural decisions, by non-deciding or by being unresponsive to the Defense's objections. As an example, Counsel mentioned the objections made during the direct or cross examination of the witnesses for both the Prosecution and the Defense, in particular of the protected witness RV-2.

13. Within the violation of the right to a defense, Counsel's appeal further stated that the equality among the Defense's and the Prosecution's witnesses was also violated. Counsel concluded that the Trial Panel treated most favorably the witnesses from whose testimonies it obtained the facts to the prejudice of the accused (witnesses RV-2, RV-5, other protected witnesses as well as witnesses Haris Tvrtković, Salko Šabanović, Adem Berberović), while the Defense witnesses, in general, were not credited.

14. The Defense further submitted that the right to a defense was violated also because of the facts that no classic records were made, that the main trial transcripts were not delivered regularly and in whole, and that the accused had no technical options to reproduce the CDs.

15. The appeal stated that the Trial Panel violated the right to a defense by dismissing the Defense's justified proposal for a co-counsel appointment, that is, when it deprived the accused of the right to enjoy the highest degree of defense by favoring the principle of judicial efficiency.

16. Counsel also finds a violation of the right to a defense in the Court's actions at the

hearings held on 19 February 2014 and 2 April 2014, when the accused was removed from the courtroom without his guilt and thereby unlawfully deprived of the possibility to fully and actively participate in the proceedings, as a result of which the ban on trial in absence was violated.

17. Having submitted that the right to a defense was violated by the dismissal of the Defense's evidentiary proposals (paras. 59-67 of the appealed Judgment), Counsel concluded that the Trial Panel used double standards by way of accepting all the Prosecution proposals, while dismissing numerous pieces of evidence proposed by the Defense. Along this line, Counsel submitted that the Trial Panel accepted as proposed evidence the Findings and Opinion of expert witnesses Eva Tabeau and Jakub Bijak, who neither presented their respective analyses at the hearing nor were cross-examined by the Defense, and, at the same time, dismissed the Defense's proposal that an expert analysis be carried out by Prof. Dr. Svjetlana Radovanović, expert witness in demography, by which the Defense wanted to contest the referenced unlawful evidence.

18. Also, the appeal stated that the Trial Panel further erred in dismissing the Defense's proposal of 21 January 2015 to have a graphology analysis of the signature of the Prosecution witnesses RV-1 and RV-2 contained in their statements given during the investigation, which significantly differs from their testimonies given at the hearing held on 9 April 2014. In this regard, the Defense particularly urges the Appellate Panel to pay attention to cross-examination of witnesses RV-1 and RV-2.

19. Counsel also sees a violation of the right to a defense in the dismissal of the Defense's proposal to examine witnesses Vinko Pandurević and Momir Krsmanović.

20. Due to the fact of the accused's long absence resulting from his illness, the Defense asked for additional time to prepare the case. However, this proposal was dismissed, and the Court ordered that the Defense evidence be presented immediately after the Prosecution evidence presentation, whereby, according to Counsel's conclusion, the accused's right to a defense was also violated.

21. The appeal ultimately stated that, after the acceptance of the proposal to visit the crime scene, the crime scene was indeed visited but without Counsel's presence, the record of which was tendered in the case record as Court Exhibit 2. Counsel finally concluded that Article 14(2) of the CPC BiH was thereby grossly violated.

22. The Appellate Panel has held that the advanced objections are ill-founded.

23. This Panel has primarily noted that only the concretely indicated and reasoned objections will be addressed, and that it will not respond to the arbitrarily formulated objections, such is, e.g., a generalized complaint that, during the entire proceedings, the Trial Panel treated the Defense passively, or that the Defense's complaints advanced during both direct and cross-examination were dismissed without being concretely evaluated. Specifically, such averments do not satisfy the requirements for being reviewed, and the Panel *a priori* dismisses them.

24. In addition, the Panel has considered as ill-founded the Defense's complaints highlighting unsuccessfully a violation of the right to a defense, and concluded that the Trial Panel afforded the best treatment to the witnesses from whose testimonies it drew the facts which are not to the prejudice of the accused. The fact that the Trial Panel credited the Prosecution witnesses by whose testimonies the accused's guilt was being proved, and based on them drew the conclusion that his guilt was proved, cannot automatically mean that the other party to the proceedings, that is, the accused, was treated unequally. The adversary principle was satisfied at the main trial: both the parties presented their respective theories, each party was given a possibility to contest the arguments of the opposing party, and the Court rendered its decision after an impartial evaluation of the evidence. The fact that the Court found the accused's guilt to be proved on the basis of the Prosecution witnesses' testimonies does not mean that it unequally treated the and evaluated the Defense evidence, but rather that the Prosecution offered sufficiently solid evidence which could not be discredited by the Defense. Therefore, the Defense's objection that the lack of equality of arms ensues from the foregoing, is ill-founded. The logical step after the completion of the evidentiary proceedings is rendering a decision which will not suit both of the parties to the proceedings. However, this does not mean that, in the rendering of such a decision, the Court has violated the principle of equality of arms, but rather that, in the concrete case, the Prosecutor, who bears the burden of proof, indeed offered sufficiently solid and convincing evidence proving the accused's guilt. Any further consideration of such objections, as well as their advancement, would be more appropriate for the consideration of the established state of facts, and certainly not for finding a violation of the right to defense.

25. The Appellate Panel also considers as ill-founded the Defense's complaint that its right was violated because no classic records were made during the main trial, and

because it did not receive regularly and in whole the CDs and the transcripts. In rendering such a conclusion, the Panel relied on Article 253, as read with Article 155 of the CPC BiH, from which it ensues that, in addition to the keeping of written records on the main trial conduct, there is a possibility to make its audio-video recordings. It should be also highlighted that the practice is to make one or the other, rather than to cumulatively keep a written record and make audio-video recordings. In such situations, the main trial record consists of either a written record or the main trial video-recording transcript. Therefore, considering that all hearings before this Court are being audio-video recorded, no classic written transcript is being kept about the procedural actions' contents, but rather the essentials of the procedural matters are being noted, and a CD with the recording may be issued upon request filed by the party to the proceedings, counsel or authorized persons. Transcripts are also being made and they are easily accessible to the parties and may be issued at any time upon their request. In view of the foregoing, the objection that the Defense's rights were violated on the grounds of failure to keep classic records is ill-founded.

26. Also unjustified is Counsel's effort to indicate that the right to a defense was violated by the Court's dismissal of the proposal that a co-counsel for the accused be appointed. Specifically, the Appellate Panel has reviewed the case record and found that the Court of BiH's Decision No. S 1 1 K 014365 14 Krl of 9 February 2014 dismissed as ill-founded the motion of the accused Vitomir Racković's Defense for the appointment of an *ex officio* co-counsel, and that this Decision was upheld by the Appellate Panel in its Decision No. S1 1 K 014365 14 Krž of 10 March 2014, dismissing Counsel's appeal as ill-founded. This Panel has also upheld the views presented in the above referenced Decisions. Specifically, in evaluating the need to appoint an *ex officio* co-counsel, the Trial Panel took into account Article 41(i) of the Courts Rule of Procedure, as upheld by the Appellate Panel in deciding on the appeal. This Article provides for the issues of the appointment of co-counsel¹. Accordingly, taking into account all the facts pertaining to the concrete case (which is not a custody case, the accused is charged with the commission of crime with no command form of responsibility since the case record obviously shows that the accused allegedly acted as an ordinary soldier, and that in accordance with the agreement reached at the status conference held on 31 January 2014, it was anticipated that the main trial

¹ Rules of Procedure of the Court of BiH, Official Gazette of BiH, numbers 82/05 and 60/11.

would be held each Wednesday, that the Prosecution anticipated almost 25 hours for the examination of proposed witnesses and the total of 17 proposed pieces of documentary evidence), properly concluded that this was not a complex criminal case, that it would involve the usual pace of work on a war crime case of similar or identical complexity in which the accused' defense is represented by just one *ex officio* counsel.

27. This Panel has also considered as ill-founded Counsel's objection that the Trial Panel violated Article 247 of the CPC BiH – *Ban of Trial in Case of Absentia* when it removed the accused from the courtroom at the hearings held on 19 February and 2 April 2014. Having reviewed the transcripts of the hearings held on the referenced days, this Panel concluded that, in the concrete situation, the Trial Panel had acted lawfully and in no way violated the accused's right to a complete, comprehensive and active participation in the proceedings. On the referenced days, the hearings were attended by two witnesses with granted protective measures, both in this case and in the proceedings before the ICTY. The Court was under obligation to determine which specific measures were granted to the witnesses before the ICTY since such measures cannot be reduced. To this effect, it was of key importance to determine whether the referenced witnesses testified in the presence of the persons accused in those proceedings, for if they did not, this would be also followed in the current proceedings. Therefore, the accused was removed from the courtroom for a very short period of time, and only for as long as it was needed for the witnesses to comment on the measures at issue, whereupon the accused was brought back to the courtroom. Thus, the Panel has not held that the accused's right to a defense was thereby violated in any way. In reaching this conclusion, the Appellate Panel has also taken into account the fact that the transcripts of the referenced hearings did not show that, at that moment, the accused or his Counsel made any objections to the accused's removal from the courtroom, all the more so because such an objection is still ill-founded. In addition, Counsel did not leave the courtroom, whereby the defense in such short moments of the accused's absence from the courtroom was certainly ensured.

28. This Panel has also considered as unsuccessful the objections concerning the dismissal of the Defense's evidentiary proposals. Considering that Counsel advances several evidentiary proposals within this complaint, which were dismissed with the explanations provided in paras. 59-67 of the contested Judgment as the appeal stated, this Panel will address the foregoing issue once. To this effect, the Appellate Panel has primarily concluded that the Trial Panel did not, in any way, act by using double standards

and that no such conclusion in this regard can be drawn, as the Defense attempted to present. Specifically, the Defense's proposal that an expert analysis be carried out by an expert witness in demography was quite unjustified considering that, as the appealed Judgment stated, the conclusion on the changes in the ethnic composition of the population in the territory of the Višegrad municipality could be also reached on the basis of the witnesses' testimonies, from which it clearly ensues that, before the war, the Muslim population formed the majority in the territory of the Višegrad municipality, while today the Serb population forms the majority there. Accordingly, having reviewed the main trial transcripts, the Appellate Panel concluded that almost all the witnesses (except Mihajlo Jelisavčić – testified on 24 December 2014), whose testimonies the Trial Panel evaluated in rendering its finding on the changed demographic structure, gave their evidence prior to the decision dismissing the referenced proposal for an expert evaluation was made.² In view of the foregoing, unclear is the Defense's question as to how the Trial Panel could know, in rendering its decision, what the referenced witnesses would testify about when almost all testimonies preceded the disputable decision. In drawing this conclusion, the Appellate Panel also took into account the fact that the Trial Panel properly found that the referenced expert analysis would be irrelevant and uneconomical because it is clear, bearing in mind the referenced testimonies, that the Trial Panel did not rely, to a decisive extent, on Exhibit T-5, which was supposed to be contested exactly by the Defense's proposed expert evaluation. The Appellate Panel has considered as ill-founded the Defense's views presented in this appeal in relation to its effort to indicate that the Trial Panel acted arbitrarily by dismissing the Defense's proposal for a graphologist expert evaluation of the signatures of the Prosecution witnesses RV-1 and RV-2, and, in this relation, that the Defense's assertions, that the Trial Panel suggested the witnesses to contest their signatures on the disputed evidence, are also improper. The Appellate Panel drew such a conclusion upon reviewing the transcript of the hearing held on 9 April 2014, when the witnesses RV-1 and RV-2 were examined. It is obvious from these transcripts that no responses were suggested to the witnesses, but rather that the Trial members made efforts to resolve the developed situation since the witnesses themselves were obviously confused.³ In addition, the referenced witnesses' testimonies show, as also

² The Decision was rendered on 3 December 2014, and the witnesses were examined before the Court of BiH at the hearings held on the following days: Jelisavka Petrović – 22.10.2014; Miroslav Mirković – 29.10.2014; Miloš Makljenović - 05.11.2014; Milorad Mirković - 26.11.2014 and Žarko Krsmanović – 03.12.2014 (before the decision rendering on the same day).

³ „**Judge:** Witness, I will now ask you about the first statement, if you can remember, the one on which your full name was written in capital letters, the one you have been presented with now.

Witness RV 2: Yes.

Judge: Well, you also said that it is indicated there that the statement was given in Zenica, but you say that you have never given any statement in Zenica.

Witness RV 2: I was present in Zenica indeed, but I gave no statement.

Judge: You gave no statement. I am interested in this. This statement was typed on a typing machine, which means that it is not in handwriting. How did they take your statement? Did they take it in the way that they had just interviewed you and subsequently typed it somewhere else?? Tell me, please?

Witness RV 2: Let us say, when they came to me, is that perhaps the '95 statement?

Judge: Yes.

Witness RV 2: They came to me from Visoko (asking me) to give a statement related to the arrest of Vito Racković (*unclear*) I (*unclear*) see Visoko, I did not discuss with them for a long period of time. I don't want to give you any statement, how do you in Visoko know, I mean, I can now ... through our association someone from Visoko...

Judge: OK, OK. They now want you to give them a statement, tell me?

Witness RV 2: And now I, sorry for interrupting you, I collected for them several times, you know, I asked,...I did not want to go to give them a statement, simply, I don't know...

Judge: Did you speak with them?

Witness RV 2: Yes, I did speak with them.

Judge: Speak. At the time when you spoke with them, did they come to you and bring along any typing machine and typed what you were saying in front of you, or they just orally spoke with you?

Witness RV 2: We just spoke orally. I advised my association and they told me to tell the as it was, what I had experienced...so I went (to them) and told them ...

Judge: OK. OK. Where did you go?

Witness RV 2: I think that this statement was given/taken in Visoko, in the Ministry of Interior (MUP).

Judge: In the MUP. When you were giving this statement, was anyone typing it on a typing machine?

Witness RV 2: I do not remember.

Judge: You do not remember?

Witness RV 2: I do not remember.

Judge: Did you sign that statement on that day, or someone brought it to you subsequently to sign it? Do you remember the signing of the statement at all?

Witness RV 2: I think that those statements were not signed at all but rather that it was just the information gathering/collecting.

Judge: Just the information gathering/collecting?

Witness RV 2: Just the information gathering/collecting, and whether they notified me after I had left... I am suspicious about that, how come that it was in Visoko, what that was...

Judge: OK. OK. SO, you were giving the statements, but at the time they were not signed, but rather information was just collected...

Witness RV 2: Yes, they were just collected and...

Judge: That's OK. Thank you."

...

„**Judge:** OK, here is just one more record from '94. An inspector visited you in the house where you live...

Witness RV 1: He says he is...

Judge: Listen to me, please. He introduced himself as an inspector, spoke with you, and took notes in handwriting?

Witness RV 1: He wrote with his pencil, and I remember the paper well too.

Judge: OK. And you did not put any signature on his papers at the time?

Witness RV 1: I cannot remember indeed.

Judge: OK. After how long he brought it to you, that statement of yours typed, because obviously he had returned somewhere to an office to type it, because the statement...

Witness RV 1: I don't have his statement at all. He did not bring it to me at all. I do not have it personally, that statement from Goražde, I do not have it.

Judge: The first statement...was the witness presented with that statement?

Counsel: She was marking the statement ...

Judge: The first statement, the first statement we have given to you here, where you say that it is not your signature, do you remember? That is the statement I am talking about.

Witness RV 1: Aha.

Judge: That is where the inspector handwritten it, and subsequently went to his premises and probably typed it. Has he ever showed you that statement?

Witness RV 1: No.

Judge: Never. Do you see this statement for the first time now, the one that you have been showed?

Witness RV 1: Yes, yes, for the first time, because I do not have that statement at all. I have these, the other one that you have showed me, I have that one.

Judge: So, the witness, you have never, you see that statement today for the first time?

Witness RV 1: For the first time. I only know that someone had come, I do not know who he was...

Judge: And made handwriting?

Witness RV 1: And I know (he had) some paper, and pencils, and he wrote down.... there was some paper and the pencil.

found by the Trial Panel, that the disputable statements are not the statements in terms of Article 273(1) of the CPC BiH, but rather, the collection of information, and that while giving this information the witnesses were not cautioned of the procedural safeguards and the other procedural prerequisites which would render such a statement formal and lawful. In view of the foregoing, completely proper is the Trial Panel's view that any expert evaluation of such statements, which are not even evidence in terms of Article 273(1) of the CPC BiH, would be redundant and unnecessary considering that it would imply additional time and expenses, which would lead to the lack of economy and efficiency of the proceedings.

29. Also indisputable for this Panel is the dismissal of the Defense's proposal to examine witnesses Vinko Pandurević and Momir Krsmanović. Having so concluded, the Appellate Panel considered that the Trial Panel did not, in any case, prematurely decide on the alibi, but rather properly found that, at the moment when it issued its decision on witness Pandurević's examination, a sufficient number of witnesses had testified about the circumstances about which Pandurević⁴ was also supposed to testify. In addition, before reviewing the transcript of 11 February 2015, the Appellate Panel noted that, when the Trial Panel dismissed the referenced proposal it did not mention the alibi issue. The fact that it was explained in this Judgment is indisputable for this Panel considering that, at the time when the Judgment was written and the explanation provided, the decision had already been published. Thus, with the note that the alibi theory was unsuccessful, the Trial Panel just reiterated that it did not err in dismissing the proposal for this witness's examination.

30. In relation to the tendering of Exhibit T-20 – page 74 of Momir Krsmanović's book, in relation to which the Defense requested the author's examination before the Court, the Appellate Panel considers as irrelevant any related discussion since it has held, just like the Trial Panel, that this does not, in any case, amount to important and key pieces of evidence on which the judgment is based, namely that it does not support the decisive facts. Therefore, the Court made no specific reference to it in its Judgment.

Judge: Thank you."

⁴ Nenad Mirković on 22.10.2014; Miloš Ivanović on 22.10.2014; Miroslav Mirković on 29.10.2014; Dragan Mirković on 29.10.2014; Novak Miličević on 05.11.2014; Miloš Makljenović on 05.11.2014; Vojo Čebić on 05.11.2014; Stanimir Zečević on 03.12.2015; Željko Rosić on 10.12.2014; Mihajlo Jelisavčić on 24.12.2014 and Miodrag Mirković on 11.02.2015 – prior to the decision rendering.

31. With regard to the Defense's submission that it was provided insufficient time to prepare its case since it was ordered to propose its witnesses within a 7-day deadline after the Prosecution evidence presentation, while it should have been taken into account that the accused had been absent from Višegrad for a lengthier period of time due to his illness, the Appellate Panel has concluded that the burden of active proving lies on the Prosecutor who must prove the Indictment charges beyond "a reasonable doubt", while it is assumed that the accused is innocent, and that the burden of the Defense's active proving is limited by the presumption of innocence. In view of the foregoing, it is quite proper to conclude that the Prosecutor always needs more time and assets to prepare the prosecution theory and to prove it during the proceedings against the accused. This Panel has also taken into account the fact that, since the outset of the proceedings, the accused has had his counsel who could prepare his case and collect evidence even without such an active participation on the part of the accused. The case may be successfully prepared even if the accused is in custody, when his counsel alone performs majority of the actions due to the obviously restricted communication between the accused and the external world. Therefore, the accused's defense could also have been successfully prepared in the concrete case.

32. This Panel also considers as ill-founded the appellate complaint that the Trial Panel violated the right to a defense because it visited the crime scene without Counsel's presence, despite the Defense's request that the visit timing which would also suit the Defense be found. The Appellate Panel primarily points to the section of the transcript of the hearing of 15 October 2014:

Judge: OK. Call the witness in. Let us use the time until the witness enters. We planned to visit the crime scene on Friday. This is not the classic action of proving but rather the Panel should be definitively satisfied and gain an idea of what and where it had happened. Also, we have been informed that you have a hearing on Friday, at what time? Please, have a seat.

Counsel: Well, on Friday, at 13:00 hrs, the proceedings will be reopened before the Appellate Panel in the case of Savo Babić.

Judge: Your presence is not obligatory, but perhaps it would be good if...

Counsel: It is clear to me that it is not obligatory, but considering that I have proposed the visit, I would indeed like to be present. Ultimately, I do not know what the Court has planned, but I am certainly willing to move the Court to primarily visit the village of Kabernik.

Judge: We will visit it, as well as the villages of Donja Lijeska, Gornja Lijeska and Kabernik, we will visit them all.

Counsel: Now, who is tasked with showing you where all those sites are, and how?

Judge: The accused will also be present at the site, I think, we don't have, the accused is also invited to attend the crime scene visit.

Counsel: If you cannot accept the Defense's proposal for a visit at the time which suits Counsel too, what can I do about that, it is how it is.

Judge: We would start at about 11:30 hrs.

Counsel: There is no chance as far as I am concerned.

Judge: OK. Maybe something will happen until Friday...

Counsel: If it does happen, I will be gladly in Višegrad if any changes occur in this other case here.

Judge: Well, yes.

Counsel: If any changes occur in your...

Judge: If it were in the morning hours, you could have probably been in time, if it were at 09:00 hrs.

Counsel: Yes, if it were at 09:00 hrs, to have all the sites visited it takes around an hour and a half, two hours maximum, because I have visited those sites; roads are bad and narrow, rather bad roads, and it takes additional two and a half hours to return to Sarajevo.

Judge: We will start visiting the sites in the Racković case at 11:30 hrs. We have another case, so at 09:00 hrs, we will start in this other case...

Counsel: Aha.

Judge: ... visiting the scene.

Counsel: Are the same locations in question, if I may know?

Judge: It's Višegrad.

Judge Smajlović: The locations are not same.

Judge: The locations are not same.

Counsel: They are not same.

Judge: But it the Višegrad area....

Counsel: Let us say, if there is a possibility for me to attend, could we first visit the locations of interest for this defense, and you further visit the other locations. Could such an option be possible, if I ask the Appellate Panel here, considering that it is a pre-trial hearing, to start a minute later, let us say, perhaps they would accept, I do not know, I had no consultations with anyone about this.

Judge: We can address it, but later on.

Counsel: OK.

Judge Smajlović: There is also a problem with the witnesses....

Judge: The problem is with the witnesses in this case. We have protected witnesses.

Counsel: OK, if it must be like that, let it be, what we can do.

Judge: OK."

33. It primarily ensues from the foregoing that it was not a classical act of proving referred to in Article 92 of the CPC BiH, but rather the Panel wanted to create an idea of what had been happening. In this regard, the Court was not under obligation to adjust the timing of the crime scene visit to Counsel's obligations in all other cases considering that the Court has its own obligations which must be coordinated. Also, the record concerning the crime scene visit of 17 October 2014 shows that the accused was present during the crime scene visit, which renders the referenced objection ill-founded.

34. The arbitrary appellate allegation, that is, the eighth violation of the right to a defense, is absolutely inappropriate for reviewing as such, in relation to which the Panel has already provided its explanation and has already addressed the alleged inequality of arms.

(b) Essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH – the Operative Part of the Judgment is incomprehensive, contradictory internally or to the reasons for the judgment, or the judgment does not at all...contain the reasons or it did not provide the reasons on the decisive facts

35. According to the appellate allegations, the referenced essential violation is apparent from the fact that the Operative Part of the Judgment does not contain the subjective element either, that is, the accused's relationship with the act of commission and the resulting consequences.

36. In addition, Counsel submits that the Judgment's incomprehensibility is also apparent from the facts that the Operative Part neither indicated the existence of armed conflict nor did the reasoning address the referenced element of the crime.

37. The appeal further stated that the Court violated the criminal procedure provisions under Article 297(1)(k) of the CPC BiH also because the contested Judgment does not contain the reasons, or it did not provide the reasons on the decisive facts. In that context, the appeal objected to the evaluation of the testimonies of the Defense witnesses Boško Trifković, Nenad Mirković, Miloš Ivanović, Miroslav Mirković, Dragan Mirković, Novak Miličević, Miloš Makljenović, Vojo Ćebić, Slaviša Marković, Radomir Živković, Milan Zečević, Zoran Tasić, Milorad Mirković, Stanimir Zečević, Nenad Trifković relating to all the four Sections of the convicting part of the Operative Part of the contested Judgment; of Želimir Đurić and Momir Ninković in relation to Section 4 of the convicting part of the Operative Part of the Judgment; and of Božo Tešević, Jelisavka Petrović and Mihajlo Jelisavčić who testified about the circumstances pertaining to the general context of the Indictment, as well as Dušan Bukvić, Žarko Krsmanović and Slobodan Tešović who testified about the accused's wounding, and Pero Drašković who testified about the fact that the accused was not seen at the Počivale site, as witness Jasmin Cero testified.

38. The Defense also submits that the contested Judgment does not contain the reasons for and does not take into account the contesting of the credibility of witnesses Adem Berberović, Salko Šabanović, RV-2, RV-5, RV-4, RV-6, RV-1 and RV-9, as well as the fact that the Trial Panel was under obligation to act in accordance with Article 281(2) of the CPC BiH and Article 290(7) of the CPC BiH.

39. The Appellate Panel has held that the referenced objections are ill-founded.

40. According to this Panel, this Judgment is not deficient with regard to the (non)-existence of the factual details constituting the subjective element of the criminal offense on the part of the accused Vitomir Racković in the Operative Part of the contested Judgment. Specifically, the Judgment clearly stated that the accused ... *within a widespread and systematic attack of the army and the police of Republika Srpska and the paramilitary formations, directed against the Bosniak civilian population in the territory of the Višegrad municipality, **knowing** about such an attack ... participated in the persecution of the Bosniak civilian population in the territory of the Višegrad municipality, **on ethnic and religious grounds** ... **intentionally** causing great suffering or serious injury to body or to physical or mental health...*, which correlated with the time frame and the site of commission of the criminal offenses of which he was found guilty, constitutes the subjective element and the knowledge of the accused about the general context within which he had acted. Article 172(h) of the CC BiH defines persecution as “*the intentional and severe deprivation of fundamental rights, contrary to international law, by reason of the identity of a group or collectivity*”. With this offense, the perpetrator grossly and in violation of international law deprived one or more persons of fundamental or human rights, wherein the selection of such person or persons was made on the basis of the identity of a group or collectivity, or the particular group or collectivity was targeted. Such a selection is based on the indicated distinctions among groups or other reasons generally recognized as inadmissible in international law.⁵ Therefore, the accused Racković’s intent ensues from the mere manner of commission of the offense, where only one conclusion can be drawn, namely that the accused committed persecution on discriminatory grounds by severe deprivations of physical liberty in violation of the fundamental rules of international law, by forcing another by use of force or threat of direct attack into a sexual intercourse (rape) and by other inhumane acts of similar nature, intentionally causing great suffering or serious injury to body or to physical or mental health. In view of the foregoing, it can be concluded beyond a doubt that the accused Racković was aware of the existence of a series of widespread and systematic crimes directed against the Bosniak civilian population in the Višegrad municipality, that he undoubtedly knew and wanted that his acts (other serious deprivations of physical liberty, rape and other inhumane acts) form part of that attack, and that he contributed to such an attack against the Bosniak civilian population.

⁵ Commentaries on the Criminal Codes in BiH, Council of Europe, 2005, p. 567 – 568.

41. The Defense's objection that the Operative Part of the Judgment is incomprehensive because of the non-indication and non-explanation of the armed conflict within which the criminal offenses were committed is contrary to the mere nature of the criminal offense of Crimes against Humanity and the positions taken in the international case law. It is necessary to note at this point that, unlike the notion of "armed conflict", the notion of "*attack*" within the criminal offense of Crimes against Humanity pursuant to the recognized ICTY jurisprudence *is not limited to the use of armed force; it also encompasses any mistreatment of the civilian population*".⁶ The attack could precede, outlast or continue during the armed conflict, but it need not be a part of it.⁷ The attack is not limited to the use of military force or violence.⁸

42. The objections to the Trial Judgment in terms that it contains no reasons on the decisive facts are ill-founded, arbitrary and unsupported with arguments. The *prima facie* analysis of the contested Judgment, as required under the standards of the judgment review on the ground of essential violations does not point to the existence of the described essential violation. The Trial Panel indeed acted fully in compliance with Article 290(7) of the CPC BiH, which provides that the Court shall specifically state which facts it finds proved. To this effect, it is important to emphasize that this approach does not mean that, in drawing the conclusions on the decisive facts, the judgment had to refer to each piece of evidence individually, and to the manner in which it correlated them with the other pieces of evidence, as the appeal improperly highlighted. It rather mentioned and presented the contents of the pieces of evidence of prevailing significance for drawing the conclusion on the decisive facts. Therefore, from the aspect of the contested Judgment's formal and proper nature, the Appellate Panel concludes that the Trial Panel presented sufficient and comprehensively admissible reasons for its views and factual findings by relying on the relevant evidence corroborating the position taken by the Court in whole, which will be addressed in more detail further in the reasoning. Accordingly, it is not justified to raise objections to the evaluation of the witnesses' testimonies, as the appeal attempted, only because the evaluation of the referenced testimonies and the analysis made in the related conclusion drawing do not suit one of the parties to the proceedings. Accordingly, the Appellate Panel concluded that the Defense's appeal arbitrarily objected

⁶ Vasiljević, Trial Chamber, Judgment of 29 November 2002, paras. 29-30.

⁷ Dragoljub Kunarac et al., case number IT-96-23-A, Appeals Chamber Judgment of 12 June 2002, para. 86.

⁸ Akayesu, Trial Judgment, paras. 676 – 684.

to the alleged violation and only listed the witnesses whose testimonies it believes were improperly evaluated, but provided no arguments and circumstances indicating that any different conclusion could be also drawn, which is inadmissible. Also, the appellate allegation that “... *the Trial Judgment contains a series of contradictions between the operative part and its reasons ...* „ or “... *particularly obvious deficiency of the Judgment is the lack of evaluation of the credibility of contradictory evidence ...*”, cannot alone be appropriate for this objection reviewing without providing a concrete explanation of the contradictions at issue, namely, without explaining which concrete pieces of evidence were contradictory and whose credibility the Court failed to evaluate.

43. Along this line, the Appellate Panel recalls that the applicant must concretize the appellate grounds on which he/she contests the judgment, and specify which part of the judgment, evidence or the Court’s action is being contested, and provide a clear explanation supported with arguments substantiating the advanced complaint.

44. Mere arbitrary indication of the appellate grounds, as well as pointing to the alleged irregularities during the first instance proceedings without specifying the appellate ground to which the appellant refers does not constitute a valid basis for the reviewing of the trial judgment. Therefore, the Appellate Panel will dismiss without any further consideration the unreasoned and unclear appellate complaints, pursuant to the Appellate Panels’ developed practice⁹.

45. With regard to the Defense’s complaint that the trial Judgment or the Trial Panel did not take into account the contested credibility of witnesses Adem Berberović, Salko Šabanović, RV-2, RV-5, RV-4, RV-6, RV-1 and RV-9, the Appellate Panel has concluded that the fact that it was concluded that the referenced witnesses were credible does not mean that the Trial Panel did not evaluate the Defense’s objections and the documentary evidence directed at contesting their credibility, but rather that the Defense’s referenced attempts failed. Such Appellate Panel’s conclusion is also supported with the parts of the contested Judgment in which the referenced witnesses’ testimonies were evaluated. Thus, in relation to witness Adem Berberović, in paras. 264 and 265 of the contested Judgment, the Trial Panel evaluated the Defense’s evidence contesting this witness’s credibility. Thus, in relation to Exhibit O-11, the Panel concluded that the Indictment factual

framework did not at all charge the accused with participating in the injured party's arrest, but rather that this incident involved the accused's acts of co-perpetration within the other inhumane acts of which the Trial Panel found him guilty. The Panel thus justifiably concluded that any comprehensive analysis of the stated inconsistencies in the witness's testimony was irrelevant, considering that it would be redundant and irrelevant bearing in mind the factual basis of the present case. The Trial Panel also referred to Exhibit O-12 and found that it is a statement given in the CSB in 1994 in relation to which the procedure in compliance with the then procedural law was not applied, as a result of which it is not a statement given during the investigation in terms of Article 273(1) of the CPC BiH. The Trial Panel properly found that any further elaboration on this ground would be unnecessary.

46. Also, in relation to witness Salko Šabanović's testimony, the Trial Panel referred to the Defense Exhibits O-17 through O-21 (paras. 236, 237 and 238 of the contested Judgment). In relation to Exhibit O-17, the Trial Panel found that it is not a lawful statement. In relation to the other referenced Exhibits, the Trial Panel found that the treatment accorded to the witness, that is, the problems he had after giving evidence in the proceedings against Nenad Tanasković, explain the inconsistencies about which the witness also testified before the Court. The witness stated before the Court that all he had stated in the statement T-3 or the statement O-20, whose contents were indicated within para. 235 of the contested Judgment, was true.

47. In relation to witness RV-2, the Appellate Panel has pointed to paras. 185-189 of the contested Judgment, in particular to the finding that: *"... in the Panel's view, these inconsistencies in the witness's testimony are neither relevant nor decisive for her (the witness's) credible definition of the objective commission of the very incident and the way in which it had indeed occurred, as well as for the accused's role and conduct on the critical occasion. This is because other witnesses, who testified about the same facts, within the scope of expected and logical minor inconsistencies, gave decisive and consistent description of the accused's role and actions on the critical occasion and the specific swears by which he addressed them, mentioning, prior to that, that they had all known him very well from before"*. It is apparent from the foregoing that the Trial Panel

⁹ See, ICTY Appeals Judgment in *Krajišnik*, para. 17; Appeals Judgment in *Martić*, para. 15; Appeals Judgment in *Strugar*, para. 17. A number of Panels of the Court of BiH have followed such a practice in their judgments. To this effect, see *Trbić*, Second Instance Verdict number X-KRŽ-07/386 of 21 October 2010.

took into account all the circumstances, or the evidence and objections presented by both parties, but concluded that this witness is credible. In relation to the testimony of witnesses RV-5, RV-4, RV-6, RV-1 and RV-9, the Appellate Panel has concluded that the Trial Panel had indeed provided the reasons for the decisive facts and the reasons for which the testimonies are considered as credible. The Appellate Panel noted that the inconsistencies in the witnesses' testimonies are expected and natural, and that they resulted from the fear and chaos prevailing on the critical occasion. The Appellate Panel concluded that the inconsistencies do not concern the relevant parts of their testimonies and that they are not of such a character so as to bring into question their testimony in whole. As also found by the Trial Panel, it was of decisive importance that the testimonies of all witnesses are concurrent, consistent and indisputable with regard to the essential facts (for a more comprehensive analysis of the evidence in this regard see paras. 200-227 of the contested Judgment).

48. Ultimately, regarding the complaint concerning all the above mentioned witnesses, this Panel has noted that despite the fact that it reviewed this complaint, it was not concretely presented to a sufficient extent; that it barely reached the threshold required for being reviewed; that it was far from providing justified arguments for its possible acceptance because no sentence thereof provided any explanation of the evidence and the manner by which the credibility of the referenced witnesses was contested and of the reasons for which the Defense believes that those attempts should have been evaluated as successful.

(c) Essential violation of the criminal procedure provisions under Article 297(1)(i) of the CPC BiH – the Judgment is based on the evidence on which it cannot be based pursuant to the provisions of the CPC BiH

49. According to the appellate complaints, the first instance Judgment is based on the evidence on which it cannot be based pursuant to the provisions of the CPC BiH, that is, on the evidence that follows: - examination of Dr. Alma Džubur Kulenović, admission into evidentiary materials of the rebuttal evidence T-20, a novel by Momir Krsmanović titled "And God Cried over Bosnia" (*I Bog je zaplakao nad Bosnom*) contrary to the Defense's objection and its request for cross-examination, additional Exhibits T-29, T-30, T-30a and Exhibit DS2.

50. According to the Appellate Panel, the referenced complaints are inappropriate pursuant to the standards of review, wherefore they were dismissed as ill-founded, unclear and unreasoned.

51. The Appellate Panel reiterates that the applicant must specify the grounds, on the basis of which he contests the judgment, specify which section of the judgment, evidence or the proceedings of the Court he contests and adduce clear and substantiated reasons in support of the appeal. Mere arbitrary indication of the appellate grounds and of the indication of alleged irregularities in the course of the first instance proceedings, without specifying the ground to which the applicant refers, is not a valid ground for review by the Appellate Panel. Therefore, the Appellate Panel dismissed as ill-founded the unreasoned and unclear appellate complaints, such as those in the concrete case.

(d) Essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH

52. Counsel submits that the violations which may be subsumed under this legal ground are numerous and that they exist in all cases where the Court failed to apply or incorrectly applied a provision of the CPC BiH, but only if it affected or might have affected the rendering of lawful and correct verdict.

53. In this regard, Counsel submits that Article 14(1) and (2) and Articles 273(1) and 281(1) of the CPC BiH were violated.

54. As it ensues from the appellate complaints, the Defense submitted that the Court did not conscientiously evaluate each piece of the adduced evidence, individually or in correlation with the other evidence (Article 281 of the CPC BiH). Counsel submitted that Article 290(6) of the CPC BiH was also violated. According to the appeal, all the foregoing led to the application of double standards in relation to the Defense's and the Prosecution's evidence.

55. In this regard, the Defense's appeal also provided an analysis of the standards of evidence evaluation, having insisted on the application of the principle *in dubio pro reo*.

56. The Appellate Panel has held that the referenced complaints are unclear and unreasoned.

57. At this point, it is necessary to analyze what is being considered as an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH indicated by Counsel's appeal. The referenced statutory provision provides the following:

"There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code, and this affected or could have affected the rendering of a lawful and proper verdict."

58. Starting from the referenced provisions' contents, and correlating them with Counsel's complaint, the Appellate Panel primarily notes that Counsel's appeal failed to explain how the indicated omissions by the Trial Panel affected the lawfulness and the proper nature of the contested Judgment so as to be able to evaluate whether the effect was essential.

59. Therefore, an optional existence of the stated essential violations of the criminal procedure provisions could not be examined either.

60. In this regard, the Panel has also noted that, within this complaint, Counsel repeated certain complaints already presented under the essential violation of the criminal procedure provisions under Article 297(k) of the CPC BiH, concretely, the evidence evaluation analysis, in relation to which the Appellate Panel already provided its explanation in para. 42 of the Judgment, and concluded that the *prima facie* analysis of the contested Judgment satisfied the standards set forth in Article 281 and Article 290(6) of the CPC BiH.

61. In relation to Counsel's consideration of the principle of *in dubio pro reo*, concerning the evidence evaluation standard, the Appellate Panel has concluded the following. Primarily, the Panel has held that the quality of the presented appellate arguments, already in the consideration of the first premise of the *in dubio pro reo* rule, indicates there is no doubt regarding the facts constituting the underlying elements of the criminal offense or those on which the application of a criminal legislation provision depends so that the Court could at all address the option contained in the other part of the premise, pursuant to which the Court shall resolve such a situation by rendering a judgment more favorable to the accused.

62. Specifically, the Defense deals in its appeal with the theoretical aspect of the referenced phrase, its significance and optional application in the systems of both the Anglo-Saxon law and the current criminal law in BiH. However, having focused on the

theoretical significance, the Defense failed to refer to the concrete Judgment and the application of the notion in terms of the proper nature of the established state of facts.

63. In concluding so, the Appellate Panel had in mind that the Trial Panel examined and comprehensively evaluated all the adduced pieces of evidence, both individually and in correlation, confronted the Defense's and the Prosecution's evidence, and based on such an established state of facts, decided on the accused's guilt.

64. Therefore, even though the Defense's arguments are significant from the theoretical aspect and call for a further caution in the use of notions in the Court's decision, it is nevertheless impossible to argue that there are essential violations of the criminal procedure provisions.

(i) Non-disclosure of the evidence

65. The Defense submitted that Article 14 of the CPC BiH was violated also because of the alleged non-disclosure of evidence because the Prosecution had contacted a very large number of witnesses prior to their giving evidence, but made unavailable to the Defense any official note on the nature and contents of those contacts. The witnesses concerned are the following: Alma Čukojević, Munira Omanović, Himzija Tvrtković, Sija Džananović, Suvađ Dolovac, RV-5, Remzija Ajanović, Halida Alić, Rašid Mameledžija, RV-11, RV-6, RV-14, Alma Džubur-Kulenović, Nesib Nuhanović, Adil Čakar and Nezir Mešić.

66. The Appellate Panel has held that the referenced complaint is ill-founded.

67. According to the Panel, a complaint concerning the non-disclosure of evidence cannot be formulated in the way the appeal attempted to formulate it. The fact that the Prosecutor spoke with the witnesses, and the fact that the hearing transcripts show that the Prosecutor had informal conversations with the witnesses on the trial day because of his indication in almost all cases '*even though we had met this morning*', cannot amount to the referenced violation. Also, the Appellate Panel has noted that the party to the proceedings is not bound by the law to submit possible (official) notes concerning the preparation of witnesses.

68. In view of all the foregoing, the Appellate Panel has held that all the complaints, that the Trial Panel's referenced actions concerning the proper nature of the procedural aspect

of the case caused essential violations of the criminal procedure provisions under Article 297(2) of the CPC BiH to the prejudice of the accused, are ill-founded, and therefore dismissed them.

(ii) Complaint concerning the identification in the courtroom

69. The Appellate Panel has primarily noted that the referenced complaint needs to be examined within the essential violation referred to in Article 297(2) of the CPC BiH.

70. The appeal stated that several Prosecution witnesses “recognized” or “identified” the accused in the courtroom, with regular objections by the Defense, and that the Trial Panel dismissed these objections with the explanation that the identification was not classical, and subsequently noted on several places in the Judgment, within the evaluation of the witnesses’ testimonies, that the witness identified the accused in the courtroom. The Defense therefore submits that the explanation, that it was just a formal act, is not convincing, and to that effect went on to analyze the act of identification from the aspect of positive law.

71. The Appellate Panel has held that the referenced complaint is ill-founded.

72. In relation to the Defense’s objection concerning the accused’s identification in the courtroom, the Appellate Panel has concluded that such an identification does not amount to a procedural act of proving in terms of the legal provisions under Article 85(3) and (4) of the CPC BiH, as also found by the Trial Panel by providing its explanation under the separate title¹⁰, and evaluating it exclusively in connection with the witnesses’ testimonies and the other evidence pursuant to the principle of free evaluation of evidence. Therefore, the referenced identification had neither decisive importance nor such probative strength in the evaluation of the evidence adduced directly at the hearing, which the Panel evaluates in rendering the decision on the decisive facts and the accused’s guilt.

73. The Appellate Panel has ultimately cautioned that this explanation responded to all other complaints made on the ground of identification in the courtroom, considering that Counsel repeated this objection throughout the appeal, and considering that the continued

¹⁰ See paras. 46-50 of the contested Judgment.

repetition would be irrelevant, except in certain parts for the reason of systematic presentation.

**B. APPELLATE GROUND UNDER ARTICLE 299 OF THE CPC BiH-
INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS¹¹**

1. Appellate complaints advanced by Counsel for the accused Vitomir Racković

(a) Appellate complaint of incorrectly established state of facts from the aspect of elements of the criminal offense of Crimes against Humanity

74. The appeal contested all the essential elements of the mere criminal offense of Crimes against Humanity. Counsel concluded that the Court erroneously found that, at the time covered by the Indictment, a systematic and widespread attack existed in the territory of the Višegrad municipality, and that it did not explain whether and which actions on the part of the accused formed part of the widespread and systematic attack that allegedly existed.

75. The appeal further stated that, during the main trial, the Prosecution adduced no piece of evidence whatsoever proving the existence of the state of war and armed conflict at the critical time, whereby the existence of this element of the criminal offense was erroneously established.

76. Counsel further submitted that the Trial Panel unjustifiably found that the widespread and systematic attack on the civilian population in the Višegrad municipality had lasted between mid-May and late August 1992, considering that this Prosecution's allegation was contested by both the Defense's evidence and Prosecution witnesses' testimonies. Counsel just concluded that tensions among the ethnic groups were intensified. In support

¹¹ The Appellate Panel observes that Counsel's appellate complaints overlap and that he did not properly concretize what is subsumed under which ground. In this regard, the Panel subsumed the issue of application of Article 180(1) and Article 29 of the CC BiH and will address it under the section of the Judgment which will deal with the review of the criminal code violation, while it reviewed the complaints concerning the accused's identification in the courtroom under the essential violations referred to in Article 297(2) of the CPC BiH. All other complaints concerning the elements of the criminal offense and concretely the state of facts concerning the convicting sections of the operative part of the judgment, as Counsel submitted, will be reviewed in this section considering that Counsel based the essential elements of the criminal offense of Crimes against Humanity on the allegedly improperly established state of facts.

of this conclusion, Counsel referred to the testimony of witnesses Alma Čukojević, RV-7, RV-8 and RV-12 concerning the circumstances in which they had worked.

77. In further support to its assertions, the Defense concluded that many witnesses described that the Užice Corps' arrival was primarily aimed at attempting to relax the tension-prevailing atmosphere and that after its arrival the life in Višegrad became more or less normalized.

78. Counsel submitted that the Trial Panel's finding, that the attack was directed against the civilian population, is erroneous and that the analysis of the witnesses' testimonies clearly shows that this element was not proved. The Defense also submitted that the aim of the VRS attacks on the Bosniak armed formations in Višegrad and its surroundings was not to carry out the ethnic cleansing and expel the civilian population but rather to neutralize already at the beginning the Bosniak armed formations in Višegrad, and subsequently the forces of the Army BiH which posed the permanent threat and risk even for the minority civilian population in Višegrad and its surrounding villages, as well as for the VRS units.

79. Counsel also fully contested the existence of *mens rea* on the part of the accused and concluded that the Prosecutor adduced no piece of direct evidence whatsoever based on which a reasonable trier of fact could conclude that the accused was aware of the attack of such a character and that unlawful acts would form part of the attack. In support of his conclusion, Counsel mentioned the event about which the witnesses also testified, pertaining to the problem with the dam and Murat Šabanović, as well as the vandalistic destruction of the bust of the Nobel laureate, Ivo Andrić.

80. Counsel further submitted that it was necessary to prove that all the acts were committed with the discriminatory intent in order to be able to found a person guilty of the criminal offense of persecution. Accordingly, the appeal concluded that, during the evidence presentation, the Prosecution did not indicate, in any case, the accused Racković's attempts to discriminate against any person in any way whatsoever, but rather just tendered the objective evidence, which are facts the accused could not influence in any way. The Defense supported its assertions also with the testimony of the Prosecution witness Nihad Dizdarević, who stated that he had not heard, before or after the war, the accused Racković expressing any hatred or intolerance on ethnic or religious grounds.

81. Considering that the accused was under two Sections of the Operative part of

the contested Judgment convicted of the commission of the criminal offense of unlawful imprisonment, the Defense believes it is noteworthy that the status of the alleged injured parties is extremely important exactly for this criminal offense, considering that, pursuant to international humanitarian law, the internment of prisoners of war as well as of civilians under specific conditions is permissible. In this regard, Counsel concluded that it was already indicated that a certain number of mentioned individuals were prisoners of war, and that their internment was permitted, even though, considering his status, the accused was not in a position to affect either this decision or the decisions concerning the place and conditions of their internment, etc. Counsel also contested the finding under para. 174 of the contested Judgment, and pointed to the alleged inconsistencies in the witnesses' testimonies.

82. The Appellate Panel has held that the referenced complaints are ill-founded.

83. Contrary to the advanced appellate complaints, the Appellate Panel concludes that, considering the established state of facts, the Trial Panel properly found that at the time covered by the Indictment, a widespread and systematic attack directed against the civilian population indeed existed in the territory of the Višegrad municipality, and that the accused Racković's acts, by their nature and consequences, formed part of the widespread and systematic attack on the civilian population of which the accused was aware and that those acts cannot be viewed outside the context of such an attack. In addition, this Panel has held that, with regard to the foregoing, the contested Judgment provided clear and concrete reasons, which this Panel also upholds as valid and based on the adduced evidence.

84. In relation to the foregoing, and considering that within this complaint contesting the existence of a widespread and systematic attack, Counsel also pointed to the lack of evidence proving the existence of armed conflict, it is important to point (again) to the issue addressed below. Even though it has already addressed the referenced issue in para. 41 herein, the Panel reiterates that the existence of a widespread and systematic attack is not an essential element, namely that the existence of the criminal offense of Crimes against Humanity does not depend on it. Unclear is Counsel's objection formulated in the way that, given the *non-presentation of evidence concerning the existence of war, armed conflict or occupation, not all essential elements of **war crimes under Article 172 of the CC BiH** were proved*, considering the existing essential differences between the underlying elements of the criminal offenses of – war crimes under Articles 173, 174, 177

and 179 of the CC BiH and the criminal offense of Crimes against Humanity under Article 172 of the CC BiH, one of the key ones being exactly the need to prove the existence of an armed conflict or war, whose proving is not necessary in case that the criminal offense at issue exists. Therefore, the Defense's objection contesting the existence of a widespread and systematic attack is irrelevant considering the non-existence of an armed conflict, that is, the failure to prove it. With regard to the foregoing, the Trial Panel properly found, in para. 124 of the contested Judgment, that *the qualification of the attack as a general element of the offense in the concrete case, is not solely based on its military aspect, considering that the attack is not limited just to the use of armed force, but rather generally also means the commission of violence against the civilian population.*

85. Furthermore, the Defense's attempts failed in showing, by the witnesses' testimonies concerning their work posts attendance, that the life in the Višegrad municipality was unobstructed, as well as the Defense's effort to qualify the foregoing just as the intensified tensions among the ethnic groups. Having evaluated the witnesses' testimonies mentioned by Counsel in relation to the employment of the witnesses or the persons closely related to them, while correlating them with the situation in the territory of the Višegrad municipality, the Panel concluded that the Defense had a partial approach to those testimonies in an effort to adjust them to its theory. Thus, for example, the Defense submitted that witness Alma Čukojević testified that she had worked until 28 May 1992, disregarding, however, that this very witness also stated that her husband had worked through April 1992, which was established by this Panel upon the review of the main hearing transcript 26 February 2014. Also, the Defense disregarded the key reason for the work cessation of the witnesses and their close relatives, regardless of whether it was precisely in May or a month or two months later, but within the incriminating time frame specified in the Indictment, that is, the mass abduction of Muslims, as witness RV-7 testified at the hearing on 26 February 2014.

86. On the other hand, this Panel has also observed the other witnesses' testimonies properly evaluated by the Trial Judgment in the presentation of the situation in the Višegrad municipality. To this effect, the testimony of witness RV-5, mentioned in para. 114 of the contested Judgment, is interesting. This witness stated that she was issued with a movement permit so she could come to work, and that only Muslims were issued with such movement permits. The foregoing speaks of not only the situation itself, but also of the fact that the discriminatory treatment was directed towards only one group of the

civilian population – Muslims.

87. In view of the foregoing, the contested Judgment also properly evaluated the testimonies of witnesses Rašid Tvrtković, RV-2, RV-6 and Adem Berberović, as well as of the Defense witness Boško Trifković, who confirmed that the Muslim houses in Kabernik had been set on fire before the houses owned by the Serb families Ninković and Mirković. In this Panel's view, the Trial Judgment presents and examines convincingly, in its paras. 115-122, the testimonies of the above mentioned witnesses, as well as of other Prosecution witnesses who clearly and undoubtedly testified about the development of the situation in the Višegrad municipality since April 1992. Thus, witness Rašid Tvrtković stated that he had to leave his house because of the arrival of the *Beli orlovi* unit from Serbia, which started abducting Muslims. Witness RV-2 testified about the situation developing in Kabernik, and witness RV-6 about the situation in Višegrad and Dubova.

88. In view of the foregoing, the Appellate Panel has upheld, in whole, the Trial Panel's finding presented in para. 122 of the contested Judgment:

„On the basis of the foregoing, the Panel has found that the attack in the territory of the Višegrad municipality was *widespread*. In addition, having analyzed the character and the circumstances of the attack, the Panel found that any possibility, that the attack on the civilian population was just a random attack, is excluded, because all the foregoing was ongoing pursuant to a developed and continued pattern of conduct, which attributes to it the *systematic character*.”

89. In addition, the Defense's effort to present all the foregoing as intolerance between the ethnic groups, by stating certain events, particularly the dam opening by Murat Šabanović, was not accepted by this Panel, considering all the established facts. The Panel has upheld as proper in whole the Trial Panel's findings presented in para. 111 of the contested Judgment:

„Pursuant to the Panel's finding, the generally known incident of the dam opening by Murat Šabanović occurred within the referenced intolerance between the ethnic groups, which the Defense was particularly keen on proving in the proceedings, as well as many other events about which the witnesses, particularly the Defense witnesses testified (halting the bus from Užice, burning of the Serb's flag, etc.). However, as the Panel established in these proceedings based on the adduced evidence, what occurred subsequently went far beyond the scope of intolerance among the nations and entered the scope of a widespread and systematic attack directed against only one part of the population, that is, Bosniaks, in which the accused took part, firstly in the role of a TO soldier and subsequently of a VRS soldier, as the Panel found proved beyond a reasonable doubt.“

90. In reviewing the appellate complaint bringing into question the assertion that the

participation of the police and the army in the attack and that of the Užice Corps was aimed at calming the situation, this Panel has concluded that the Užice Corps, as the Trial Panel found, took the side of only one part of the population (Serbs), disarmed exclusively the Bosniak population, which had to surrender all the weapons in their possession¹², including even those for which they had legitimate permits – such as hunters' rifles, and which Corps was exclusively composed of Serbs, according to the adjudicated fact No. 7 (para. 110 of the contested Judgment). Having found that all this had happened before the eyes of the police and the local Serb authorities, that is, along with their participation, which confirms the involvement of the politics in furtherance of the events at issue, the Trial Panel properly correlated witness Pero Drašković's testimony (physics professor, who stated that he had been a member of the MUP), with the testimonies of witnesses Jasmin Cero and RV-7, who testified that they had seen him on 31 May 1992 in the accused's company.

91. Contrary to the Defense's submissions, that the aim of the VRS attacks on the Bosniak armed formations in Višegrad were not the ethnic cleansing and persecution of the civilian population but rather initial neutralization of the Bosniak armed formations in Višegrad and its surroundings, the Appellate Panel has concluded that the primary objective of the attack was the Muslim civilian population, as also properly found by the Trial Panel in paras. 126-133 of the contested Judgment.

92. In drawing this conclusion, the Panel was led by the fact that all the Prosecution witnesses, who testified about this matter, confirmed that the attack was directed exclusively against the civilian population who possessed neither weapons nor uniforms, nor did they act within combat formations, as the Trial Panel found in para. 128 of the contested Judgment. It is primarily clear that all the women-victims subjected to the incriminating acts referred to in Sections 1 and 3 of the convicting part of the Operative Part of the contested Judgment were civilians who were neither engaged in the army nor offered any armed resistance.

93. In relation to the second part of Section 1 of the convicting part of the Operative Part of the contested Judgment – men unlawfully taken to the Orahovci elementary school, in reviewing the Trial Panel's finding within the appellate complaints, the Appellate Panel also

¹² Witness Adem Berberović testified that the Užice Corps had stayed in the Višegrad area for around one month and was engaged in the Bosniaks' disarming (transcript of the hearing held on 21.05.2014).

examined the transcripts of the testimonies of the Defense witnesses Momir Ninković, Stanimir Zečević and Želimir Đurić. These witnesses confirmed that the men in question were unarmed civilians who looked frantic¹³ and that their testimonies, in whole, point to the conclusion that those persons were, beyond a doubt, civilians.

94. In relation to Section 2 of the convicting part of the Operative Part, this Panel has concluded that the Trial Panel properly found that all the Prosecution witnesses, who gave evidence on this matter, confirmed that, on the critical day, the injured parties had been abducted from their homes; that they were unarmed civilians taking no part in any combat activity; and that this finding leaves no dilemmas for this Panel in concluding who these persons were, which remains uncontested by the appellate complaints.¹⁴

95. In relation to the *nexus* itself, the Appellate Panel recalls at this point that, pursuant to customary international law and Article 172 of the CC BiH, it is important that the accused is aware of the attack against the civilian population, that his acts form part of the attack, and that the prosecution need not prove by direct evidence that the accused was aware of this context and *nexus*, but rather that the foregoing can also be proved by circumstantial evidence.

96. In this Panel's view along this line, the Trial Panel properly found that, in the concrete case, there is a *nexus* between the concrete offenses of which the accused Racković was found guilty and the proved attack on the civilian population, considering that the accused, first as a member of the TO, and subsequently of the military post (VP) Višegrad 7158 since 18 May 1992, which was within the Višegrad Brigade¹⁵, had reason to be aware of the events in the territory of the Višegrad municipality, in terms of the large scale of the attack, the comprehensive activities of the Serb forces undertaken against the Bosniak civilian population in the Višegrad municipality, as well as of the severity and nature of the offense underlying this concrete crime.

¹³Thus, e.g. Momir Ninković testified as follows:

“Prosecutor: Have you found them there when you entered? Where were they?

Witness: Some of them were upstairs, I think, and some downstairs. I cannot be precise now. Anyway, people were in the school. There were many men; some of them sat at the tables; some were standing; some of them were just distracted.” (Transcript from the hearing held on 19.11.2014 – witness Momir Ninković)

¹⁴ The testimony of eye-witness Remzija Lisak was particularly convincing with regard to the foregoing. She certainly noticed certain details considering that she had recognized her relative Esad Mameledžija at the TAM small truck.

¹⁵ See para. 134 of the contested Judgment.

97. In this regard, the Appellate Panel has concluded that the accused Racković's acts are definitely not singled out as separate or alienated from the overall events that occurred in the territory of the Višegrad municipality, particularly considering that the accused had taken these acts along with other members of the VRS, as a result of which he was convicted as a co-perpetrator (except in relation to Section 3), from which the single possible conclusion has been drawn that the accused Racković was fully informed about the attack and knew that he contributed to that attack by his acts. Also, in examining the evidence and the established facts, the Appellate Panel did not notice that the accused objected, by any of his acts, to such an attack, or that he showed his disagreement in any way. In this regard, the Trial Panel made a fully proper conclusion in para. 140 of the contested Judgment by finding that:

"If the foregoing is viewed in the context of a mass-scale nature of the attack itself, and of the comprehensive activities of the Serb forces undertaken against the Bosniak civilian population, it is justified to conclude that the accused, as a person present in the Višegrad territory at the relevant time, and particularly as a person forming part of the army which carried out the attacks, was fully informed about what was going on in the territory of this municipality on a daily basis, wherefore it can be concluded beyond a doubt that the accused Vitomir Racković knew about the existing series of widespread and systematic crimes directed against the Bosniak civilian population in the Višegrad municipality. Thus, there is no doubt that the accused knew and wanted that his acts (other severe deprivations of physical liberty, rape and other inhumane acts) form part of the attack and that he wanted to contribute to such an attack against the civilian population."

98. In view of the foregoing, the Appellate Panel considers as ill-founded the Defense's assertions mentioning again certain incidents already dealt with by this Panel with the conclusion that they did not bring into doubt the existence of widespread and systematic attack (the bust destruction, the dam opening...), which the Defense attempted to present as an alleged confusion about the events, wherein the accused had no reason to know about any such attack and take part therein.

99. Contrary to the appellate complaints, the Appellate Panel has concluded that the Trial Panel did not err in finding that the discriminatory intent existed on the part of the

accused Racković¹⁶, considering that the conclusion is based on the completely and properly established state of facts.

100. Having so concluded, the Appellate Panel took into account that, in presenting the arguments in support of his conclusion that no discriminatory intent existed on the accused's part, Counsel pointed to the evidence (T-5 – Changes in the ethnic composition of the Višegrad municipality; T-6 – Instruction of the SDS Main Board on the Organization and Activities of the Serb People in BiH in Extraordinary Circumstances) without taking into account the key evidence stated by the Trial Panel in the contested Judgment, from which it drew its conclusion on the existent intent. Thus, the Appellate Panel points to paras. 154-157 of the contested Judgment where the Trial Panel presented the witnesses' testimonies (Munira Omanović, RV-14, RV-5, Halida Alić and Adem Berberović), from which the discriminatory intent clearly ensued, namely that all the accused's proved acts of commission contained this discriminatory intent. Also, Counsel's appeal unnecessarily attaches too much significance to witness Nihad Dizdarević's statement that he has never heard the accused, before or after the war, expressing any hatred or intolerance on ethnic or religious grounds, considering that the referenced period is any way irrelevant for the discussion on this issue.

101. In relation to Counsel's objections from the appeal section concerning the unlawful imprisonment, the Appellate Panel primarily examined the findings in para. 174 of the contested Judgment indicated by the Defense. To this effect, the Panel firstly concludes that Counsel arbitrarily described the referenced objection and generally contested the findings, but concretized no specific inconsistencies in the witnesses' testimonies, as a result of which their credibility was diminished. In reviewing the referenced complaint, the Appellate Panel, however, considers that it is important to conclude that the alleged inconsistencies, as noted by the Trial Panel in the referenced paragraph and as apparent from the fact that witness RV-7 stated that the accused was in the civilian clothing, while witnesses Munira Omanović and RV-14 stated that he wore a peasant cap with a cockade, are insignificant and in no case bring into question the key circumstances about which these witnesses testified. Along this line, the Appellate Panel has also recalled the Trial

¹⁶The existence of discriminatory intent is particularly apparent from the treatment accorded to witness RV-5, in relation to which this Panel refers to the part of the transcript presented in the part herein concerning the established state of facts in relation to Section 3 of the convicting part of the Operative Part of the Judgment.

Panel's position presented already in para. 85 of the contested Judgment, which it upholds in whole. The Trial Panel found that:

"Most witnesses who appeared before this Panel had eye-witnessed the events occurring at the critical time in the territory of the Višegrad municipality, wherefore any remembering and presenting such traumatic events may trigger strong emotional reactions and undermine the witness's ability to give clear evidence on all the circumstances, and, in particular, it is not reasonable to expect that the witnesses, who had at the time lived in the conditions of mental and physical terror, paid attention to details and that in their statements they could remember all the circumstances irrelevant to them, because their attention was aimed at mere survival."

Also, this finding clearly shows why the witnesses had different observations. Considering the time and their circumstances, all the witnesses noticed and presented, pursuant to their own ability of expression, what they had remembered in relation to the accused. In view of the foregoing, the appellate complaints advanced along this line are dismissed as ill-founded.

102. This Panel has further noted that Counsel again presented arbitrary complaints containing no concrete facts whatsoever. Counsel merely stated that, allegedly, certain injured parties were prisoners of war whose internment was permissible, but specified no person or evidence to corroborate such a conclusion. Therefore, having considered such complaint as irrelevant, the Appellate Panel refers to paras. 92, 93 and 94 herein, in which it already concluded beyond a doubt that all those cases involved civilians only.

103. Counsel's appeal gave a too broad presentation of both the case law and his theories about certain issues, while disregarding their application to the concrete case, including Counsel's duty to concretize the reasons for which he considers and which decisive facts and the evidence corroborating them, that his client had no reason to doubt that the actions referred to in Sections 1 and 2 of the convicting part of the Operative Part of the Judgment constituted arbitrary abductions of persons. Considering that the Trial Panel's finding was in no way brought into doubt by such a complaint, the Appellate Panel has fully upheld that the accused had acted with direct intent in the events described in Sections 1 and 2 of the convicting part of the Operative Part of the Judgment and thus committed the criminal offense of Crimes against Humanity – persecution by other severe deprivations of physical liberty.

(b) Sections 1 and 2 of the convicting part of the Operative Part of the Judgment – unlawful deprivation of liberty within the incorrectly and incompletely established state of facts

104. The appeal primarily contested the Trial Panel's finding under para. 227 of the contested Judgment because of the Defense's position that none of the witnesses stated that the accused Racković had beaten anyone. Counsel also submitted that the conclusion presented in para. 233 of the contested Judgment was drawn from the incorrectly established state of facts; that it is unclear who stated that the accused had knocked 4 teeth out of Salko Šabanović's mouth; and that the Court interpreted the injured Šabanović's statement.

105. According to Counsel, the Court credited only the Prosecution witnesses and unjustifiably did not credit the Defense witnesses Boško Trifković and Nenad Mirković. The Defense also submitted that the Trial Panel did not sufficiently evaluate witness RV-7's testimony which is of acquitting character in favor of the accused.

106. In contesting witness Salko Šabanović's testimony, Counsel stated that the accused was identified by the referenced witness in the courtroom in violation of the CPC BiH's provisions; that this witness testified that he had been mistreated by Miloš Pantelić; that the accused Racković fired around the woods since it was the order he had to comply with; and also that 4 other different versions were offered in this witness's statements, from which it obviously ensues that this witness was adjusting his statements depending on his current needs.

107. In support of such a theory concerning this appellate complaint, the Defense also submitted that witness Sija Džananović stated that she does not know and has never heard the accused's name, as well as that witness Remzija Ajanović, who had been imprisoned at the school, could not recognize the accused in the courtroom.

108. In addition, Counsel pointed to witness RV-14's statement that there was a green truck confiscated by Nešo Tanasković; that he saw the accused wearing a peasant cap with a cockade and that he had arrived there on foot; that the accused was in an olive-green uniform; and that there was no heavy weapons on the truck (PAM), but just the ammunition cases and sitting benches.

109. The Defense also contested witness Jasmin Cero's testimony. This witness

stated that he could not have possibly seen Pero Drašković at Počivale considering his statement that he had never been at this site. In relation to witness Cero's statement, that Salko Šabanović told him that the accused Racković had hit him (Šabanović), Counsel submitted that Salko himself was not resolute that he had been hit by the accused, and that Miloš Pantelić and Nenad Tanasković were convicted under a final judgment for this act.

110. Correlating the testimonies of Želimir Đurić, Remzija Ajanović, Boško Trifković and Momir Ninković, Counsel concluded that the injured parties were not captured by regular members of the VRS, but rather by persons with no connections with the regular structure.

111. In contesting witness Munira Omanović's testimony, the Defense submitted that it is hard to believe that the accused had worn an army coat in mid-June. Also, the Defense submitted that witness RV-12 testified that, on the critical occasion, the accused had a peasant cap with a cockade on his head, and that witnesses Miloš Ivanović, Nenad Mirković, Miroslav Mirković, Dragan Mirković and Nenad Trifković testified to the contrary. In addition, the Defense submitted that witness RV-12 had given a different statement in the MUP Goražde.

112. The appeal further referred to Suvad Dolovac's testimony who stated that he had known Mustafa and Hamed Mulaomerović, but that he does not know if they had been abused by the accused Racković. Counsel mentioned again the witnesses who identified the accused in the courtroom.

113. Counsel particularly highlighted the testimony of Nermina Mulaomerović, who stated that her husband had been abducted by Nešo Tanacković and Goran.

114. According to the Defense, witnesses Miloš Ivanović, Nenad Mirković, Milan Zečević, Radomir Živković, Miroslav Mirković, Dragan Mirković, Momir Ninković, Stanimir Zečević, Slobodan Tešović, Miodrag Marković, Zoran Tasić and Milorad Mirković testified in support of the assertion that the accused was present in the Zaglavak area for 40 days, but that the Trial Panel did not credit their testimonies for unjustified reasons.

115. In contesting witness Remzija Liska's testimony, apart from indicating that the accused's identification in the courtroom by this witness was unlawful, Counsel also submitted that this witness described no concrete action whatsoever on the part of the

accused.

116. In relation to Himzija Tvrtković's testimony, the Defense submitted that the court should have taken into account that she is at odds with the accused, that she did not identify him in the courtroom and that the Court provided no decisive explanation of the reasons for which it credited this witness. In relation to the foregoing, Counsel also submitted that the Defense tendered in the case record two records of examination of Himzija Tvrtković, which clearly shows that she was adjusting her statements depending on the circumstances.

117. That the Court did not conscientiously evaluate Haris Tvrtković's testimony the Defense concluded primarily from the fact that the accused was unlawfully identified by this witness and the fact that, in 1992, the witness was age 12.

118. In relation to witness Rašid Tvrtković, the Defense again objected to the (accused's) identification in the courtroom. In addition, the Defense referred to the contradictions in the accused's description.

119. The Defense asked why the Court had no comment about witness Rašid Mameledžija.

120. In relation to witness Salko Šabanović's testimony, Counsel submitted that the Court provided no explanation of the reasons for which this witness was credited, despite the fact that he gave evidence about important facts contrary to many other Prosecution witnesses' testimonies.

121. In relation to witnesses Halida Alić's assertions, Counsel indicated that, in the critical situation, she was unable to notice anything, and that the Court did not explain why this witness was credited despite the existing inconsistencies in relation to the testimonies of other witnesses for both the Prosecution and the Defense.

122. Counsel argues that the testimony of Boško Trifković, that he had never seen the accused driving a motor vehicle or having a beard during the war, should have been also taken into account.

123. In relation to the accused's wounding, the appeal pointed to the testimonies of Dušana Bukvić, Žarko Krsmanović, Stanimir Zečević and Vljeko Mirković, as well as to

Exhibits O-40–O-44 and O-3, which the Court did not evaluate with due diligence.

124. The Appellate Panel has held that the referenced complaints are ill-founded.

125. Considering that Counsel's foregoing complaints were not presented systematically, but rather just repeated in various parts in relation to certain assertions, this Panel will respond to the referenced complaints in the same order. Therefore, certain repetitions may be expected, all for the purpose of responding adequately to the particular complaint.

126. The Panel has primarily considered as ill-founded Counsel's complaint that the Trial Panel merely interpreted what witness Šabanović had thought in his testimony. In drawing such a conclusion, the Appellate Panel took into account the reasoning presented in para. 243 of the contested Judgment, where the Trial Panel did not, in any way, interpret what the witness had actually thought, but rather provided the reasons for which the witness changed his testimony, and supported it with arguments. Also, the Panel reviewed the transcript of the hearing at which the referenced witness testified, and found therein the footing for the referenced conclusion, namely because the witness repeated several times that he did not want to say who had beaten him, and that he had certain problems because he testified in the cases about the Višegrad-related events. Along this line, the Appellate Panel has gained an impression that, in a certain way, the witness withheld the truth in order to avoid having any problems in the future while visiting his prewar home. Also, this Panel has particularly added to all the foregoing the fact that the Trial Panel could gain the impression about the relevance of witness Salko Šabanović's testimony because it could observe his conduct directly during his testimony at the hearing, which is, in fact, the exact purpose of the direct presentation of evidence. Similarly, the Trial Panel also indicated in para. 83 of the contested Judgment that: *"In evaluating the credibility of the witnesses' testimonies, the Trial Panel could first-hand observe the witnesses, their posture, voice, attitude, bodily and emotional reactions to the questions, and non-verbal conduct in relation to the accused."*

127. The Appellate Panel has further concluded that Counsel had an arbitrary approach by not supporting arguments presented in his complaint that the Trial Panel did not credit the testimonies of witnesses Boško Trifković and Nenad Mirković in para. 249 of the contested Judgment, as well as that the Trial Panel erroneously evaluated the witnesses' testimonies presented in paras. 250-253 of the contested Judgment, wherefore the Trial Panel had to explain the possible fabrication of the Prosecution witnesses' testimonies. In

view of all the foregoing, the appeal leaves an impression that anything that does not suit the Defense's theory is erroneous and fabricated.

128. The Appellate Panel concretely reviewed the Trial Panel's finding on witness Boško Trifković's and witness Nenad Mirković's testimonies, and concluded that it is proper in whole, considering that their testimonies, as such, in no way brought into question the substance of the Prosecution witnesses' testimonies (Salko Šabanović, RV-7 and Jasmin Cero), who had on the critical day clearly and undoubtedly identify the accused and precisely defined his role and conduct. In upholding such Trial Panel's position, this Panel took into account that the Prosecution witnesses' testimonies were not, in any way, aimed at burdening the accused with more charges than with what they had objectively experienced, and that, on the other hand, witnesses Boško Trifković and Nenad Marković were motivated by their own personal interests to protect themselves against self-incrimination by using prefabricated testimonies to support the accused.

129. The Defense's complaint, that the Trial Panel erroneously evaluated the testimonies of the Defense witnesses presented in paras. 250-253, also lacks adequate argumentation which would bring into doubt the Trial Panel's findings. The fact that by correlating the testimonies of Želimir Đurić, Momir Ninković and Stanimir Zečević with the testimonies of the direct victims - Prosecution witnesses, the Trial Panel drew the conclusion unacceptable for the Defense, does not mean that the referenced witnesses' testimonies were erroneously evaluated. Moreover, having acted exactly in the lawful manner by correlating all the pieces of evidence as well as by confronting both parties' evidence, and particularly taking into account all the witnesses' consistent statements regarding the stirring, lamb-roasting-related detail, the consistent testimonies of witnesses Stanimir Zečević, Jasmin Cero, RV-7 and Salko Šabanović about visits to the Orahovac area on foot and by a small TAM truck to as well as the gatherings near the store in Orahovci, the Trial Panel drew the only possible proper conclusion based on the previously mentioned witnesses' testimonies.

130. In this Panel's view, the Defense's objection regarding the insistence that the witness RV-7's testimony be evaluated in relation to Sections 1 and 2 of the convicting part of the Operative Part of the Judgment in terms of the principle of *in dubio pro reo*, is also ill-founded. Specifically, Counsel's approach to the referenced witness's testimony is partial in relation to his response to the question of whether he had seen the accused among the soldiers or not (in relation to Section 1 of the Operative Part), without taking into account

all other circumstances, comprehensively explained by the Trial Panel in the contested Judgment. Thus, in para. 171 of the contested Judgment, the Trial Panel provided a convincing explanation, supported with arguments, that *“on the critical day of 31 April 1992, the described events were occurring successively, and civilians were taken in groups towards the sites of Počivale or Orahovci, some of them in columns, and some loaded on a small TAM truck, which explains why the witness RV-7, who had marched in the column along with other soldiers, saw the accused no sooner than when arriving at the Vlasinje site, while witness Salko Šabanović saw him on the small TAM truck during the transportation towards Orahovci.”*

131. This Panel has also considered as irrelevant Counsel's assertion that the witness RV-7 stated that Salko Šabanović did not tell him by whom he had been beaten. This is because the other evidence proved that the accused had indeed taken part in the charged acts against Salko Šabanović (primarily the mere testimony of the injured party, see para. 126 herein and para. 243 of the contested Judgment). Thus, the witness RV-7's testimony can be viewed from the aspect of supporting evidence considering that, even though he does not know who beat Šabanović, he anyway confirmed the accused's presence on that occasion¹⁷:

“Prosecutor: Do you see Salko Šabanović anywhere around?

Witness: Salko was also..., I saw Salko Šabanović when they brought him in...when they brought him in, I went off to fetch some water; to bring some water. I was ordered to do it. However, I returned when they were beating him, and I watched that out of the corner of my eye.

Prosecutor: What did you see?

Witness: Yes, they were beating him. However, Neđo Vukašinović realized that I saw that, that I was watching that secretly, so he ordered me to fetch some water again.

Prosecutor: Who beat Salko Šabanović?

Witness: I do not know who beat him, those men were inside.

Prosecutor: Who were the men present inside?

Witness: Nenad Tanasković, Vitomir Pantelić and another two persons, two-three persons. There was also ...

Prosecutor: Was Vitomir Racković also present there?

Witness: Pardon me?

Prosecutor: Was Vitomir Racković present there?

Witness: Yes, he was.”

132. In relation to Counsel's repeated contesting of witness Salko Šabanović's testimony with regard to both his inconsistent statements and the accused's identification in the

courtroom, the Appellate Panel has pointed to the explanations already provided along this line in paras. 72 and 73 (concerning the identification), as well as in para. 126 (concerning witness Salko Šabanović's inconsistent statements) of the present Judgment.

133. In this Panel's view, the Defense's submission, that witness Sija Džananović stated that she had not heard Vitomir Racković's name, is irrelevant to dealing with this issue, considering that it is of no key importance whether or not the referenced witness had ever heard the accused's name. In relation to the accused's identification by Remzija Ajanović, the Appellate Panel notes it is interesting that, when it suits it, the Defense attributes significance to this action in the present case, while it contests it in all other cases when the accused was identified by the witnesses.

134. In reviewing the appellate complaint that, *contrary to the other witnesses, witness RV-14 provided a different description* of the accused, his arrival and the truck by which the injured parties were transported, the Appellate Panel has primarily noted that Counsel did not give a conclusion which should be supported by such an allegation, as well as that he does not confront and concretize the testimonies of other witnesses who gave different descriptions, which renders such a complaint vague. However, assuming what Counsel actually wanted to contest, the Appellate Panel concluded, to the extent to which this complaint as such allowed its review, that para. 174 of the contested Judgment referred to certain inconsistencies in the witnesses' testimonies, including the witness RV-14's testimony, and properly noted that *"...the Panel attributed certain inconsistencies in the testimonies to the overall fear and the circumstances prevailing at the time, which certainly went beyond the usual human experiences, because not only that the witnesses at the same time feared for their lives but rather for the lives of their family members. Therefore, it can be rightfully expected that they did not equally perceive all details, including those less important at such moments. Thus, such irrelevant inconsistencies in the witnesses' testimonies were not of decisive importance for the Panel to find that their testimonies are credible and authentic in whole."*

135. Also unsuccessful is Defense's effort to avoid the accused's responsibility for the acts taken against Salko Šabanović by emphasizing that even witness Jasmin Cero could not be certain that the accused Vitomir Racković had actually hit Šabanović, and that Miloš Pantelić and Nenad Tanasković were convicted for that under a final judgment. In

¹⁷ Transcript of the hearing held on 26 February 2014.

concluding so, the Appellate Panel relied on the fact that it has already reviewed the assertions concerning Salko Šabanović's statements, and concluded that Šabanović confirmed that the accused Vitomir Racković had also beaten him, and that not even the final judgment in *Pantelić and Tanasković* can contest this fact since the referenced acts were indeed taken in complicity, wherefore Pantelić's and Tanasković's responsibility cannot automatically exclude the responsibility of the accused Racković.

136. With regard to witness Pero Drašković's testimony, the Appellate Panel has concluded that nothing brought into question Jasmin Cero's testimony concerning Pero Drašković's presence at (the site of) Počivale, namely that this complaint, construed in the way that *the Trial Panel did not credit witness Drašković only because he is a witness for the Defense*, was insufficiently supported with arguments.

137. According to the Appellate Panel, also unsuccessful is the Defense's objection presented in the form of conclusion that irregular structures took part in the charged acts (Sections 1 and 2). Counsel drew this conclusion from witness Remzija Ajanović's statement that the referenced persons had been wearing masks, which, in correlation with the fact that witness Želimir Đurić stated that Commander Pandurević had been unaware of the situation in the field, leads to the referenced conclusion that irregular structures were in question. Counsel also added to the foregoing that, on the critical day, witnesses Boško Trifković and Momir Ninković did not see the accused near the school in Orahovci. In concluding that this complaint is ill-founded, the Appellate Panel relied on the fact that the appeal offered insufficient arguments which would bring into doubt the Trial Panel's findings, wherein witness Ajanović's testimony was stated in part, and insufficiently concretized, while the lack of credibility of witnesses Bošković, Ninković and Đurić has been already explained.

138. With regard to the complaint about the accused's identity, or inconsistent statements regarding the description of his clothing, in terms of whether he wore *an army overcoat (Munira Omanović)*, or *a peasant cap with the a cockade (RV-12)*, or *none of that (Miloš Ivanović, Nenad Mirković, Miroslav Mirković, Dragan Mirković and Nenad Trifković)*, the Appellate Panel has considered any discussion along this line as irrelevant, namely that the Trial Panel properly found that the referenced circumstances were irrelevant, and that *such insignificant inconsistencies in the witnesses' testimonies have no decisive importance whatsoever for the Panel in evaluating their credibility and authenticity*. In addition, also irrelevant is the contesting of the Prosecution witnesses' testimonies with

the Defense witnesses' testimonies regarding the referenced circumstances, which are in and out of themselves irrelevant, that is, they are of no key significance for drawing the final conclusion.

139. Contrary to the appellate complaints, this Panel has held that the testimonies of witness Suvad Dolovac and Nermin Mulaomerović are of no particular relevance for drawing any different conclusion. In addition, the Trial Panel made no particular reference to these two witnesses' testimonies, despite being entitled to do so considering that, in drawing a conclusion on the decisive facts, only the substance of the evidence of major significance for drawing any conclusion about them, is being presented.

140. In the Appellate Panel's view, the Trial Panel provided a very concise and convincing explanation of the reasons for which it did not accept the accused's alibi that he had been present at the Zaglavak site continually for a 40-day period, and that the appeal's repeated mentioning of the Defense witnesses who testified about these facts, did not bring into question the Trial Panel's finding. The Appellate Panel has also upheld in whole the referenced Trial Panel's finding and noted that it is not necessary to elaborate on this issue any further. The Appellate Panel has therefore referred to the section of the Trial Judgment – The Accused's Alibi – Zaglavak and the Accused's Wounding.

141. Contrary to the appellate arguments, this Panel points to para. 178 of the contested Judgment, which very clearly described witness Remzija Liska's testimony, whose substance included the description of abduction of persons, the statement about the accused's mere presence and his invitation to her cousin to climb onto the truck. This Panel is satisfied with the foregoing upon a review of the transcript of the hearing testimony of Remzija Liska (2 April 2014.):

“Witness: ... further down the road, under the ravine. My relative Esad was tending cattle just behind the houses. Vito whistled and waved him, and he (my cousin) came down, whereupon Vito loaded him onto the small TAM truck and they headed off under the ravine.

Prosecutor: Who is Vito?

Witness: Vito Racković?

Prosecutor: How do you know that it is Vito?

Witness: I know because I saw him on the small TAM truck, when he was thrown out (*unclear*) he was on the small TAM truck, that's how.”

142. In relation to the foregoing, the Appellate Panel has noted that the explanation was given in relation to the question of why the previously mentioned witness stated that the accused was in charge, and along this line referred to para. 179 of the contested

Judgment.

143. The Defense's submission that the Trial Panel should have taken into account that witness Himzija Tvrtković is on bad terms with the accused is ill-founded. The Appellate Panel concluded so because the witness's statement, that she is on bad terms with the accused, was not given in terms of which this question was actually posed, but rather for the fact that the accused undertook the charged acts wherefore the witness expressed certain anger. Accordingly, if the referenced fact was evaluated in the way as required by the Defense, all injured parties would always been on bad terms with accused persons and no testimony could be adequately taken into account, which is unjustified and inadmissible. Along this line, the Appellate Panel has held it necessary to also point to the following section of the referenced witness's testimony:

Judge: Could you tell me if you have any family relations with or are you on bad terms with the accused Vitomir Racković?

Witness: We have never been, but we are now, that's that.

Judge: OK.

Witness: He acted wrongly, and now we are (on bad terms). I swear to God, we have never been like that before, everything was OK. We were neighbors."

144. In addition, contrary to the Defense's submissions, this Panel has observed that the Trial Judgment reasoning shows the reasons for which witness Himzija Tvrtković was credited. The Trial Panel highlighted that this witness, as well as her son, decisively described the day when their husband and father had been abducted. Considering that this witness's testimony is also consistent with that of Remzija Liska, her credibility is unquestionable, and there was no reason whatsoever to separately explain why the testimony of this witness was credited, since it clearly ensues from the reasoning itself. In relation to the Defense's Exhibits O-4 and O-5, that is, the alleged adjustment of this witness's statements, and that, in the Defense's view, the Court provided no reasons for which it credited the witness's hearing testimony, rather than her statement given during the investigation, the Appellate Panel has noted that, already at the beginning of the contested Judgment, the Trial Panel generally indicated that such a situation could possibly occur, and noted that it was not under obligation to present its position again for each concrete case individually:

"The Panel has also considered the consistency of each witness's testimony given at the main trial and their previously given statements. Sometimes, the witness's oral testimony differed from his/her statement given during the investigation stage. However, one should bear in mind that over twenty years

have elapsed since the occurrence of the events they testify about, and that it is justifiably expected that the elapsed period of time has affected the accuracy of their evidence. In addition, the fact is that, due to the nature of the criminal proceedings, the witnesses at the hearing may be posed different questions in relation to the questions posed to them during the previous examination. Thus, certain inconsistencies are justifiably expected after certain questions have been concretized.” (Para. 84 of the contested Judgment).

145. In the Appellate Panel’s view, Haris Tvrtković’s testimony is also indisputable since it is consistent with his mother’s testimony. The Trial Panel established this witness’s age, and justifiably did not particularly refer to it because it does not, in and out of itself, diminish the value of his testimony.

146. According to the Appellate Panel, the Defense’s repeated insisting on the contradictions in the testimonies of witnesses Rašid Tvrtković, Rašid Mameledžija, Salko Šabanović is ill-founded. The Appellate Panel has concluded that it is not necessary to explain the foregoing again, considering the conclusion made above that the referenced inconsistencies are neither important nor significant, and that they are attributed to the differences in human perception in such extraordinary and unnatural circumstances.

147. In the Appellate Panel’s view, witness Halida Alić’s testimony is unquestionable considering that the Trial Panel examined this testimony very convincingly and correlated it with the testimony of witness RV-2, who is the direct victim – actor in the event, who eye-witnessed the moment when the accused put her, Besim, Alija and Omer Čančar onto the truck during her visit to her neighbors in the hamlet of Čančari on the Feast of the Sacrifice (Eid al-Adha or Kurban Bayrami) on 12 June 1992. The testimony of Halida Alić was not brought into question.

148. The Appellate Panel has already provided the explanation regarding Boško Trifković’s testimony. In relation to the appeal’s insisting on the accused’s alibi or the repeated presentation of the views concerning the accused’s wounding, which were already addressed by the Trial Panel, this Panel has fully upheld the Trial Panel’s finding that the proving of the referenced alibi was unsuccessful, and referred to the Trial Panel’s completely proper findings presented in the contested Judgment – the Accused’s Alibi – Zaglavak and the wounding.

(c) Section 3 of the convicting part of the Operative Part of the Judgment – the rape of witness RV-5 in light of the incorrectly and incompletely established state of facts

149. In relation to the time of the crime commission, the Defense asked how it is possible that the victim does not remember the precise date of such a severe incident.

150. In pointing to many alleged contradictions in the witnesses' testimonies in relation to the circumstances pertaining to this section, Counsel referred to the issue of the time of crime commission (June or July 1992), the number of women abducted on the referenced day (4, 5 or 6), the number of soldiers who abducted them (1, 2, 3 or 4), the type of vehicle by which they were transported (a small TAM truck or a van), the vehicle color, the particular seats where the women sat, the accused Racković's clothing, was he armed or not, and the bridge across which they passed.

151. In relation to the foregoing, the appeal presents the reviews of the testimonies of witnesses RV-5, Božo Tešević, RV-9, RV-1 i RV-8, and RV-6. In addition, the Defense particularly raises the question of whether the witness RV-5 knew the accused or not, and why she decided to spoke up about the referenced incident no sooner than 21 years after its occurrence.

152. The Defense also referred to the testimony of Dr. Alma Đubur Kulenović. The Defense concluded that this witness had examined the witness RV-5 on two occasions upon the request of the Association of Women Victims of War, and that on these occasions witness RV-5 presented her with no medical documentation concerning the period 1992-1993.

153. Counsel particularly referred to the section of witness RV-6's testimony related to the persons she saw in the vehicle on her way back from the house in Crnča.

154. In addition, the appeal addressed the issue of why witnesses RV-6 and RV-5 did not report their being raped in any states where they resided until 2013, and why they gave contradictory statements regarding the medical assistance seeking in Sweden.

155. The Defense particularly referred to Bakira Hasečić's testimony and concluded that she had fabricated everything very carefully.

156. Counsel ultimately submitted that the Defense examined many witnesses and

tendered the documentary Exhibits O-1 and O-2, and thus proved that the accused had never driven any passenger or freight vehicle whatsoever.

157. According to the Appellate Panel, the foregoing complaints are ill-founded.

158. The time of the commission of the charged act is unquestionable for this Panel. The Panel has concluded, along this line, that it is not rare that the injured parties cannot remember the precise date when such a grave event occurred, particularly in the then prevailing circumstances. The offense committed against witness RV-5 was extremely traumatic for her, particularly in relation to the time when it was committed, in a situation when the people were constantly transferred from one place to another, when they were uncertain of the precise day. That is why it is not unusual that they can merely specify the concrete month, its beginning or end, when something occurred.

159. Even though the appeal tried to contest the Trial Panel's finding of facts due to certain inconsistencies in the witnesses' statements, the Appellate Panel concludes that this finding is proper. In this regard, paras. 217-223 of the contested Judgment provided the reasons for which the testimonies of witnesses RV-5, RV-6, RV-1, RV-8, RV-9 and RV-10 were credited. Prior to that, the Trial Panel comprehensively and diligently examined and evaluated all evidence and found that the witnesses have positively identified the accused. In relation to the foregoing, witness RV-5's testimony is particularly stirring, consistent in its decisive elements, detailed, impartial and therefore convincing. The Appellate Panel has also upheld such Trial Panel's evaluation with no dilemmas.

160. In concluding so, the Appellate Panel further takes into account not only the injured party RV-5's comprehensive description of the chronology and the site of the incident, but also her internal feelings before and after the incident. Her description of the events and her condition before the encounter with the accused and the rape itself is stirring. The witness described very convincingly the sequence of events, about which this Panel has no dilemmas either (transcript of 19 February 2014):

“Witness: Vito asked 'why don't you laugh? We were as mute as fish. How do you want to die? We kept silent. No one let a sound out. Do you want a bullet into your forehead? Do you want me to make a raft of you, to tie you all together and throw you into the Drina River? We kept silent. What's that? Why do you keep silent? You'll see now how Serb mothers moan. What did I say? I responded nothing. I just kept thinking about my children.

Prosecutor: For how long you were driven like that?

Witness: Honestly, it could be a minute, five minutes or hundred minutes. It was a whole year. It continued, and lasted for a long period of time, that driving of his.

...

Witness: When we arrived, I saw a house burnt down to my right. I do not know whose house that was. On the other side, there was a beautiful house, a big house. I do not know whose house that was either.

...

Prosecutor: OK. What happened thereafter?

Witness: Horror.

Prosecutor: Witness, I know this is difficult for you, but can you briefly describe what happened after you had stopped in the settlement of Crnča.

Witness: Vito started provoking us and laughing at us. No one was like him, who had the power.

Prosecutor: Where were you at the moment, and where the accused were at the moment when he started provoking you, as you said?

Witness: I moved to the seat next to the driver's seat at the time.

Prosecutor: Why did you move there?

Witness: Because he told me to move to the front seat, and this other girl stayed in the back seat.

Prosecutor: OK. Where was the accused at the moment when he provoked you, as you say?

Witness: In the front seat.

Prosecutor: OK. What happened further on?

Witness: What happened further on? It was something most difficult in the world what a woman can experience, a defeat; someone is doing to you whatever he likes, laughs at you, and provokes you. Vito ordered me to strip off.

Prosecutor: Ordered whom?

Witness: Me.

Prosecutor: OK.

Witness: You are silent. Your brain stopped functioning. You do not feel your body. You know nothing at all. He stripped off and made me strip off too.

Prosecutor: How did he make you do that?

Witness: By force. Strip off! And you could not do anything but strip off.

Prosecutor: Could you refuse to do so?

Witness: I begged him not to do that to me. He did not listen to me.

Prosecutor: OK. What happened next?

Witness: He started raping and provoking me. He told me: "Now, you will have a Serb child. All you Muslim women will have Serb children. I did not respond. The words just remained in my head. He finished the job. He made me to..., I apologize...

Prosecutor: You may say.

Witness: He put his sex organ in my mouth and simply enjoyed.

Prosecutor: Did you do what he asked you to do?

Witness: All what, what he did, what he asked I did it all.

Prosecutor: Did the accused strip off...

Prosecutor: ... his clothes?

Witness: Yes.

Prosecutor: Do you remember?

Witness: The trousers.

Prosecutor: Yes. What happened with your clothing?

Witness: It was all around me."

161. According to this Panel, such a verbal presentation is sufficiently imaginable, with plastic details and so accurate that they do not bring into doubt the truthful presentation of the course of the incident, and reflect exactly the way in which the witness described it. This testimony is also supported with the testimonies of the foregoing witnesses who gave evidence about the sequence of the events at issue, the accused's arrival, and the

abduction of women, their return and their physical appearance thereafter.

162. Possible inconsistencies in the witnesses' testimonies are understandable and logical considering that the injured parties were in an unavoidable situation, uncertain about their lives and worried about their beloved ones, particularly about the minors that some of them had left behind. Also important for this Panel is that they are consistent and indisputable in relation to the decisive facts. It is of key importance that all the witnesses consistently stated that the soldier who had driven the vehicle on the critical occasion was the accused Vitomir Vito Racković. This identification is also supported with the fact that the accused had introduced himself to the injured party RV-5, with his full name, and that he has a daughter whose name is Slavica (see para. 220 of the contested Judgment).

163. Considering that the appeal particularly insisted on the issue of the bridge crossed over by the injured parties together with the accused, the Appellate Panel has noticed that, in its para 226, the contested Judgment adequately responded to these objections already presented before the Trial Panel, and concluded that, based on the adequate evaluation of the offered evidence, it was factually proved that they crossed over the New Bridge (Novi most), which is acceptable for this Panel too.

164. In view of the foregoing and for the same reasons, the Appellate Panel has also considered that witness RV-6's testimony is unquestionable. This is so because her statement about whom she saw after she went out of the house is not that much significant for proving of the accused's guilt, particularly taking into account that an unidentified soldier had done the same to this witness. This witness's description of witness RV-5 is also relevant since she could herself remember why RV-5 had looked just as it was described.

165. According to the Appellate Panel, the objection to the testimony of Dr. Alma Džubur-Kulenović is ill-founded primarily because it is not the key evidence on which the accused's guilt is based. It is rather a corroborating piece of evidence which, along with all other presented evidence, forms a consistent and complete view of the charged incident. Also irrelevant for this Panel is whether the referenced expert witness was presented or not with any documents, considering that the injured party's diagnosis was established in relation to the consequences of the criminal acts taken against her. In evaluating the referenced medical doctor's testimony in this regard, the Appellate Panel will also refer to the objection concerning the reasons for which the injured party spoke up about the

incident no sooner than 21 years after its occurrence, as well as for which she had never reported it to anyone. The Appellate Panel finds the responses in the following (transcript of 18 February 2015.):

“Prosecutor: Witness, how much the rape victims are willing to speak about that incident?

Witness: It is individual.

Prosecutor: Can you tell me based on your practice experiences.

Witness: From my long practice, I may say that I have come from the Chicago Psychiatric Clinic, and that I have been working in Sarajevo with '91 trauma victims. Prior to that, I had worked in Zagreb. A conspiracy of silence has existed for a long period of time, which was even described in the literature. There is a shame to admit what happened. Despite the geographic areas where the crimes were committed in Bosnia and Herzegovina, the mere fact when a person tells that he/she was here and there at that particular time, may be highly indicative of the fact that this person also experienced sexual torture. Changes have occurred, I believe, under the influence of the fact of impunity, we call it the perception of impunity. As long as our victims had the perception of impunity of offenders, they kept silent.”

166. With regard to the Defense's submissions attempting to avoid the accused's responsibility by proving that he had not passed any exam to obtain a driving license, this Panel upholds the Trial Panel's position, considering the fact that the *de iure* non-existence of the driving license often does not exclude the *de facto* knowledge to drive a certain category of motor vehicles. This is also supported with the fact that the accused had worked as construction machines' operator with the *Granit* Construction Company and had certainly acquired certain driving skills.

167. Ultimately, the Appellate Panel has to conclude that the Defense's referral to the alleged Bakira Hasečić's fabrications is fully irrelevant since it has been concluded, beyond a doubt, that the witnesses' convincing testimonies already proved the state of facts related to this count.

168. Also, in addressing this issue, the Appellate Panel considers as irrelevant the alleged (non)-seeking of medical assistance by witnesses RV-6 and RV-5 in Sweden. However, this Panel has reviewed the transcript of the hearing at which witness RV-5 testified (19 February 2014), and found no inconsistencies with witness RV-6's testimony. This is so because witness RV-5 also stated that she had indeed sought medical assistance in Sweden (transcript of 19 February 2014):

“Counsel: You did not. Have you contacted a medical doctor?

Witness: I did, in Sweden.”

(d) Section 4 of the convicting part of the Operative Part of the Judgment – the interrogation and beating of Adem Berberović

169. The Defense submitted that this Section of the Judgment was based solely on witness Adem Berberović's testimony. The Defense indicated that this witness repeatedly gave inconsistent statements and that the Trial Panel neither noticed the disputable inconsistencies in the contested Judgment nor indicated which statement it credited.

170. The appeal particularly indicated that, in describing the act of abuse, the witness *first used the word 'bayonet', and then the word 'knife'* and that witness Nesib Nuhanović testified that Adem Berberović told him that he (Adem) had been abused by Uroš Pantelić.

171. In referring to this Court's case law, the Defense submitted that there is no basis for rendering a convicting judgment if there is an uncorroborated evidence of just one witness.

172. The Appellate Panel has held that the referenced complaints are ill-founded.

173. The Defense incorrectly submitted that the contested Judgment did not refer to the alleged contradictory witness's statements, O-11 and O-12. To this effect, the Appellate Panel points to paras. 264 and 265 of the contested Judgment, which exactly addressed and explained certain inconsistencies, and this Panel fully upheld them too.

174. In relation to the Defense's insisting that witness Nesib Nuhanović stated that Adem Berberović told him that he (Adem) had been abused by Uroš Pantelić, the Appellate Panel reviewed the transcript of Nesib Nuhanović's testimony of 18.02.2015, from which it ensues that, even at the time, Counsel made efforts and pressured the witness to confirm that the injured party had been abused by Uroš Pantelić. However, the foregoing was clarified by the Prosecutor's further examination of the witness:

“Prosecutor: When he mentioned to you (the name) Uroš Pantelić, what did he tell you at the time about Uroš Pantelić?

Witness: He told me that he had been beaten in the school.

Prosecutor: Yes.

Witness: In Gornja Lijeska.

Prosecutor: Yes.

Witness: And I asked him if he had recognized anyone. He told me that he had only recognized Uroš Pantelić.

Prosecutor: Did Uroš beat him? Did he say anything about that?

Witness: He did not tell me.”

175. Having further reviewed the transcript of Adem Berberović’s testimony of 21.05.2014, the Appellate Panel concluded that the Defense’s complaint regarding the allegedly changed witness’s statements concerning the use of either bayonet or the knife leaned against his neck, was ill-founded. By her question posed to the witness, the judge wanted the witness to concretize the item. The witness consistently confirmed that the item in question was a knife:

“Judge: OK. You have mentioned a knife, have you?

Witness: Yes, I have. Yes.

Judge: Can you describe the type of knife in question?

Witness: It was the same as knives in the army, same as the army knives.

Judge: What is the name of that knife?

Witness: Well, I don’t...

Judge: Have you served the compulsory army service?

Witness: Yes, I did it in '84. I spent a year there...

Judge: Can it be said that it was a bayonet?

Witness: That was the Yugoslav National Army. At the time, everyone had to serve the army.

Judge: Can it be said that the knife was a bayonet, in the form of bayonet?

Witness: No.

Judge: That military knife?

Witness: Yes, that’s one, not the other one. Not that one. It was not a bayonet at the time. A knife, it was a long knife, around 30 cm long.

Judge: The length of the cutting edge or of the whole knife?

Witness: Of the cutting edge. “

176. In view of all the foregoing, the Appellate Panel has concluded that the appeal did not bring into question by anything the Trial Panel’s findings on this section of the Operative Part of the convicting part of the Judgment, especially taking into account that the Trial Panel evaluated with particular due diligence the testimony of witness-injured party Adem Berberović. This Panel has also upheld the foregoing and concluded that the referenced witness’s testimony is corroborated with witness Nesib Nuhanović’s testimony both regarding his whereabouts and the status at the critical time (a civilian not-taking any combat activity), as well as that he was abused.

177. On the basis of all the foregoing, the Appellate Panel has concluded that the state of facts established by the Trial Panel was not brought into question and therefore upheld it as such in whole.

C. APPELLATE GROUND UNDER ARTICLE 298 OF THE CPC BiH-
VIOLATION OF THE CRIMINAL CODE

1. Appellate complaints of Counsel for the accused Vitomir Racković

178. Considering the Appellate Panel's conclusion, that the section of the appeal concerning the application of Article 180(1) and Article 29 of the CC BiH falls under this sub-ground, the Panel will firstly examine the referenced appellate ground and then refer to Counsel's complaints advanced under this section of the appeal.

(a) Article 180(1) and (29) of the CC BiH

179. In analyzing this provision of Article 180(1) of the CC BiH, Counsel's appeal concludes that the Prosecution was under obligation to specify the concrete way and the actions by which the accused Racković committed the criminal offenses at issue.

180. In addition, apart from the previous conclusion on the (accused's) *actus reus*, Counsel submitted that the accused's *mens rea* should also have been proved.

181. In submitting that the accused was convicted of committing the criminal offenses at issue as a co-perpetrator, Counsel also indicated that the operative part of the contested Judgment does not state which accused's acts specifically constitute the act of co-perpetration.

182. The Appellate Panel has held that the foregoing complaints are ill-founded.

183. In view of the foregoing, that is, of the Appellate Panel's conclusion that the state of facts was established completely and correctly, there is no doubt for this Panel too that it is clear which actions on the part of the Accused satisfied the elements of the criminal offense in question. Also, the Appellate Panel has held that the foregoing is also in compliance with Article 180(1) of the CC BiH – individual responsibility.

184. The Appellate Panel has concluded that Counsel's objection concerning the existence of complicity is ill-founded because Sections 1, 2 and 4 of the convicting part of the Operative Part of the Judgment clearly listed the actions undertaken by the accused, which in their entirety contribute to and constitute complicity to a decisive extent. In

addition, the Trial Panel clearly separated Section 3 of the convicting part of the Operative Part of the contested Judgment with the conclusion that the accused acted alone as a direct perpetrator.

(b) Application of substantive law – *tempus regit actum*

185. The defense submits that the CC SFRY should have been applied to the concrete case as the law in force at the time of the alleged commission of the criminal offense (*"should this Court "possibly" decide to legally define my client's acts in accordance with this Defense's proposal as war crimes against the civilian population/prisoners of war, this offense was provided for in the law that was in force at the time of my client's "alleged" actions" – appeal, p. 43.*).

186. The Appellate Panel has concluded that the referenced complaint is ill-founded.

187. The Panel has primarily upheld the Trial Panel's finding that:

"At the time of the charged acts' commission, the CC SFRY did not provide for crimes against humanity as a criminal offense, but they formed an imperative principle of international law, and, in 1992, they undoubtedly formed part of customary international law¹⁸. Pursuant to international law, crimes against humanity are recognized in universal terms of jurisdiction to persecute, thus a conviction for such offenses, pursuant to the law which subsequently provided for and established this offense as a criminal offense, and provided for a separate criminal sanction, is not in violation of Article 7(1) of the ECHR.

Such a position was also taken in the case number 51 891/99, *Naletilić v. Croatia*. In addition, the Panel has held that, from the aspect of prescribed sentence, the adopted Criminal Code of the SFRY was not a more lenient law to the perpetrator considering that the CC SFRY did not at all prescribe the criminal offense in question".

188. Having considered the Trial Panel's proper acting in relation to the application of substantive law, the Appellate Panel concluded that the derogation from the principle of time constraints regarding the application of the Criminal Code is exactly in question in relation to the criminal offense of Crimes against Humanity under Article 172 of the CC BiH when Article 4a) of the CC BiH should have been applied. The criminal offense concerned was not as such prescribed by the Criminal Code effective at the time of the crime commission (CC SFRY). However, since this incrimination involves violations of the rules

¹⁸ Decision of the European Court of Human Rights, *Šimšić v. Bosnia and Herzegovina*, number 51552/10 of 26.08.2010.

of international law, concerning the offenses which meet the underlying elements of the criminal offense of Crimes against Humanity under Article 172(1) of the CC BiH, the requirements laid down under Article 4a) of the CC BiH have been satisfied.

D. APPELLATE GROUND UNDER ARTICLE 300 OF THE CPC BiH- SENTENCING

(a) Appeal filed by the Defense

189. The appeal does not elaborate in detail on this appellate ground except for proposing, pursuant to its position on the CC SFRY's application, that the magnitude of sentence should be 5-20 years. However, bearing in mind the instrument of extended effect of the appeal¹⁹, the Appellate Panel also examined the sentencing decision.

(b) Appeal filed by the Prosecution

190. The Prosecution argued that the Trial Panel did not sufficiently take into account the other aggravating circumstances on the part of the accused Racković, while overestimating the extenuating circumstances.

191. To this effect, the Prosecution concluded that numerous criminal acts were never taken into account, that the injured parties still feel deep consequences in terms of their traumatization, mental and physical pain, as well as the fact that unnecessary cruelty was manifested in the commission of these offenses, which had no strategy or any logical reason except to harm the injured parties and make their lives even more difficult. In addition, the Prosecution argued that the fact that the accused is in his declining years cannot constitute an extenuating circumstance.

¹⁹ Article 308 of the CPC BiH: "An appeal filed in favor of the accused due to the state of facts being erroneously or incompletely established or due to the violation of the Criminal Code shall also contain an appeal of the decision concerning the punishment and forfeiture of the property gain (Article 300)."

(c) Conclusion of the Appellate Panel

192. The Appellate Panel has considered as well-founded the Defense's complaint regarding the sentencing, but in terms of its length within the magnitude provided for in the CC BiH (an explanation of the impossibility of the application of the CC SFRY was already provided).

193. In drawing the conclusion on the length of the prison sentence, the Appellate Panel primarily took into account Article 39 and Article 48 of the CC BiH. The Appellate Panel took into account the Trial Panel's proper acting in the evaluation of both the extenuating and the mitigating circumstances, and also upheld it. This Panel however concluded that this Court's case law should have been also taken into account in the cases conducted for the criminal offense of Crimes against Humanity, where the consequences were much graver – more resulting deaths, without questioning the gravity of the consequences in the present case, and that the imposed 12-year sentence is too stringent and unnecessary in achieving the purpose of punishment.

194. This Panel has not, in any case, held that any particularly extenuating circumstances exist on the part of the accused which could result in a reduction of the statutory prescribed sentence. However, the Panel has held that, considering all the aggravating and the extenuating circumstances also considered by the Trial Panel, in addition to the Court's case law as indicated above, the 10-year prison sentence is the only adequate sentence by which the purpose of punishment can be achieved, including both the special and general deterrence as well as social condemnation.

195. The foregoing has in no case brought into question the degree of the accused's guilt, or his direct intent to participate in persecution, independently or as a co-perpetrator, by other severe deprivations of physical liberty, other inhumane acts and rape. However, taking into account both the foregoing and the Court's obligation to ensure that the sentence is adequate and proportionate, neither lesser nor lengthier than that required to achieve its purpose, the Appellate Panel has concluded that the contested Judgment should be revised by sentencing the accused for the criminal offense described in the Sections of the convicting part of the Operative Part of the contested Judgment to imprisonment for a term of 10 (ten) years.

196. Considering that the Defense's appeal on this ground was granted, it is irrelevant to explain in detail the reasons for which the Prosecution's appeal and the request for

imposition of a lengthier prison sentence than that imposed under the Trial Judgment was not granted.

197. In view of all the foregoing, and pursuant to Article 314(1) of the CPC BiH, it was decided as stated in the Operative Part of the Judgment.

RECORD-TAKER

Ena Granić

PANEL PRESIDENT

JUDGE

Mirko Božović

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