Bosna i Hercegovina **Босна и Херцеговина**

Sud Bosne i Hercegovine
Суд Босне и Херцеговине

Case Number: **S1 1 K 006028 16 Krž 4**

Judgment pronounced on: **21 April 2016**

Before the Appellate Panel composed of:

Judge Senadin Begtašević, Presiding Judge
Judge Tihomir Lukes, Reporting Judge
Judge Mirko Božović, member

CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

The Accused Oliver Krsmanović

SECOND INSTANCE JUDGMENT

Prosecutor for the Prosecutor's Office of B-H:

Edin Muratbegović

Defense Counsel for the Accused:

Attorney Slaviša Prodanović

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Sarajevo, 21 April 2016

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, sitting on the Panel of the Appellate Division of Section I for War Crimes composed of Judge Senadin Begtašević, as the Presiding Judge, and Judge Tihomir Lukes and Judge Mirko Božović, as members of the Panel, with the participation of Legal Advisor Ena Granić, as the record-taker, in the criminal case conducted against the Accused Oliver Krsmanović for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraphs (a), (e), (f), (g), (i) and (k) of the Criminal Code of Bosnia and Herzegovina (CC B-H), as read with Article 29 and 31 of the CC B-H, all as read with Article 180(1) of the CC B-H, and the criminal offense of Violating the Laws and Practices of Warfare in violation of Article 179(2)(d), as read with Paragraph (1), all as read with Articles 29 and 180(1) of the CC B-H, having decided on the respective Appeals by the Prosecutor's Office of Bosnia and Herzegovina and the Defense Counsel for the Accused Oliver Krsmanović, Attorney Slaviša Prodanović, from the Judgment of the Court of B-H No. S1 1 K 006028 11 Kri of 31 August 2015, after a public session of the Appellate Panel held in the presence of the Prosecutor for the Prosecutor's Office of B-H, Edin Muratbegović, the Accused Oliver Krsmanović and his Defense Counsel, Attorney Slaviša Prodanović, pursuant to Article 310(1), as read with Article 313 of the Criminal Procedure Code of B-H (CPC B-H), on 21 April 2016 rendered the following:

J U D G M E N T

The respective Appeals by the Prosecutor's Office of B-H and the Defense Counsel for the Accused Oliver Krsmanović are hereby **dismissed as unfounded** and the Trial Judgment of the Court of B-H S1 1 K 006028 11 KrI of 31 August 2015 is hereby **upheld**.

R e a s o n i n g

1. Under the Judgment of the Court of B-H No. S1 1 K 006028 11 Kri of 31 August 2015 (Trial Judgment), the Accused Oliver Krsmanović was found guilty that with the acts described in the enacting clause of the convicting part of the Judgment (Conviction) (Sections 1-8) he committed the criminal offenses as follows: under Section 1, Crimes

against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (i) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 2, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (f) of the CC B-H, as read with Article 180(1) of the CC B-H; under Section 3, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (i) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 4, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (i) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 5, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (a) of the CC B-H, as read with Articles 31 and 180(1) of the CC B-H; under Section 6, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (i) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 7, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraphs (e) and (a) of the CC B-H, as read with Article 180(1) of the CC B-H; under Section 8, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (k) of the CC B-H, as read with Article 180(1) of the CC B-H. For that reason, in application of Articles 39, 42 and 48 of the CC B-H, the Trial Panel sentenced him to imprisonment for a term of 18 (eighteen) years.

2. Pursuant to Article 56(1) and (2) of the CC B-H, it was decided that the time the Accused spent in custody would be credited toward the imposed sentence. The Accused was in extradition custody from 30 May 2011 to 3 June 2011 under the decision of the Court of B-H No. S1 3 K 006016 11 EKS of 31 May 2011, and from 3 June 2011 to 6 December 2013, when custody was terminated and prohibiting measures imposed on the Accused under the decision of the Court of B-H No. S1 1 K 006028 11 Kri of 3 December 2013.

3. Pursuant to Article 188(4) of the CPC B-H, the Accused was relieved of the duty to reimburse the costs of the proceedings, while the injured parties were instructed to pursue their potential claims under property law in a civil action, pursuant to Article 198(2) of the CPC B-H.

4. Under the same Judgment, contrary to the foregoing and pursuant to Article 284(c) of the CPC B-H, the Trial Panel acquitted the Accused Krsmanović of the charges that with the acts described in the enacting clause of the acquitting part (Acquittal) of the contested Judgment, he committed the criminal offenses as follows: under Section 9, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraphs (f) and (g) of the

CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 10, Violating the Laws and Practices of Warfare in violation of Article 179(2)(d) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 11, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (a) of the CC B-H, as read with Articles 29 and 180(1) of the CC B-H; under Section 12, Crimes against Humanity in violation of Article 172(1)(h), as read with Sub-Paragraph (f) of the CC B-H, as read with Article 180(1) of the CC B-H.

5. Pursuant to Article 189(1) of the CPC B-H, the costs of the criminal proceedings with respect to the Acquittal shall be paid from the budget of the Court, while pursuant to Article 198(3) of the CPC B-H, the injured parties were instructed to pursue their claims under property law in a civil action.

6. The Prosecutor's Office of B-H and the Defense Counsel for the Accused Oliver Krsmanović, Attorney Slaviša Prodanović, filed timely Appeals from the Judgment.

7. The Prosecutor's Office of B-H filed the Appeal on the grounds of incorrectly and incompletely established state of the facts and the decision on the sentence, and moved the Appellate Panel to grant the Appeal completely as well-founded, and, pursuant to Article 315 of the CPC B-H, revise the Trial Judgment by finding the Accused guilty of all relevant acts of the criminal offense he is charged with under the Indictment, and by imposing on him a sentence of long term imprisonment in accordance with the law.

8. Defense Counsel for the Accused, Attorney Slaviša Prodanović, filed the Appeal on the grounds of an essential violation of the provisions of criminal procedure, violation of the criminal code, incorrectly and incompletely established state of facts, and the decision on the sentence, and moved the Appellate Panel to grant the Appeal pursuant to Article 315 of the CPC B-H, render a decision revoking the Trial Judgment and schedule a hearing.

9. The Prosecution and the Defense filed responses to each other’s Appeals, moving the Court to dismiss as unfounded the other party’s Appeal.

10. Pursuant to Article 304 of the CPC B-H, a session of the Appellate Panel was held on 21 April 2016 in the presence of Prosecutor Edin Muratbegović, the Accused Oliver Krsmanović, and his Defense Counsel, Attorney Slaviša Prodanović.

11. During the public session, the Prosecutor, Defense Counsel and the Accused each

fully reiterated their written appeals and motions.

12. The Prosecution and the Defense also reiterated their written responses to each other's Appeals.

13. Pursuant to Article 306 of the CPC B-H, having reviewed the contested Judgment insofar as contested by the Appeal, the Appellate Panel rendered a decision as quoted in the enacting clause for the reasons that follow.

I. ACQUITTAL

A. GROUND OF APPEAL OF INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

1. The Prosecution Appeal

(a) Appeal grievances concerning Count 5 of the Indictment

14. Although the Prosecution considers as proper the averments of the Court of B-H that there is no other witness (except OK-14) to the event referred to in this Count of the Indictment – the rape of OK-14, the Prosecution nevertheless stresses that the Court should have been mindful of the fact that witness OK-14 confirmed at the main trial that she once saw the Accused in downtown in the period concerned and that she heard him telling a passer-by that he had raped many Muslim women, which she personally experienced.

15. The Prosecution also states that it is true that witness Radovan Milosavljević said that he had been watching the event from a distance of 50 meters, but considers it a sufficient distance from which he was able to see the Accused.

16. The Appellate Panel considers the referenced grievances to be unfounded.

17. The Appellate Panel concludes, as did the Trial Panel, that the Prosecution did not prove beyond reasonable doubt that with the acts described under Count 5 of the Indictment the Accused committed the criminal offense of Crimes against Humanity carried out by persecution, that is, by acts of torture and rape, when in early June 1992, in the *Vilina Vlas* hotel he participated in the rape of Bosniak women who were unlawfully detained in that building, including the protected witness OK 14, and when he

participated in other kinds of sexual violence by forcing, together with Željko Lelek and Milan Lukić, another person to rape I.Dž., which the referenced person did, which was the last time the victim was seen.

18. Having reviewed the Prosecution objection with respect to the part of this Indictment Count which concerns the rape of witness OK-14, this Panel concluded that the Prosecution had not offered any new facts or corroborating evidence which would have resulted in a conclusion different from the Trial Panel's. With respect to the rape of OK-14, the only examined witness is the very injured party - witness OK-14, as the Prosecution also states. It is true that with this type of offenses most often the only witness is the person against whom the act as charged was committed and that a conviction may be based on the victim's statement. However, in such situation, the statement must be carefully reviewed and there must not be any doubt about its accuracy and truthfulness, especially about the identification of the protagonists, which was not the case in the proceedings at hand. During the examination at the main trial on 21 August 2012, the injured party could not confirm with certainty that she was also raped by the Accused Oliver Krsmanović, although she was certain about the names of the other two persons. In such situation, given the injured party's uncertainty, and in the absence of any other piece of evidence that would have supplemented her statement and led to an undeniable conclusion that the Accused was the person in question, the Trial Panel could not have made any other inference but acquit the Accused.

19. In view of the foregoing, the Appellate Panel does not consider the witness' averment that she heard Oliver Krsmanović saying that he *had raped many Muslim women* to be decisive for the specific event. According to the witness, she had heard it before she was taken away, and what she had heard is not a decisive indication of the Accused's responsibility and guilt for the act committed against her.

20. With respect to this Indictment Count's part that concerns the rape of I.Dž. committed by Slobodan Vuković together with Stevan, Gojko, Radovan, Sibal and the Accused Oliver Krsmanović upon the order of Milan Lukić, the Appellate Panel has concluded that the Trial Panel acted properly when it did not fully credit witness Radovan Milisavljević. As said earlier, he was watching the event from the distance of 50 meters, during which there was a considerable number of uniformed persons in front of the hotel, hence the identification of the Accused by this witness was reasonably called into question. The point here is not a subjective assessment of witness Milisavljević's eyesight, but an

objective circumstance that nobody in that situation would have been able to accurately assess some person's potential presence considering all circumstances, especially since the event the witness was watching was inherently so disturbing as to call into question the witness' ability of assessment and independent judgment.

21. Mindful of the foregoing, despite the demonstrated special sensitivity regarding the ordeal that witness OK-14 went through, as most certainly did witness I.Dž. as well, which ordeal leaves immeasurable consequences on the health and life, and mindful of the demonstrated justified fear which prevented her from looking at her rapists, this Panel was nevertheless not satisfied that the evidence was sufficiently convincing to indicate that the Accused was the one who raped witness OK-14, that is, that he participated in the incident involving I.Dž.

22. Therefore, having taken into account all circumstances as a whole, this Panel was not able to establish the responsibility of the Accused beyond any reasonable doubt, which the Trial Judgment also properly found. For that reason, guided by the fundamental principle of the CPC B-H, *in dubio pro reo,* under which "a doubt with respect to the existence of facts that make the elements of a criminal offense or on which depends an application of certain provisions of criminal legislation shall be decided by the Court with a judgment and in a manner more favorable for the accused", this Panel concluded that it was not proven that the Accused Oliver Krsmanović committed the criminal offense he was charged with under this Count of the Indictment.

(b) Appeal grievances concerning Count 7 of the Indictment

23. The Prosecution stressed in the Appeal that despite the fact that none of the witnesses testifying about the event referred to in this Count of the Indictment was an eyewitness, there were nevertheless witnesses Muša Kustura and Raza Omerović who were passing by the mosque while it was on fire and saw the Accused in front of it, together with Milan Lukić. To corroborate the foregoing, the Appeal reads that witness Kasim Dedić had indirect information from Muša Kustura and he wrote it down in his diary which was admitted as a Prosecution exhibit.

24. According to the Appeal, Defense witness Miroslav Krsmanović also confirmed that he had seen the Accused by the mosque that day.

25. Summing up the foregoing, the Prosecution concludes that, although it was stated

that there was no description of the relevant act, it is clear that the mosque was on fire, that the Accused was standing in front of it and that he did not do anything to prevent it, but that he rejoiced singing songs and extoling Serbia, which is sufficient to charge him with the commission of this criminal act.

26. The Appellate Panel considers the referenced grievances to be unfounded.

27. In the opinion of this Panel, based on the evidence, that is, witnesses' statements about this event, the Trial Panel was not able to conclude that the Accused Krsmanović had participated in the destruction of the mosque as a co-perpetrator. The Prosecutor did not prove the allegations from the Indictment.

28. The Appellate Panel has concluded that the Accused's presence in front of the mosque at the relevant moment does not prove that he participated in the act as charged. The Prosecution's attempt in the Appeal to incriminate the Accused because of his mere presence and failure to undertake any actions to prevent consequences while the mosque was burning is not sufficiently corroborated. The elements of the criminal offense that the Accused was charged with under the Indictment concerning this event do not include a mere presence or failure to undertake actions to prevent a consequence. Article 179(2)(d) of the CC B-H clearly states the specific underlying elements, that is, acts of the criminal offense of Violating the Laws and Practices of Warfare.

(c) Appeal grievances concerning Count 9 of the Indictment

29. According to the Appeal, the Prosecution considers that the state of the facts was incorrectly established with respect to this Count of the Indictment as well, given that witness OK-7 said at the main trial that Milan Lukić and his men, including the Accused Oliver Krsmanović, participated in the imprisoning of civilians in Meho Aljić's house. As follows from the Appeal, the statement of OK-7 was also corroborated by the statement of Mujesira Memišević.

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

31. This Panel upholds the Trial Panel's opinion, presented following a comprehensive analysis of the witnesses' statements, that it is indisputable that more than 70 civilians were detained in a house at Bikavac, and that soldiers commanded by Milan Lukić shut the doors and windows and set the house on fire, but the Accused Krsmanović's

participation and role in the whole event was not fully clarified.

32. Even the witness - injured party Zehra Turjačanin, the sole survivor of this event, confirmed that she had seen Milan Lukić and six *White Eagles* [*Bijeli orlovi* in the vernacular; translator's note], but did not confirm Oliver Krsmanović's presence. As the Trial Panel also stated, the only witness who saw Milan Lukić, Oliver Krsmanović, Joviša Planinčić and Željko Lelek at the relevant time carrying a garage door next to the house where the civilians were detained, is witness OK-7, who said that Zehra and Mujesira could also see Oliver. However, by comparing witness OK-7's statement with Mujesira Memišević's statement, it is not possible to reach an indisputable conclusion about the Accused's participation in the relevant event, given that witness Mujesira Memišević stated that she had seen the Accused a day or two later, but not on 27 June 1992.

33. Based on the foregoing, considering that in the Judgment the Trial Panel analyzed and properly evaluated the witnesses' statements about the event in Meho Aljić's house, this Panel was not able to establish beyond any reasonable doubt the Accused's presence and participation therein either, since the Prosecution Appeal did not contain any new facts or evidence or an analysis of the existing evidence from which it would be possible to make an inference different from the one made by the Trial Panel.

(d) Appeal grievances concerning Count 10 of the Indictment

34. Referring in the Appeal to the statement of Šaban Muratagić (read during the main trial), as well as the statements of Adem Šišić and Zlatka Dragović, the Prosecution concluded that the Trial Panel erred when it nevertheless took into account only the statements of witnesses Nurko Dervišević and Ramiz Kulo, who did not say that the Accused Krsmanović had beaten them in *Uzamnica*.

35. According to the Prosecution, if the witnesses whose statements were evaluated by the Trial Panel did not say that the Accused had beaten them, it cannot imply to mean that he had not beaten Šaban Muratagić, Bajro, son of Adem Šišić and Mustafa Dragović, who do not have a single motive to incriminate the Accused without grounds.

36. The Prosecution also comments on Defense witness Srđan Vučičević's statement who confirmed that he was not able to see from all sentry posts which soldier was entering *Uzamnica*, due to which he did not state categorically that the Accused had not come together with the soldiers. According to the Appeal, there was no reference to this witness'

statement in the Judgment.

37. The Appellate Panel considers the referenced grievances to be unfounded.

38. In a situation when two witnesses who received the information about the relevant event indirectly identified the Accused as a participant, whereas witnesses Nurko Dervišević and Adem Berberović, who were detained in the *Uzamnica* facility, identified Šaban Muratagić as a person who beat up the prisoners, with witness Dervišević stating that he did not see the Accused Krsmanović in *Uzamnica*, the Trial Panel could not establish the state of the facts as argued in the Prosecution Appeal.

39. The Trial Panel states in the Trial Judgment that the Record of Examination of Ramiz Kulo also corroborates the averments of Nurko Dervišević and Adem Berberović as it does not identify the Accused Krsmanović as a participant in the beating. If this is taken into account, it is not possible to render a conclusion on the guilt of the Accused beyond reasonable doubt.

40. It is indisputable that the statements of the witnesses who were in the *Uzamnica* camp had a greater probative value than the statements of the witnesses with hearsay information, whereby they called into question the guilt of the Accused and led to the application of the *in dubio pro reo* principle and the conclusion as made by the Trial Panel.

41. Notwithstanding such conclusion, the Appellate Panel notes that it did not think at all that the witnesses whose family members had been beaten, that is, who conveyed their indirect knowledge, wanted to incriminate the Accused without grounds. However, when in the chain of evidence a doubt occurred about the Accused's presence in the facility, it was not possible to render an indisputable conclusion that the Accused had undertaken the acts as charged against the injured parties.

42. With respect to the Prosecution averment that the Trial Panel made no reference to witness Srđan Vučičević's statement, the Appellate Panel notes: *The Appeals Chamber* [in Kvočka et al.] *recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record*. *(Judgment, Appeals Chamber in Kvočka et al., paras. 23-25).* The fact that the Trial Panel did not comment on a certain statement in the

Judgment does not mean that the statement was not evaluated, given that all pieces of evidence are evaluated conscientiously and carefully, both individually and in terms of their mutual correspondence, when rendering a decision. However, if a statement is not of decisive importance and does not lead to a different determination, it is not necessary to comment on it in the reasoning of a Judgment.

43. The Appellate Panel notes that it will review the decision on the punishment in the part of the Appellate Judgment addressing the convicting part of the Trial Judgment, while it will note here that it is not necessary to expound on the decision as to the punishment given the previously presented reasoning of the acquittal.

II. CONVICTION

A. GROUND OF APPEAL OF ESSENTIAL VIOLATIONS OF CRIMINAL PROCEDURE PROVISIONS

1. The Defense Appeal

44. First of all, the Appellate Panel considers that the Defense Appeal very closely links the appeal grievances of essential violations of criminal procedure and of the incorrectly and incompletely established state of facts. However, given that it is necessary to separate these two grounds of appeal and that their respective review may lead to different consequences, the Appellate Panel separated them, and it will review here only the appeal grievances which the Defense Counsel specifically defined as essential violations of the criminal procedure provisions. The Panel will review all other grievances, including those closely related to the grievances of essential violations, in the relevant section of this Judgment.

(a) Essential violation of criminal procedure provisions under Article 297(1)(j) of CPC B-H – charges exceeded

45. Defense Counsel considers that the Trial Panel violated the identity of the Judgment and the Indictment when it intervened in the description of facts of Section 1 of the Conviction and found as sufficient the statement that the described event happened mid-May 1992.

46. The Appellate Panel considers the referenced grievance to be unfounded.

47. A Judgment may pertain only to the person who has been indicted and only to the act as charged in the confirmed Indictment, that is, Indictment amended at the main trial. It follows clearly from the foregoing that there must exist an identity between a Judgment and an Indictment, which means that the Court will render a decision only with respect to the specific charges against the Accused. The subjective identity thus implies that a Judgment pertains to an indicted person, while the objective identity is manifested as a correspondence between the description of facts of the Indictment and the enacting clause of the Judgment.

48. In the case at hand, the Court did not go beyond the framework of the Indictment, given that it found the Accused guilty of the criminal offense whose all required elements were contained in the Indictment. The Appellate Panel recalls that the identity between a judgment and an indictment actually implies the identity of the acts that the accused person is charged with, that is, the very description of facts, not the individual facts made more precise by the Court on the basis of the adduced evidence. Therefore, the fact that the Trial Panel closely explained that the acts of the Accused took place *"mid-May 1992"* does not imply a violation referred to in Article 297(1)(j) of the CPC B-H, as the Defense persistently argued.

49. In such situation, ill-founded is the Defense appeal grievance that the Trial Panel acted to the detriment of the Accused by having intervened in the description of facts of the enacting clause of the contested Judgment.

50. In that respect, the appeal grievance that, contrary to the averments in the Trial Judgment, witness Mujesira Oprašić nevertheless commented on the date of her husband's abduction turns out to be irrelevant for the deliberation on this issue. Whether or not the witness commented on it does not have a decisive influence on the conclusion about the time of the perpetration, given that it was not possible to find a precise reference to the exact date of perpetration in the other evidence. The Trial Panel therefore acted properly when it decided that the time designation of *mid-May 1992* was sufficient.

51. Finally, given that Defense Counsel also argued in this appeal grievance that the year was lacking in the enacting clause of the Judgment, the Appellate Panel has concluded that it was a technical error, and that when paragraph 224 of the contested

Judgment is reviewed, there is no doubt that the Trial Panel implied the year 1992. [1]

(b) Essential violation of criminal procedure provisions under Article 297(1)(k) of CPC B-H – the wording of the Judgment is incomprehensible, internally contradictory or contradicts the grounds of the Judgment, or the Judgment has no grounds at all, or it does not cite reasons concerning the decisive facts

52. With respect to Section 1 of the Conviction, Defense Counsel is of the opinion that the Trial Panel failed to describe the acts of each co-perpetrator in the factual description of the enacting clause of the Judgment, which makes the Judgment incomprehensible, internally contradictory or contradicting its own grounds.

53. With respect to Section 3 of the Conviction, Defense Counsel also states that it cannot be seen how many persons there were together with the Accused, that the co-perpetrators' acts were not described individually and that the relevant act committed by the Accused was not described either, which makes the enacting clause incomprehensible. With respect to this Section, Defense Counsel also stresses that there is a difference between the Judgment's enacting clause and its reasoning, since in the enacting clause the abduction is said to have happened on one day, whereas witness OK-7 claims that Omer Jašarević aka Đilbas and Ismet Memišević were abducted before *Bajram* Muslim holiday and the other inhabitants afterward.

54. Defense Counsel is also of the opinion that there are defects in the enacting clause with respect to Section 5, that is, that it was not described what constituted the Accused's acts of aiding and that there was no explanation of the Accused's intent in the reasoning, either.

55. According to the Defense, there is an essential violation of the procedure because the Judgment is incomprehensible as a result of discrepancy between the enacting clause and the reasoning with respect to Section 7 of the Conviction. The enacting clause mentions the Accused Krsmanović, Milan Lukić, Đorđe Šević, Dragutin Dragičević and several other unidentified soldiers as the perpetrators of the crime, whereas the reasoning reads that only Krsmanović and Lukić committed the killing of the civilians from Sjeverin.

[1] Although Defense Counsel classified this issue as one of incomprehensibility, which would have corresponded to a violation referred to in Sub-Paragraph (k) of Article 297, the Appellate Panel has decided to explain the relevant answer at this place for the sake of a systematic presentation.

56. Presenting the appeal grievances with respect to Section 8 of the Conviction, Defense Counsel concluded that it lacked a description of grave mental suffering or serious injury to body or to physical or mental health. The Appeal also argues that the legal definition lacks a link between Article 172 of the CC B-H and Article 29 of the CC B-H, given that the enacting clause reads that the Accused acted together with a person nicknamed Kinez.

57. The Appellate Panel considers the referenced grievances to be unfounded.

58. Having analyzed the factual description of the relevant charges with respect to Sections 1 and 3 of the Conviction, the Appellate Panel has concluded that the Trial Panel sufficiently individualized the acts of the Accused and other persons who carried out the relevant acts together with him. It is true that their acts were described in the enacting clause as a common action, for both Section 1 – abduction of Hamed Oprašić, and Section 3 of the enacting clause – unlawful deprivation of liberty and enforced disappearance of Bosniak men, however their individual acts actually constitute a unity of action undertaken against the victims.

59. Therefore, a general prerequisite for co-perpetration as a common perpetration is a common decision on the act: each perpetrator has made a decision to perpetrate the act, each perpetrator carries out his act together with another, and the very contribution is such that, within the framework of common decision on the act and division of roles, it constitutes an important part in the perpetration plan. The emphasis is on the *common perpetration*, which is executed by a *common participation* in the very act*, hence the Accused decisively contributed to the perpetration with his acts* (for example, in Section 1, according to a witness, he *held a rifle at the ready*).

60. The Panel established that the Accused participated as a co-perpetrator in the referenced acts together with other persons, and gave a decisive contribution to the perpetration of this criminal offense by having taken Hamed Oprašić from his house under threat of firearms, which he did together with Milan Lukić, ever since Hamed Oprašić has been unaccounted for and his body undiscovered, according to Section I. Therefore, as a co-perpetrator he participated in the persecution by enforced disappearance of Bosniak men.

61. Based on the foregoing, unsuccessful was the Defense attempt to argue the lack of objective prerequisites for co-perpetration on the part of the Accused and reduce the

problem of causal link between the Accused's act and consequence to the missing description of the co-perpetrators' individual acts in the Judgment. The enacting clause of the Trial Judgment presented the events as charged under Sections 1 and 3 in a clear and detailed manner, and, having evaluated the relevant evidence, established beyond reasonable doubt that the Accused also participated in the referenced events, which is absolutely sufficient for the existence of guilt and of the institution of co-perpetration as defined in Article 29 of the CC B-H.

62. Having in mind the foregoing, this Panel has concluded beyond doubt that there was no defect in the description of facts in the enacting clause which would have challenged the accuracy of the contested Judgment's legal conclusions regarding the application of the institution of co-perpetration, as the Appeal avers without any grounds. Therefore, the Trial Judgment does not contain an essential violation of the criminal procedure provisions under Article 297(1)(k) of the CPC B-H, that is, the enacting clause of the Judgment is not incomprehensible.

63. With respect to the Defense objection that there is a difference between the enacting clause and the reasoning for Section 3 of the Conviction, the Appellate Panel concludes that the objection is unclear, given that the reasoning makes no mention of the abduction before and after Bajram, but comments on the witnesses' statements on which the Trial Panel based its decision and concluded that the event took place on an undetermined date in June 1992.

64. With respect to the acts described in Section 5 of the enacting clause, the Appellate Panel concludes that the enacting clause mentions the presence of the Accused, the entering of a factory and the taking of the people outside, from which stems a clear conclusion on the Accused's aiding role, which is confirmed in the reasoning of the Judgment. Paragraph 275 contains a conclusion that follows directly from the acts referred to in the enacting clause: *the act of aiding by the Accused was manifested in the abduction of civilians whom Milan Lukić led to the Drina River bank and killed.*

65. Contrary to the Defense averments, the Appellate Panel has concluded that the Judgment cannot be incomprehensible as argued by the Defense merely because the reasoning does not comment on the guilt of each person referred to in the enacting clause if that person is not accused in the given case. The reasoning of the Judgment focused on the explanation of the evidence corroborating the averments about the Accused, hence

there cannot exist a violation of the kind the Defense tried to argue with respect to Section 7. More explanation will be provided for some other person who is a participant but not accused in the case at hand because of such person's close link with the acts of the Accused, as is the case here with Lukić and the Accused Krsmanović.

66. In the opinion of this Panel, also unfounded is the appeal grievance that the description of facts of Section 8 of the Conviction lacks a description of the consequence as an essential element of the criminal offense of which the Accused has been found guilty and that, therefore, the enacting clause is incomprehensible. The Appellate Panel concludes that paragraphs 211-216 of the Trial Judgment provide an explanation of what is considered inhumane treatment under international humanitarian law of whose violation the Accused was found guilty, and what the consequences of such acts are. This explanation preceded an analysis of the event in Section 8 of the enacting clause, whereby the Trial Panel clearly indicated which consequence ensued from the acts of the Accused, and established that it was *persecution in connection with other inhumane acts.*

67. Therefore, although the description of facts in Section 8 of the enacting clause does not explicitly contain a conclusion on the consequences of the actions undertaken, in the reasoning of the contested Judgment the Trial Panel nevertheless commented on the elements and consequences of the acts as charged that constituted inhumane acts. Consequently, the description of the undertaken actions is followed by a conclusion on their imminent consequences. The description of the act in Section 8 undoubtedly corresponds to the consequence of inflicting both physical and mental pain, whose intensity was certainly increased because of the fact that the injured party in question was a mentally impaired person.

68. For this reason, unfounded are the appeal grievances that the enacting clause of the contested Judgment is incomprehensible as it has not described a consequence as an essential element of the criminal offense of which the Accused has been found guilty.

69. Finally, with respect to this Section of the enacting clause, the Appellate Panel does not consider contestable the omission of Article 29 in the legal definition. Irrespective of the averment that the Accused acted together with the person nicknamed Kinez, the Court did not have to define the same acts solely as a co-perpetration, given the fact that it obviously could not define acts of co-perpetration, but only individualized the acts of the Accused.

(c) Essential violation of criminal procedure provisions under Article 297(2) of CPC B-H

70. The Appellate Panel primarily notes that the objection concerning the identification of the Accused by witnesses in the courtroom should be reviewed as part of an essential violation under Article 297(2) of the CPC B-H.

71. Given that throughout the whole Appeal the Defense Counsel raised an objection in every case of alleged “identification” of the Accused in the courtroom, the Appellate Panel has concluded that a single response to the disputable situation should be given here, and never be addressed again in the reasoning.

72. The Defense stressed that multiple Prosecution witnesses “recognized” or “identified” the Accused in the courtroom, and that particularly disputable is the fact that the identification happened after the Presiding Judge told a witness who was sitting on which side.

73. The Appeal emphasizes the identification of the Accused by witness Hasan Korać when an omission was made and the witness was not told who was sitting where and, thus, an error was made immediately when the witness pointed at the legal officer of the Prosecutor's Office.

74. The Appellate Panel considers the referenced grievance to be unfounded.

75. With respect to the Defense objection regarding the identification of the Accused in the courtroom, the Appellate Panel concludes that such identification does not constitute an evidentiary action in terms of Article 85(3) and (4) of the CPC B-H, and it was evaluated only with respect to the witnesses’ statements and other evidence under the principle of free evaluation of evidence. For that reason the referenced identification was not decisive or did not have a decisive probative value in the evaluation of the evidence adduced directly at the main trial, which evidence the Panel evaluates when rendering a decision on decisive facts and the guilt of the Accused.

76. With respect to the situation involving witness Hasan Korać, the Appellate Panel is of the opinion that it does not mean that in all other situations the witnesses were able to identify the Accused only because they were clearly instructed where he was sitting. In any case, the witness’ statement is not decisive, and it should be taken into account that the witness remembers the Accused exactly in the age that corresponds with the age of the person to which he pointed. It is a common knowledge that when witnesses take their

stand in a courtroom, they return to the time they testify about and re-live certain things.

77. Finally, the Appellate Panel warns once again that this reasoning constitutes a single response to all objections on this ground – identification in the courtroom -- which the Defense Counsel repeated throughout the Appeal, given that continuous repetition would not serve any purpose.

B. GROUND OF APPEAL OF INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS

1. The Defense Appeal

(a) Section 1 of the Conviction

78. The Appeal primarily stressed that witness Mujesira Oprašić, whose husband was abducted in the manner described in this Section of the enacting clause, gave statements on three occasions, and that in her statements of 14 January 2008 and 28 May 2009 she did not connect the Accused Krsmanović to her husband's abduction, whilst in the statement of 2 October 2009 she gave a different version of the event, saying that the Accused Krsmanović also walked by Hamed and Milan. In that respect, the Defense Counsel also states that witness OK-15 gave a different version of the event than witness Mujesira, which concerns the color of the vehicle in which the victim was taken away. Also, OK-15 says that everyone went in the vehicle, whereas witness Mujesira says that Lukić and the driver, whose name she does not know, went with Hamed, and that the Accused Krsmanović did not go with them.

79. In order to contest witness Mujesira's statement, Defense Counsel also commented on the statement Branislav Čubrilović gave at the hearing on 18 November 2014 when he denied participation in this event, although witness Mujesira Oprašić identified him as a participant. Challenging the statement of witness Mujesira Oprašić, the Defense also makes a reference to the statement Brane Vojnović gave before a notary that at the time of the war conflict he was not in the territory of the former homeland and that the first time he came to Višegrad was in 1995.

80. Defense Counsel concludes that it is not logical that Vojnović and Čubrilović were not accused as well given that witness Mujesira's statement was credited, and also that

the Court failed to address the discrepancies in the respective statements of witnesses Mujesira Oprašić and OK-15.

81. The Appeal argues that it follows from the contested Judgment that the Court was not aware that Branislav Čubrilović had testified before the court as well, but only read that he had given a statement before a notary. With respect to Vojnović's statement before a notary, the Appeal reads that it is not logical that such statements cannot be evaluated, as, consequently, it would not be possible to evaluate statements of persons who have died meanwhile.

82. The Appellate Panel considers the referenced grievances to be unfounded.

83. The Appellate Panel concludes that the Trial Panel provided a detailed analysis of the witnesses' statements about this event, evaluating them individually and in terms of their mutual correspondence, and commenting on potential differences. The Trial Panel stated that there existed differences between the different statements by Mujesira Oprašić, but the Trial Panel acted properly when it credited this witness having evaluated her statements as a whole. It is impossible to demand from persons who have undergone grave traumas -- and witness Oprašić lost both her son and husband, and who testify about the events of many years ago, to repeat their statements identically every time and to remember the smallest details. What a witness says considerably depends on the manner of examination, that is, of the issue that is brought to witness' attention and that will stimulate his recollection in that respect. Consequently, the Appellate Panel accepts the position taken by the Trial Panel in paragraph 228 of the contested Judgment:

> "However, the Panel gave credence to the statement that this witness gave at the main trial, having taken into account all relevant circumstances for evaluation of a statement, primarily its clarity and logicality, and it thus evaluated the witness' statement regarding the differences from the statement given in the investigation that the Accused Krsmanović most likely *held a rifle at the ready."*

84. The Appellate Panel concludes that the fact that the Judgment does not comment on the potential differences in the respective statements of witnesses Mujesira Oprašić and OK-15 has not led to such circumstances which would have affected the properly established state of facts, as it is obvious that the referenced differences are insignificant and do not contest the course of the events. It is particularly important to mention that witness OK-15 also said that Oliver Krsmanović was holding a rifle, a bayonet, pointed at Hamed Oprašić's back, which is also confirmed by Mujesira Oprašić's statement that the

Accused *held a rifle at the ready,* all of which constitutes a proper conclusion in the Trial Judgment that the statements of these two witnesses are clear, logical and mutually complement each other.

85. With respect to witnesses Branislav Čubrilović and Brane Vojnović, the Appeal cannot challenge witness Mujesira Oprašić's statement by arguing that, if her statement is credited, the referenced two witnesses should also be criminally prosecuted given that she identified them as participants in the event. It is a common knowledge who the prosecution authority in criminal proceedings is, so a witness' credibility cannot be challenged only because some participant whom the witness also identified as a perpetrator has not been accused in a given case.

86. With respect to the statement of Branislav Čubrilović, the Appellate Panel concluded, having analyzed the contested Judgment, that its paragraph 230 contained a technical error. The referenced paragraph reads: *Witness Branislav Čubrilović gave a statement before a notary, which was tendered into the case file as exhibit No. O-21.* Given that it is obvious from the list of tendered evidence that exhibit O-21 was the Statement of Brane Vojnović given before notary Milomir Prorok on 2 September 2014, it is indisputable for this Panel that it is a technical error and that the Trial Panel actually implied the statement of witness Vojnović, not Čubrilović[2].

87. The fact that the referenced Statement was not evaluated, which the Defense compares with situations involving dead persons, is not disputable for this Panel. The law strictly lays down the exceptions from direct presentation of evidence, and, when this is applied, it involves the reading of statements previously given to a Prosecutor or authorized persons of prosecution authorities, not to notaries.

(b) Section 2 of the Conviction

88. Contesting the state of facts established for this Section of the Conviction, the Defense Counsel stressed that the injured party could not have had a dilemma with respect to the identity of the Accused since the Presiding Judge clearly informed the witness (injured party) as to who was sitting where.

[2] The Judgment did not make any reference to the statement of witness Čubrilović, which does not mean that it was not evaluated, but that it did not decisively influence the outcome of the case. The Court is not obliged to comment on each piece of adduced evidence in the reasoning, but to evaluate all of them and expound only on the decisive ones.

89. Also, the Appeal stresses that the injured party Zijad gave his statement for the first and only time on 22 August 2011, after the arrest of the Accused, but it is questionable how the investigator knew which circumstances the injured party would testify about when it was to be his first statement (the introduction reads that the witness was notified by the investigator what circumstances he would be examined about). To corroborate the argument of an incorrectly established state of facts, the Defense also states that witness OK-15 did not mention this incident in the statement of 10 December 2009, and that it is simply impossible that the Accused was at different locations in such short period, given that six Sections of the enacting clause encompass actions carried out in the period of some 20 days.

90. Finally, Defense Counsel concludes that a neuropsychiatrist expert witness should have been heard to show whether the injured party experienced mental pain and suffering from the acts as charged, if they existed at all.

91. The Appellate Panel considers the referenced grievances to be unfounded.

92. This Panel has analyzed the reasoning of the contested Judgment with respect to this event and has concluded that the Trial Panel acted properly when it found convincing and sufficient the statements of witnesses, injured party Zijad Kustura and OK-15, and stated that the witnesses did not have a motive for additional incrimination of the Accused.

93. Given this conclusion, the Appellate Panel has inferred that with his appeal grievances the Defense Counsel did not undermine the Trial Panel's findings or provide some new circumstances that would have brought about a different conclusion. When it is said that the injured party Zijad does not have any doubt with respect to the identification of the Accused, that is not based on an identification of the Accused in the courtroom, which does not constitute identification pursuant to the Criminal Procedure Code anyway, but is based on the injured party's belief which dates back to the event concerned, since, when reminiscing on the undertaken acts, he was absolutely sure that the person in question was Oliver Krsmanović.

94. Also, the Appellate Panel does not consider contestable at all the statement of the injured party Zijad Kustura given on 22 August 2011. First of all, it is important to point at a part of the transcript from the main trial held on 27 January 2012 when Zijad Kustura testified:

"Defense Counsel: Alright. Tell me, when you were giving the statement

you said that you had not given a statement earlier, is that so? That was the first time for you to give a statement regarding the events in Višegrad?
Witness: Yes.
Defense Counsel: And, tell me, how did it happen that you gave a statement, on whose initiative it happened?
Witness: On whose initiative?
Defense Counsel: Yes.
Witness: So, someone, someone probably told the Prosecutor's Office that those events had taken place in Višegrad, because I talked about it when I was in Višegrad and when I fled, everybody, my neighbors, friends, relatives, wherever I went I talked about it, about what I had gone through, and it probably reached the Prosecutor's Office since everyone knew about it as I talked about it.
Defense Counsel: As far as I remember, the Prosecutor's Office summoned you and you gave a statement, is that so?
Witness: Yes."

95. So, it is absolutely clear that the investigator could have information about the event and that he had a general idea about which circumstances he was summoning the injured party, that is, what the relevant indications were. In the course of an investigation, the bodies that are involved in that stage have their ways and methods of compiling intelligence on the basis of which they draft plans for further conduct of the case and the evidence that needs to be gathered, including summonses to witnesses. Therefore, contrary to the appeal grievances, it is absolutely logical that a person who examines a witness already knows in general terms which event he investigates, at least for the initial stage, given that the interrogator reached the witness by gathering information from other persons. The information which the prosecution body receives about the perpetrated act does not have to come originally from the injured party; it is not rare that the primary sources of information on the basis of which an injured party is summonsed are the persons to whom the injured party conveyed his experience, as indicated above (see the quoted part of the transcript).

96. Also, having reviewed the Defense appeal grievance regarding the statement of OK-15, the Appellate Panel established the following: the witness gave two statements, on 10 December 2009 and on 11 August 2011. In the first statement, the abduction of Zijad Kustura was mentioned in one sentence only, given that on that occasion the witness focused on the description of another event. However, in the second statement the witness stated that in the first one a reference had been made to Zijad Kustura's abduction and then gave a more detailed explanation of the event. Consequently, the Defense appeal grievance did not successfully challenge the credibility of this witness.

97. The Appellate Panel considers unfounded and uncorroborated the Defense averment that it is impossible that the Accused perpetrated acts at different

locations in a relatively short time period (some 20 days). The acts of this type, falling under the Crimes against Humanity, are indeed perpetrated in a systematic manner, in continuity over a certain period, and, given the relatively short distances between the perpetration sites, it is beyond doubt that the presence of the Accused as indicated in the contested Judgment was possible.

98. Finally, in the opinion of this Panel, given the fact that it was established that an event from this Section of the Conviction happened in the manner described in the enacting clause of the contested Judgment, it would be redundant to request any forensic analysis as it is obvious that the consequence of strong mental pain and suffering corresponds with the described act.

(c) Section 3 of the Conviction

99. Contesting the state of the facts established for this Section of the Conviction, the Appeal emphasizes that witness OK-17, on whose testimony the Court based its decision, gave multiple statements with different versions about the abduction of civilians from the settlement of Dušče. To corroborate its averment, the Defense says that in his statement of 14 December 1993 the witness did not mention the Accused and that the Trial Panel interrupted the Defense Counsel while he was examining the witness.

100. Defense Counsel also states that the Judgment avoids commenting on any evidence that could have discredited the statement of witness OK-17, and there is also no comment on the statement of witness OK-7 as it conflicts OK-17's statement. The Appeal also touches on the statements of Rešida Gadžo, Mersiha Zulčić, Senaida Nuhanović and Džemila Žiga. The statement of Fatima Podžić stands out as it was misinterpreted, according to the Defense, since it is incorrect that she stated that her husband had been abducted together with Safet Žiga, Rešid Gadžo and Safet Pecikoza.

101. Finally, with respect to this event, Defense Counsel also commented on the statement of witness OK-6, whose testimony was not reasoned in the Judgment, and this witness stated that he had not recognized any of the soldiers except Boško, and that *Hamed Repuh was pushed in a wheelchair by his wife,* whereas the enacting clause reads that the Accused abducted Hamed Repuh.

102. The Appellate Panel considers the referenced grievances to be unfounded.

103. This Panel has concluded that, by presenting almost identical objections with

respect to the credibility of witness OK-17 as in the first instance proceedings without reference to any new circumstance, the Defense did not call into question the conclusion of the Trial Panel that credited this witness. In that respect, the Appellate Panel considers unfounded the Defense appeal grievances that the contested Judgment does not even comment on the different statements of this witness, given that paragraph 234 of the Judgment reads that the witness had given several statements and that, therefore, the Defense contested the witness' evidence. Also, this Panel notes that when establishing whether a Trial Panel's conclusion was justified and whether some witness was credited justifiably, the Appellate Panel shall start from the principle that findings of facts by the Trial Panel should not be lightly disturbed. The Appellate Panel bears in mind as a general principle that the Trial Panel has primary discretion to examine, verify and evaluate the evidence adduced at the main trial. The Appellate Panel must, therefore, appreciate the state of the facts established by the Trial Panel, especially given that, when reviewing the credibility of witnesses' statements, the Trial Panel could directly observe witnesses, their conduct, voice, attitude, physical and emotional reactions to questions, and non-verbal behavior toward the Accused.

104. This Panel also considers unfounded the Defense objection that the Trial Judgment did not comment on the witnesses' statements that allegedly discredited the statement of witness OK-17. The fact that the Judgment does not comment on the statements of certain witnesses does not mean that the Trial Panel did not evaluate them, given the fact that it has the duty to evaluate each piece of evidence individually and its correspondence with the rest of the evidence. However, when the Trial Panel makes a certain inference and decides to credit a particular piece of evidence and to consider a certain state of facts established, the Panel does not have to comment on each piece of evidence, but only on the key evidence that corroborates the conclusion reached after a comprehensive analysis. Given that statements of certain witnesses did not call into question the credible statement of witness OK-17, the contested Judgment did not have to comment on them, which does not mean that it did not evaluate them.

105. Finally, with respect to Defense grievance regarding Fatima Podžić's statement and its alleged misinterpretation in the Judgment, the Appellate Panel concludes that the referenced fact does not merit an evaluation, given that conclusion on its (in)accuracy does not influence in any way the validity of the state of the facts established for Section 3 of the Conviction as the Accused is not charged with abduction of the witness' husband

anyway.

(d) Section 4 of the Conviction

106. In the Appeal the Defense Counsel makes a reference to a part of the statement of witness Zejneba Osmanbegović and contests the established state of facts, stressing that the witness mistook the Accused for some other person. The Appeal emphasizes that the witness was mistaken not only about the street in which the Accused lived, but also about the bank of the Drina River and the Accused's and his father's employment.

107. The Appeal also contests the statement of witness Salim Ahmetspahić arguing that absolutely unfounded is the conclusion in the contested Judgment that, when the witness gave his statement only eight months prior to the trial, he was not informed why he had been summoned.

108. Finally, the Defense concluded that it was inadmissible that the description of facts in this Judgment differed from the one provided for the same event in the final convicting Judgment for Lelek, and that the conclusion in paragraph 248 of the contested Judgment was not corroborated by arguments.

109. The Appellate Panel considers the referenced grievances to be unfounded.

110. Having evaluated the Defense appeal grievances with respect to the statement of witness Zejneba Osmanbegović, the Appellate Panel concluded that it was not challenged in any way, and that the contestable situation regarding the identification of the Accused was properly and sufficiently addressed in paragraph 243 of the contested Judgment. The Trial Panel clearly noted that the identification of the Accused by the witness was evaluated together with all the other evidence and that a potentially wrong street name does not mean that it should be doubted that the witness really knew the Accused. With respect to this conclusion, this Panel notes that it is often the case in small towns that people know each other by sight as they often meet each other, despite the fact that they perhaps do not know all details about their respective private lives. The Appellate Panel considers it indisputable that the witness did not have any motive to incriminate the Accused without grounds, especially given the fact that an intervention was made in the description of facts in favor of the Accused based on the witness' testimony, as she stated clearly that it was Gordana Andrić who had threatened her that *she would cut her finger and ear off,* not the Accused Krsmanović.

111. Contrary to the averments of the Defense, this Panel notes that the Trial Judgment does not claim that in the contestable statement witness Salim Ahmetspahić was not informed why he had been summoned, that is, that he was not informed about the circumstances of the examination. It claims that he had not been asked a direct and appropriate question as he was at the main trial, which brought about certain differences in the statements. A witness' response greatly depends on the manner of examination, and, sometimes, taking into account the burden the witness bears when testifying about the loss of his kin, there is no answer without a clear and direct question, irrespective of whether or not he is sure about the identity of the perpetrator in a given case.

112. The Defense's challenge that is based on a comparison between the state of facts of the event that Željko Lelek was convicted of under final judgment and the state of facts that the Accused Krsmanović is charged with concerning the number of persons who were together with the Accused, does not influence in any way the decisive fact that the Accused participated in the event as a co-perpetrator, according to both the Appellate Panel and the Trial Panel. The respective descriptions of one and the same event cannot be identical in two identical cases, as sometimes information about new persons is learned in later stages. For example, in the previous case conducted against Lelek, now convicted, there is a reference to a *group of several armed members of the army and the police,* and later, in the case against the Accused Krsmanović, there is a more specific averment that that very person is one of the members of the group.

113. With respect to the Defense averments that the Judgment incorrectly stated that witnesses Mišo Savić, Žarko Jakšić and Slobodan Andrić did not testify about the period in which this event took place, the Appellate Panel concludes that they are unfounded. Having inspected the transcripts from the main trial when these witnesses testified[3], and having analyzed the Trial Panel's relevant findings in paragraph 248, this Panel concluded that the Trial Judgment specified that when the witnesses testified about the event referred to in this Section they did not say that the Accused had been at a different location at that time (May/June – the event happened on 1 June 1992), but claimed so with respect to September (visit to his father in Užice). This is of essential importance, and the Judgment does not claim that the witnesses did not mention the referenced period of June/May at all.

[3] Žarko Jakšić and Miladin Savić – transcript of 27 August 2013; Slobodan Andrić -- 3 September 2013.

(e) Section 5 of the Conviction

114. Emphasizing that the contested Judgment in this part is based mainly on the statement of witness OK-7, the Appeal primarily notes that this witness provided several versions about this event without mentioning the Accused at all in the first three versions. Defense Counsel also states that the Panel should not have accepted witness OK-7's claim of having watched the event from a distance of 30 meters, given the fact that the Panel made a site visit and saw that the distance amounted to 150 meters at least. The Defense stresses that it suspects that witness OK-7 testified as a witness before the ICTY under pseudonym VG 024 or VG 017 which is when he claimed not to have seen the Accused.

115. Commenting on witness Mujesira Memišević's statement, the Appeal reads that she also gave several statements and versions about this event and that the Judgment did not provide an explanation whether or not it accepted her statement.

116. Defense Counsel claims that the contested Judgment misinterprets the statement of Azra Osmanagić, while the statement of Sadik Bosno is not mentioned at all.

117. The Appellate Panel considers the referenced grievances to be unfounded.

118. Having reviewed the Defense appeal grievances, this Panel primarily notes that in paragraphs 264-275 of the contested Judgment the Trial Panel gave a comprehensive analysis of the witnesses' statements and, consequently, made a proper conclusion that the Prosecution proved beyond reasonable doubt that the Accused had participated as an aider in the killing of the civilians taken out of Varda, which he aided by taking out the civilians whom Milan Lukić then led to the Drina River bank and killed.

119. In that respect, the Appellate Panel analyzed the relevant part of the reasoning of the contested Judgment and concluded that by paraphrasing the witnesses' statements the Judgment depicted clearly why the Trial Panel concluded that the Accused's participation in this event was indisputable.

120. Contrary to the Defense averments, this Panel considers that the statement of witness OK-7, who confirmed the Accused's participation in the event, the statement of Mujesira Memišević, who thinks that the Accused participated in it, and the statement of witness OK-6, who had indirect information, constitute a body of circumstantial evidence

that leads to a clear conclusion that a certain fact existed (the participation of the Accused).

[redacted]

122. The Defense averment regarding the distance of the balcony from which witness OK-7 watched the event is not a circumstance that merits a detailed elaboration according to the Appellate Panel, given that the Trial Panel was certainly in the best situation to evaluate whether there existed an objective possibility for witness OK-7 to observe and clearly see what exactly was happening in front of the factory, as did the other witnesses who testified in that respect. The Trial Panel made a site visit, as the contested Judgment reads, on which occasion even the contestable issue of a wall, which the Defense emphasized at that time, was resolved.

123. The Trial Panel is not obliged to write down whether or not it admitted a certain witness' statement after each paragraph in which the statement was paraphrased. The very fact that the Judgment makes a special reference to a witness' statement renders the statement important, given that the Judgment only refers to the key evidence that led to a decision as stated in the enacting clause. It is absolutely clear from the conclusion that follows an analysis of the key exhibits whether or not a particular statement was accepted and in which part, as is the case here concerning the statement of Mujesira Memišević.

124. Contrary to the Defense averments, the Appellate Panel has concluded that the contested Judgment did not interpret the statement of witness Azra Osmanagić incorrectly. When rendering such conclusion, this Panel evaluated the statement of the witness given at the main trial on 16 March 2012. It is clear from the evaluation of the trial transcript as a whole, not partially as the Defense has done, that the witness blamed the Accused for her husband's death. The referenced conclusion stems from different parts of the statement, where the witness first of all says that she heard of Milan Lukić's group and that the Accused Krsmanović was its member. Also, when asked by the Prosecutor about damage compensation and support for criminal proceedings, the witness said that she demanded it all and that he should be found guilty *if he is guilty, and he indeed is,* whereupon she

repeated that she was sure that it had been done or ordered by Milan Lukić (of whose group Oliver Krsmanović was a member, as said earlier). Based on the foregoing, the following quote from the contested Judgment paraphrasing the witness' statement is not incorrect: *"Witness Azra Osmanagić says that she was not an eyewitness to the event, but she knows that her husband was taken out of Varda and killed, she does not know who killed him, but the rumors had it that that those were Oliver and Lukić ..."*

125. The fact that the Judgment does not make a specific reference to Sadik Bosno's testimony does not mean that it was not evaluated, but that the testimony did not cause a different determination of the state of the facts.[4]

(f) Section 6 of the Conviction (public excluded during testimonies of witnesses OK-12 and OK-13)

126. The Appeal contested the state of the facts in this part of the Judgment as well and read that witness OK-12 had previously given statements making no mention of the Accused. It is also disputable how he could see through a roofing tile what was happening outside given that it is hardly likely that he had the courage to shift the tiles. The Defense also stresses that it would have been logical that he had shared the information with witness OK-13.

127. Defense Counsel also claims that the Judgment insinuates that witness OK-13 heard about the Accused with respect to the specific event.

128. The Defense also objected the statement of witness Hasan Korać, arguing that the witness had not mentioned the Accused in the statement given in the Goražde CSB [Security Service Center].

129. Finally, to corroborate his averment, Defense Counsel claims that witness Fatima Zukić and witness OK-22 did not link the Accused to the relevant event, and that the Indictment of Jovan Popović by the Prosecutor's Office of B-H making no mention of the Accused was tendered as Exhibit O-16.

[4] "The Appeals Chamber recalls that it is in the discretion of the Trial Chamber as to which legal arguments to address. With regard to the factual findings, the Trial Chamber is required only to make findings of those facts which are essential to the determination of guilt on a particular count. It is not necessary to refer to the testimony of every witness or every piece of evidence on the trial record." (Appeals Chamber Judgment in *Kvočka et al.*, paras. 23-25)

130. The Appellate Panel considers the referenced grievances to be unfounded.

131. Having inspected the transcript of the main trial when witness OK-12 testified, the Panel established that the issue of previous statement was discussed as early as during the cross-examination of the witness. In that respect, the contested Judgment properly stated that the Prosecution also said that the witness did not say that Oliver had been the one who had taken Rešad Mucovski out of the house, but identified him as a person present there as he had been there together with the troops who had come to take Rešad Mucovski.

132. It is not disputable either for the Appellate Panel or for the Trial Panel, which made no particular reference to it, that witness OK-12 was able to see who was coming toward the house where he was, given that he described it in much detail when testifying at the main trial on 16 October 2012:

133. Unclear is Defense Counsel's attempt to diminish the statement of witness OK-12 by concluding that he should have shared his information with OK-13. The referenced event must have left its mark on both witnesses, and sometimes in such situations people who shared a certain experience avoid to talk about it in order to avoid re-traumatization.

134. The Appellate Panel has concluded that the Judgment did not suggest what witness OK-13 had in mind when he said that he had heard of Oliver Krsmanović, but only reported the witness' statement from his testimony.

135. With respect to witness Hasan Korać's statement, the Appellate Panel hereby refers to the previously given explanation in similar situations as to why there are differences in witness' multiple statements (see paragraph 111 above).

136. The Court can in no way consider an Indictment in some other case or the relevant news agencies' reports to be decisive evidence.

(g) Section 7 of the Conviction

137. The Defense stresses in the Appeal that it has not contested this event or the Accused's presence in it from the start of the trial, but that it contests the Accused's manner and role in it. In that respect, the Defense presents its own version of the event and concludes that the Accused did not enter the bus or take the civilians out or order them to climb on board a truck.

138. The Appeal also stressed that the Judgment in this part is based solely on the statement of the completely protected witness VVS, whose statement given before a Panel of the Court of B-H and read out at the main trial on 21 October 2014 differs from the statement given to the Prosecutor's Office on 14 July 2011. In that respect, Defense Counsel emphasized that the most important difference between these statements concerns the killing of civilians, as the witness stated before the Panel of the Court of B-H that he had seen Oliver and Milan shooting at the civilians and that they had been in civilian uniforms. However, in the statement given to the Prosecutor's Office he said precisely and unambiguously that Lukić and Krsmanović wore camouflage uniforms, that he never saw killings in Višegrad although he used to see the killed and massacred people, and that he was not watching the killing of the civilians who were taken out of the *Vilina Vlas* hotel.

139. According to the appeal grievances, the statement of the referenced protected witness was not evaluated together with the other evidence, whilst the other evidence concerning this Section is not even mentioned. The Defense states that it was certain that the statement of protected witness VVS would indeed be evaluated together with the statements of Defense witnesses Igor Cicović, OZ-1 and Stanojka Milosavljević, who testified about this event directly or indirectly.

140. The Appellate Panel considers the referenced grievances to be unfounded.

141. First of all, the Appellate Panel notes that, when it comes to this event, the contested Judgment provides reasoning in two parts, expounding on the unlawful imprisonment of civilians in one part and on their killing in the other.

142. Although the reasoning is presented in separate parts, it constitutes one whole

which, by a comprehensive evaluation of evidence, convincingly provides a proper conclusion about the Accused's guilt for the acts described in this Section of the Conviction.

143. Unfounded is the Defense averment that the conviction for this Section is based on witness VVS' statement alone without its correspondence with the other evidence having been established. Also inappropriate is the Defense's attempt to challenge this witness' credibility by citing potential discrepancies in the respective statements the witness gave to the Prosecutor's Office and the Panel of the Court of B-H.

144. This Panel notes that the contested Judgment provides a comprehensive analysis of the relevant event. In the first part of the reasoning (unlawful imprisonment of civilians) it presents the statements of 11 witnesses, mostly relatives of the civilians who were taken off the bus and later executed. In their statements they referred to the Accused Oliver Krsmanović as a person who participated in the event concerned, due to which in the second part of the reasoning (killing of civilians from Sjeverin), the Trial Panel evaluated all evidence as a whole and gave a proper and convincing conclusion which is absolutely acceptable for this Panel (paragraph 292 of the contested Judgment):

> "Having in mind the foregoing and the fact that the Accused was a member of Lukić's group, that many witnesses who had indirect information about the abduction of civilians said that that day when the abduction was taking place also present was a soldier with his face blackened with soot and wearing a head band whose description fits the Accused Krsmanović, and that witness VVS recognized him on photographs and confirmed that that was exactly what he looked like that day when the witness saw him in Vilina Vlas, the Defense did not deny his participation as a truck driver in the transportation of civilians from Mioča to Višegrad, but denied without any corroborating argument his participation in the capturing and abuse and killing of the civilians."

145. Contrary to the Defense's averments that the Trial Panel did not evaluate other evidence, this Panel points at the following paragraph of the contested Judgment:

> "The statement of protected witness VVS, who confirmed that Lukić and Krsmanović were the perpetrators of the killing of the civilians from Sjeverin, was also corroborated by the statement of witness Đorđe Šević, who obviously avoided to directly incriminate the Accused Krsmanović, but when asked by the Prosecutor he said that he might have mentioned in his statement in the investigation that Oliver Krsmanović, whose nickname at the time had been Orlić, had been with them on that occasion. Witness Miloje Udovčić, whose statement the Panel considers logical and unbiased, states that he was halted by young people with their faces painted, but he does not remember whether the soldiers were in civilian or camouflage uniforms. In favor of the foregoing are the statements of the injured parties' relatives who have indirect information about the perpetrators of the killing, but almost all emphasized that Krsmanović and Lukić are linked to it."

146. Therefore, it is obvious that the Trial Panel conducted a proper analysis and evaluation of evidence.

147. In that respect, and with respect to the Defense objection challenging the credibility of witness VVS by pointing at the discrepancies in the witness' respective statements, the Appellate Panel concludes that the referenced question – civilian clothes or camouflage uniforms, does not constitute a decisive fact to which attention should be paid and which should be evaluated, as it is not the only circumstance in the context of identification of the Accused, given the fact that witness VVS also recognized Lukić and Krsmanović on the presented photographs taken by a *Duga* reporter.

148. The Defense Appeal did not contest the state of the facts established by the Trial Panel, and reference to certain Defense witnesses does not constitute any new circumstances given that their statements were evaluated in the analysis in the contested Judgment, when it was concluded that witness OZ-1 was the only one who claimed that a tractor was involved. On the basis of this averment the Defense unsuccessfully tried to maintain its theory that some other civilians who had been transported there on a tractor were executed on the bank of the Drina River, not the civilians from Sjeverin who had been transported on board a truck.

(h) Section 8 of the Conviction

149. Defense Counsel stressed in the Appeal that the Trial Judgment was arbitrary, which was confirmed by the fact that a reference was made in this Section to the testimony of Srđan Vučičević, who did not testify about this event at all, as this Section is based only on witness OK-19.

150. The Appellate Panel considers the referenced averment to be unfounded as it does not prompt a different determination.

151. This Panel notes that witness Srđan Vučičević is mentioned in the reasoning of the contested Judgment, in paragraph 218, but that fact did not have any influence on the final decision on the Accused's guilt for this event, as it is absolutely clear from the rest of the reasoning that the determination about this act was based solely on the statement of witness OK-19 whom the Trial Panel justifiably credited.

C. GROUND OF APPEAL UNDER ARTICLE 298 OF CPC B-H - VIOLATION OF THE CRIMINAL CODE

1. The Defense Appeal grievances

152. Defense Counsel stressed that it was worrying that, following the European Court of Human Rights' judgment in *Maktouf*, this Court could impose a maximum sentence of imprisonment of 20 years for the criminal offense of Genocide, and a sentence of long term imprisonment of 45 years for the criminal offense of Crimes against Humanity.

153. Defense Counsel also argues that the acts of the Accused related to the *Sjeverin* incident should have been defined as War Crimes against Civilians, given that such definition was used for the *Štrpci* incident with identical acts for which the criminal proceedings are under way.

154. The Appellate Panel considers the referenced grievances to be unfounded.

155. The Appellate Panel is of the opinion that the grievance of alleged anomalies that provides in general terms the scope of the sentence that may be imposed for individual offenses constitutes a generalized grievance, which is not appropriate for evaluation. It would be particularly inappropriate to request from the Panel to comment on something like that in the case and Judgment at hand.

156. With respect to Defense Counsel's conclusion concerning the legal definition of the *Sjeverin* incident, the Appellate Panel notes that it is inadmissible to compare two separate cases in such a way, on top of which is the fact that reference is made to a pending case, which means that its outcome is still not known.

D. GROUND OF APPEAL UNDER ARTICLE 300 OF CPC B-H - DECISION ON THE SENTENCE

1. The Prosecution Appeal

157. The Prosecutor's Office is of the opinion that the Trial Panel meted out a lenient sentence and that the purpose of the criminal sanction in terms of Article 6 of the CC B-H

cannot thus be achieved.

158. As argued in the Appeal, the Prosecution considers that the Court underestimated the aggravating circumstances and that it did not take into account that all acts of the criminal offense concerned were committed with direct intent, and that the Accused demonstrated his ruthlessness toward the Bosniak civilians who were powerless and could not put up any resistance in the situations and circumstances they found themselves in.

159. Given that the intensity of both the physical and psychological injuries that the Accused inflicted on the victims and members of their families, and the continuous suffering they experienced during the relevant period, has lasted up to the present day due to the traumas they suffered, the Prosecution is of the opinion that the imposed sentence of 18 (eighteen) years in prison cannot constitute a nearly sufficient satisfaction for the victims.

160. The Prosecution is also of the opinion that the facts related to the Accused's family status and that he has minor children, regarded as extenuating circumstances, were overestimated.

161. Based on the foregoing, the Prosecution concludes that with the imposed sentence of imprisonment of 18 (eighteen) years it will not be possible to achieve either general or the special prevention and that such sentence will not satisfy the reasons of justice either, which is why the Prosecution moves the Court to impose the sentence of a long-term imprisonment.

2. The Defense Appeal

162. Defense Counsel is of the opinion that, due to multiple violations of the procedure, no punishment should have been imposed at all.

3. Conclusion of the Appellate Panel

163. The Appellate Panel considers unfounded the grievances in both Appeals. This Panel notes that Defense Counsel's appeal grievance on this ground was not articulated in a manner that would have been appropriate for analysis. However, it was evaluated,

pursuant to Article 308 of the CPC B-H[5], but, given Defense Counsel's exclusive motion not to impose any sentence, it was dismissed as unfounded.

164. Having reviewed the decision on the sentence starting from the Prosecution appeal grievances, the Appellate Panel took into account the circumstances bearing on the type and magnitude of punishment (aggravating and extenuating circumstances) and established that the Trial Panel evaluated and explained the degree of the criminal responsibility of the Accused, and that the Accused deliberately and knowingly perpetrated and aided the perpetration of the criminal offenses described in the enacting clause of the Judgment. The Trial Panel also properly reviewed the motives for the perpetration, the degree of danger or injury to the protected object, the circumstances in which the offense was perpetrated and the Accused's conduct after the perpetration.

165. With respect to the extenuating circumstances, this Panel considers that the Trial Panel properly concluded that the Accused was a family man with minor children, and this extenuating circumstance was not overestimated as the Prosecution claims.

166. Based on the foregoing, this Panel concludes that, contrary to the Prosecution's insistence on a more stringent punishment, the Trial Panel rendered an adequate decision on punishment as it properly evaluated the aggravating and extenuating circumstances and the participation and role of the Accused in the perpetration. This Panel considers that the referenced sentence is proportionate to the gravity of the criminal offense and that it will help achieve the purpose of punishment stipulated in Article 39 of the CC B-H.

167. Finally, this Panel has the need to note that the Trial Panel rendered a decision instructing "the injured parties to pursue their potential claims under property law in a civil action", pursuant to Article 198 of the CPC B-H. Given that the Appellate Panel reviews the Judgment only insofar as contested by Appeals (Article 306 of the CPC B-H), and that the referenced part of the contested Judgment was not subject of appeal, the Appellate Panel did not deliberate on whether such position of the Trial Panel was justified. However, the Appellate Panel concludes that a decision on claims under property law, including instruction to injured parties to take civil action as one of the manners of adjudication, may be rendered only in case the claim under property law was requested. In the opposite

[5] An appeal filed in favor of the accused due to the state of the facts being incorrectly 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).

case, the Court shall not render a decision pursuant to Article 198 of the CPC B-H. The questionable nature of the Trial Panel's decision is emphasized by the fact that the Panel also indirectly doubts the existence of such claim as it refers to it as "potential". Article 198 of the CPC B-H is titled "Ruling on the Claims under Property Law". The inference that the Court shall render a decision on a claim under property law only if such claim exists is made primarily through the linguistic, and then the logical and teleological interpretation of this Article's title and of its opening part that sets forth that "the Court shall render a judgment on claims under property law".

168. Based on the foregoing, and pursuant to Article 310(1) as read with Article 313 of the CPC B-H, a decision was rendered as quoted in the enacting clause of this Judgment.

RECORD TAKER	**PRESIDING JUDGE**
Ena Granić	**Senadin Begtašević**

LEGAL REMEDY: No appeal lies from this Judgment.