

Bosna i Hercegovina

Босна и Херцеговина



Sud Bosne i Hercegovine Суд Босне и Херцеговине

Court of Bosnia and Herzegovina

Case No. S1 1 K 021051 17 Krž 6

Delivered on: 12 July 2017

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Before the Appellate Panel composed of Judges:

Tihomir Lukes, Panel Presiding

Mirko Božović, member

Senadin Begtašević, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

the accused SAŠA ĆURGUZ

SECOND-INSTANCE JUDGMENT

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

Mr. Emir Neradin

Counsel for the Accused:

Ms. Anja Loga, Attorney

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Number: S1 1 K 021051 17 Krž 6
Sarajevo, 12 July 2017

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel composed of Judge Tihomir Lukes, as the Panel Presiding, and Judges Mirko Božović and Senadin Begtašević, as members of the Panel, with the participation of the legal advisor-assistant Nedim Muminović, as the record-taker, in the criminal matter against the accused Saša Ćurguz charged with the commission of the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in connection with sub-paragraphs a) and k) of the Criminal Code of Bosnia and Herzegovina, as read with Article 29 and Article 180(1) of the CC BiH, concerning the appeal filed by the Prosecutor's Office of BiH, and the appeals filed by the accused Saša Ćurguz and the accused's defense attorney, Ms. Anja Loga, from the Judgment of the Court of BiH No. S1 1 K 021051 16 Kri of 30 March 2017, at the session held on 12 July 2017 in the presence of the accused Saša Ćurguz, the accused's defense attorney, Ms. Anja Loga, and the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mr. Milanko Kajganić, substituting for Prosecutor Emir Neradin, handed down the following:

J U D G M E N T

Dismissing as ill-founded the appeal filed by the Prosecutor's Office of BiH, **granting in part** the appeals filed by the accused Saša Ćurguz and Ms. Anja Loga, defense attorney for the accused Saša Ćurguz, and **revising in the sentencing part** the Judgment of the Court of BiH No. S1 1 K 021051 16 Kri of 30 March 2017 by imposing on the accused Saša Ćurguz **a prison sentence for a term of 14 (fourteen) years** for the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), in connection with sub-paragraphs a) and k) of the Criminal Code of BiH of which the Trial Judgment found him guilty pursuant to Article 39, Article 42(1) and (2) and Article 48(1) and (2) of the CC BiH.

The Trial Judgment shall remain unrevised in its remaining part.

R e a s o n i n g

I – PROCEDURAL HISTORY

1. The Trial Judgment of this Court No. S1 1 K 021051 16 Kri of 30 March 2017 found the accused Saša Čurguz guilty of committing, by the acts described in the Judgment enactment clause, the criminal offense of Crimes against Humanity in violation of Article 172(1)(h), as read with sub-paragraphs a) and k) of the Criminal Code of Bosnia and Herzegovina (CC BiH), as read with Article 29 and Article 180(1) of the same Code, wherefore the Trial Judgment sentenced him to imprisonment for a term of 15 (fifteen) years on the basis of the referenced regulation and by applying the rules of Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), Article 39, Article 42(1) and (2) and Article 48(1) and (2) of the CC BiH.

2. Pursuant to Article 56 of the CC BiH, the referenced Judgment decided that the time the accused spent in the extradition custody, running from 12 December 2014 to 12 December 2015, would be credited towards the imposed prison sentence, as well as the time the accused spent in custody under the Decision of the Court of BiH of 8 February 2016 onwards.

3. In addition, the accused was pursuant to Article 188(4) of the CPC BiH relieved of the obligation to reimburse the costs of criminal proceedings.

4. Ultimately, pursuant to Article 198(2) of the CPC BiH, the injured parties Bekir Mešić, Ismet Mešić, Muhamed Anadolac and the other injured parties were instructed to pursue their claims under property law in a civil action.

II – DEFENSE'S APPEAL

5. The referenced Judgment was timely appealed by the Prosecutor's Office of BiH on the grounds of the decision on sentence, with a motion that the Appellate Panel of the Court of BiH revise the Judgment at issue, pursuant to Article 314 of the CPC BiH, in the part concerning the length of the imposed sentence, and impose on the accused a lengthier sentence than that received under the Trial Judgment.

6. The accused Saša Ćurguz also filed an appeal on the grounds of essential violations of the criminal procedure provisions, and incorrectly and incompletely established facts, and moved the Appellate Panel to revise the contested Judgment by acquitting the accused of the charges, or to revoke the Judgment and order a hearing before the Appellate Panel.

7. The Judgment was also appealed by Ms. Anja Loga, defense attorney for the accused Saša Ćurguz, on the grounds of essential violation of the criminal procedure provisions, violation of the criminal code, incorrectly and incompletely established facts, the decision on sentence and violation of Article 6 of the European Convention. The defense attorney moved the Appellate Panel of the Court of BiH to grant the appeal and revoke the contested Judgment in whole on the grounds of the existent absolutely substantial violations of the criminal procedure, and to order a hearing before the Appellate Panel of the Court of BiH, or to revise the contested Judgment by rendering a judgment of acquittal.

8. The Prosecutor's Office of BiH timely submitted its response to the defense's appeals and moved the Court to dismiss as ill-founded, in whole, the appeals filed by both the accused and the accused's defense attorney.

III – SESSION OF THE PANEL

9. Pursuant to Article 304 of the CPC BiH, the Panel of the Appellate Division held a public session, on 13 July 2017, in the presence of the accused Saša Ćurguz, his defense attorney, Ms. Anja Loga, and the Prosecutor of the Prosecutor's Office of BiH, Mr. Milanko Kajganić (substituting for Prosecutor Emir Neradin). At the referenced session, the Prosecutor of the BiH Prosecutor's Office, Mr. Milanko Kajganić, briefly presented the appellate grievances and completely stood by their appeal. In addition, the accused's defense attorney, Ms. Anja Loga, orally presented the appellate grievances and completely stood by the advanced appellate complaints and arguments. The accused stood by his defense attorney's appellate grievances, briefly presented the appellate grounds, and moved the Appellate Panel to grant the appeal as well-founded. Ultimately, the Prosecutor orally responded to the appellate arguments, and by referring to the appellate grievances moved the Court to dismiss them as ill-founded in whole.

IV – GENERAL CONSIDERATIONS

10. Prior to providing reasons for each appellate ground individually, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC BiH, the applicant should include in his/her appeal both the grounds for contesting the judgment and the reasoning behind the appeal.

11. Since the Appellate Panel shall review the judgment only insofar as it is contested by the appeal, pursuant to Article 306 of the CPC BiH, the appellant shall draft the appeal in the way that it can serve as a ground for reviewing the judgment. In that respect, the appellant must specify the grounds on the basis of which he contests the judgment, specify which section of the verdict, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

12. Mere arbitrary indication of the appellate grounds, and of the alleged irregularities in the course of the trial proceedings, without specifying the ground to which the applicant refers is not a valid ground for reviewing the Trial Judgment. Therefore, the Appellate Panel dismissed as ill-founded the unreasoned and unclear appellate complaints.

V – APPEAL FILED BY THE ACCUSED’S DEFENSE ATTORNEY

ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(1)(k) OF THE CPC BIH

i. General considerations

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

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

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

16. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the judgment. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts. The Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the judgment formally contains all necessary elements for a well-reasoned and comprehensible judgment.

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

18. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Judgment where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Judgment and should raise alleged errors of fact under Article 299.

ii. **Appellate grievances of the accused's defense attorney**

19. The defense submits that the contested Judgment does not contain reasons for the decisive facts, particularly those related to the criminal offense of persecution, because it

does not suffice to only indicate that the accused acted with the discriminatory intent. The *mens rea* requirement for persecution is larger than that for crimes against humanity, but lesser than that for genocide. It does not suffice for the accused just to be aware that he is realistically acting in the discriminatory manner, but rather he must also have a conscious intent to discriminate. Although the discriminatory intent need not play the key role in an act, it must be certainly significant.

20. The appeal indicates that the non-final judgment convicted the accused of the criminal offense of persecution in relation to the other acts set forth in Article 172 of the CC BiH that by the acts indicated in the referenced Sections of the Indictment he committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(h) by murder and inhuman treatment. Thus, in order to be able to found him guilty of the criminal offense of persecution, it needs to be proved that all other acts were committed with the discriminatory intent. Specifically, discriminatory intent must be proved, since it is the only substantially distinct element which differentiates persecution from other crimes against humanity.

21. The defense submits that, during his evidence presentation, the Prosecutor neither pointed, in any way, to the existence of the accused's intent to discriminate against anyone in any manner whatsoever, nor did the Trial Panel refer in the contested Judgment to any concrete piece of evidence proving that the accused had indeed acted with the discriminatory intent. When the Prosecutor asked the witnesses if the accused Saša Ćurguz had ever publicly promoted or created fear, and showed any hatred towards non-Serbs, or had he discriminated against anyone on the religious or national grounds, they clearly responded that he had not done any of that.

22. The appeal further pointed to the contradictions among certain witnesses' testimony credited by the Trial Panel, on which the Trial Panel based its decision but did not establish the decisive facts concerning Section 1 of the Judgment enactment clause. Specifically, the prosecution witness Bekir Mešić testified that, on the referenced occasion, 3-4 soldiers had entered the IMT Service Facility and beat them. Ismet Mešić also testified at the main trial that three-four men entered the facility; Dževad Hrnjica testified that three soldiers with automatic rifles, pistols and axes had entered the room; Muharem Štrkljević testified that two soldiers with batons and long-barrel pistols had entered that space. Therefore, none of the mentioned witnesses described the referenced event identically, while the Trial Panel credited them all, and rendered a judgment of conviction on that basis.

23. The defense submits that, after consultations with the other witness, Ismet Mešić, witness Muhamed Anadolac completely changed the statement he had given during the investigation, and at the main trial gave his evidence contradicting both his previously given statement and the statements of the prosecution witness Mahmut Muharemović. At main trial, witness Muharemović stated that “Muhamed Anadolac was present, but I do not remember if anyone had beaten him,” while Bekir Mešić stated he did not know if Anadolac had been beaten on the referenced occasion.

24. According to the appeal, the CC BiH does not provide for a precise definition of inhuman treatment. The appeal indicated that, in a large number of its judgments, the ICTY has defined inhuman treatment as an intentional act or omission, that is, as an act which is, objectively anticipated rather than accidental, which inflicts severe mental or physical suffering, or which is a serious outrage upon human dignity.

25. The defense submits that the Panel did not provide a reasonable finding of facts that by the acts he had taken, or by inhuman treatment referred to in Section 1 of the Judgment enactment clause, the accused indeed inflicted severe mental suffering on the witnesses indicated in Section 1 of the contested Judgment. The defense therefore believes that the accused did not cause any serious, real and severe suffering. Pursuant to Pictet’s comments on the IV Geneva Convention, which is in this respect identical to the comments on II and III Geneva Conventions, which provide for a series of useful observations concerning the meaning of the phrase “intentional causing of severe suffering or serious harm to body or health” (violation of bodily integrity).

26. The defense submits that, in order to prove that the injured parties suffered severe mental and psychological harm as a result to the accused’s acts, the prosecutor did not adduce as evidence any forensic evaluation findings concerning the state of the injured parties’ mental health, nor was any medical documentation concerning the injured parties presented.

27. The defense further submits that, in relation to Section 2 of the Judgment enactment clause, the Trial Panel based its finding on the accused’s guilt on a single witness’s testimony, namely the testimony of witness S1, who had allegedly eye-witnessed the referenced event, and the testimony of witness Orhan Cerić, who has indirect/subsequent

information about the referenced event. The defense submits that a forensic expert was also examined, but that the Trial Panel made no references to it at all in the contested Judgment. Witness S1 is a witness with granted protective measures; he is a single accidental survivor, and the only person uncharged with the criminal offense of murder; the witness who changed his statement given during the investigation; who is on the brink of being charged with an offense; who had not even tried to prevent the killings and who did not report them.

28. In addition, witness S1 made such a construct (of testimony) where he does not remember the name of the truck driver; who has not been either under investigation or dead; and he is the only person who could confirm or deny the witness S1's testimony. However, a comparison of his testimony with the documentary evidence clearly shows that his testimony is false. Specifically, witness S1 stated that the accused Ćurguz fired from a *Magnum* pistol at the captured persons' occipital area, and killed at least 6, 7 or 8 men; while in his statement given during the investigation he stated that the accused Saša Ćurguz had shot at three prisoners.

29. Also important for the defense is to refer to the forensic expert finding proposed by the prosecution, which was not at all taken into consideration by the Trial Panel. Specifically, in presenting her findings, forensic expert Semira Mešić Pašalić was not able to, *inter alia*, answer the defense's question concerning the time of the injuries infliction.

30. The defense further submitted that the Trial Panel was not able to find any corpses with an occipital head injury inflicted by a *Magnum* pistol, as described by witness S1. Specifically, all the changes examined by forensic experts relate to those caused by automatic rifle rounds caliber 7x8 mm, while a *Magnum* pistol uses 9 mm caliber rounds. No such violation of the head bones was found. Even more so, the findings of forensic expert in ballistics, which the defense wanted to adduce, and the prosecution made as an indisputable piece of evidence, as noted in the Trial Judgment, confirm that, among the casings and bullets found, there was no round to belong to the *Magnum* pistol from which the accused had allegedly fired.

31. The defense submits that, allegedly in 2000, witness Orhan Cerić discussed with the accused the sale of a mass-grave (related information), while he reported it to the responsible authorities no sooner than in 2007; that thereupon an investigation was initiated by the Cantonal Prosecutor's Office in Bihać regarding the crimes committed at the Hrgar pit,

and that the investigation was led by the Prosecutor, Ms. Ornela Cerić Mrenica, witness Orhan Cerić's sister. Considering that the defense learned the foregoing only subsequently, it was not able to examine the witness with regard to the manner and the extent to which witness Cerić is connected with the investigation, which completely contests the prosecution's allegation that this witness has no motive whatsoever to give false evidence.

32. The defense submits that the Trial Panel considers that the defense's witnesses are not credible, namely that the three witnesses, who have completely contested Orhan Cerić's testimony which, in and out of itself, is illogical, and that the motives which led him to give such evidence are clear.

iii. Conclusions of the Appellate Panel

33. This Panel holds that the foregoing grievances are ill-founded.

34. Contrary to the appellate grievances, the Appellate Panel holds that the Trial Panel provided an adequate explanation of the accused's discriminatory intent against both the injured parties at the IMT Service facility and the killed persons indicated in Section 2 of the contested Judgment enactment clause. The manner in which the accused acted, as comprehensively explained in the Judgment's reasoning, exactly points to the accused's conscious intent to discriminate against Bosniak civilians. Therefore, considering the accused's overall conduct in the manner as proved during the proceedings and explained in the contested Judgment, it can be concluded that the accused had indeed expressed an unequivocal discriminatory intent, wherefore his conduct cannot be viewed any differently than that as found in the Judgment, that is, it cannot be concluded that the accused did not act in a non-discriminatory manner, as the defense tried to present on no justifiable grounds.

35. In this regard, the Trial Panel properly found that the discriminatory intent, as an underlying element of persecution as a crime against humanity, was indeed proved on the part of the accused. In this context, the Trial Panel finds that the accused had reason to know that the Bosniak civilian population were being persecuted by inhuman treatment on national and religious grounds, and that the accused personally took part in the prohibited acts, and did not, at any moment whatsoever, distance himself from the prohibited acts committed by his co-combatants, and that thereby the accused shared the discriminatory intent which indeed existed beyond a doubt.

36. In that context, the accused need not directly demonstrate his intolerance to members of other national or religious groups by any verbal acts. It suffices for the existence of discriminatory intent that the accused agreed with other individuals who demonstrated discriminatory intent by both open intolerance (from which the accused did not distance himself) and the individual acts charged against him (where the accused demonstrated a particular ruthlessness). Therefore, the Appellate Panel holds that, by committing the discriminatory acts or omissions, the accused indeed had the discriminatory intent on *national and religious grounds* wherefore it dismisses as ill-founded the defense's grievances advanced along this line.

37. Also ill-founded are the defense's grievances pointing to the contradictions in the testimony of the witnesses, who gave evidence about the circumstances pertaining to both Section 1 and Section 2 of the contested Judgment, on which the appeals filed by both the accused and his defense attorney particularly insisted. Concretely, Section 1 of the contested Judgment is based on the testimony of both the witnesses-injured parties and the other witnesses possessing direct information about the referenced event (eye-witnesses), while Section 2 is, in its decisive segment, based on the testimony of witness S-1, who had also eye-witnessed the incriminating event. Contrary to the appellate grievances of the accused's defense attorney (and of the accused personally), it is quite irrelevant to both the Appellate Panel and the Trial Panel that certain witnesses' testimony differed with regard to certain circumstances irrelevant to making proper findings, and which could not, as such, result in any different court's decision. The Panel holds that certain existent inconsistencies in the witnesses' evidence regarding the precise date of the incriminating event occurrence, the number of persons who entered the prisoners' room, the weapons they carried and the details concerning the accused's physical appearance, etc., are not crucial for the correctness of the established facts because those details were differently perceived by different persons, who did not memorize them at that particular moment, considering that, most likely, none of the referenced witnesses had focused on them. The Appellate Panel particularly holds that these witnesses cannot be expected to remember all the details related to a specific event, and to identically describe that event after a long period of time elapsed. Therefore, quite logically, all witnesses cannot remember all the details and consistently describe the same event, not even some of its irrelevant details. In this regard, the existing minor inconsistencies in the witnesses' testimony, which do not bring into question the existence of the substance of the event which is being proved, cannot significantly affect the witnesses' evidence. The Court has certainly expected that certain inconsistencies will exist

in the witnesses' evidence caused by various circumstances, objective and subjective, such as: the elapsed period of time, the witnesses' personality, or individual characteristics, the circumstances surrounding the event, individual's different ability of perception and different capacity to interpret the same events, as well as quite a normal process of irrelevant detail forgetting. The referenced inconsistencies are of no such relevance so as to bring into doubt the very existence of the criminal act.

38. Crucial for the present case are both the consistency of the witnesses who had been present at the site and eye-witnessed the manner in which the accused treated the imprisoned civilians in terms of the mere act of event, namely they could watch the physical ill-treatment of the imprisoned persons, and their almost consistent testimony with regard to the time of the crime commission. Exactly such events, involving inhuman treatment exposing the injured parties to mental and physical suffering, point to the character of the act, which departs from the common rules of conduct, traumatizes the witnesses, cannot be seen on a daily basis, and is therefore being forgotten, which is why the injured parties were credited. In addition, it should be emphasized that the witnesses were to a large extent consistent about the decisive facts, namely the accused's identity, physical appearance and age, as well as the acts undertaken by the accused. The Appellate Panel also holds that there would have been far more grounds for a doubt had the witnesses' testimonies been completely identical, with no inconsistency whatsoever. Had the testimonies been completely identical they would have raised even more doubts that there was an agreement among the witnesses to give evidence with identical contents to the prejudice of the accused.

39. Also ill-founded are the appellate grievances concerning the different statements given (during the investigation and at the main trial) by witness Muhamed Anadolac (in relation to Section 1 of the contested Judgment), and witness S1 (in relation to Section 2 of the contested Judgment) by which their credibility would be contested, considering that the Trial Panel evaluated the statements given both during the investigation and at the main trial, and found that the referenced testimonies are consistent in their decisive segments (concerning the circumstances about which they testified), wherefore the credibility of these witnesses is unquestioned. Thus, it is important that, during the main trial, the Trial Panel was able to directly observe these witnesses' conduct while explaining the inconsistencies in their evidence, for which they provided reasonable and logical explanations, and that after comparing all their statements and evaluating their credibility, the Panel was able to find that the referenced inconsistencies are irrelevant. Therefore, the appellate referral to the

inconsistencies in these witnesses' evidence cannot bring into question their credibility and the essence of the events which are the subject of the present proceedings.

40. The Appellate Panel also holds that the conversations among certain witnesses are not disputable either because they do not necessarily have to lead to the contamination of evidence and violation of the witnesses' credibility, particularly considering that these persons have known each other and have together survived the referenced event in the past. These witnesses' credibility would have been compromised had a concrete piece of evidence existed proving that their evidence strictly resulted from their mutual agreement on how to give their evidence. This was not done in the concrete case, because there are several witnesses who are mostly consistent with regard to the event at issue. On the other hand, the minor inconsistencies existing in their evidence exactly indicate that their statements were not prepared in advance in order to bring the accused to a less favorable position.

41. In view of the foregoing, the Appellate Panel holds that the Trial Panel evaluated the credibility of the witnesses' statements given both during the investigation and at the main trial, and found no inconsistencies regarding the decisive facts. Specifically, there are no substantial inconsistencies which would bring into question the substance of the event, wherefore there are no essential violations of the criminal procedure provisions under Article 297(1)(k) of the CPC BiH.

42. It should be noted that, in evaluating the evidence pursuant to Article 15 of the CPC BiH, the Court is not bound by the formal statutory rules, namely that, in rendering its decision, it is not bound by predetermined formal rules but rather renders its decision pursuant to one of the basic principles of the criminal procedure, that is, the principle of free evaluation of evidence. The Trial Panel properly noted that the lack of consistency in a witness's evidence does not mean, in and out of itself, that the witness's evidence must be rejected as unreliable¹, but that, on the contrary, the Court shall duly analyze the evidence both in terms of its contents and in combination with the other evidence. In the concrete case, the Trial Panel properly analyzed the contents of the witnesses' evidence, correlated them with the other evidence, and ultimately found the accused guilty as charged.

43. It is important to note that the referenced witnesses were examined by both the prosecution and the defense, that the Panel also posed questions to them in order to obtain explanations for certain assertions, and that therefore the Trial Panel could make its finding

¹ Appellate Judgment in *Čelebići*, paras. 485 and 496-498.

regarding those witnesses' credibility. Thus, the Trial Panel correlated the witnesses' evidence, that is, their statements given during the investigation and at the main trial, credited them and accordingly provided a reasonable and logical explanation, wherefore the defense's grievances are found to be ill-founded. In the concrete case, there are many details in the witnesses' evidence identical to the other witness's evidence, which also fit within the factual framework of the event in the manner as described in the Indictment. Therefore, the Trial Panel had no doubts into these witnesses' statements regarding the description of the acts undertaken by the accused. The very manner in which the witnesses gave evidence tells a lot about the witnesses, their objectivity and reliability, since they testified exactly in the manner how they had seen the critical events. Therefore, the referenced grievance is also dismissed as ill-founded.

44. Contrary to the grievances of the defense, which made efforts to point to the accused's alibi at the critical time by referring to the witnesses' evidence and the documentary evidence, the Appellate Panel holds that the evidence to which the defense referred did not bring into question either the testimony of the key witnesses or the other evidence tendered by the Prosecution proving that the accused was indeed present at the crime scene. This is so because, as it ensues from the Prosecution witnesses' evidence, the accused was identified by the witnesses, some of whom had known the accused even before the war, and also by witnesses who identified him during the investigation and trial, who had not known him before the war but were able to recognize him during the proceedings as a participant in the criminal act. In addition, the defense's referral to the defense's evidence indicating that the accused could not have been present at the referenced sites also does not bring into question the Trial Panel's finding. As also found by in Trial Judgment, this is obviously because the then situation in the field is not apparent from the records, particularly considering the evidence of the witnesses who had either known or identified the accused, as indicated above.

45. The Appellate Panel also evaluated the appellate grievances concerning the absence of medical documentation concerning the victims' injuries, that is, the grievances that the victims suffered severe mental and psychological pain, for which no expert evaluation and medical documentation existed. In this regard, this Panel indicates that the court's findings about the consequences of the treatment accorded to the referenced persons, and the inhuman treatment of the injured parties, were exclusively based on the testimony of the witnesses-injured parties, but also on the testimony of the other eye-witnesses indicated in

the Judgment. The fact that no medical documentation was tendered in the case record concerning the extent of the injured parties' injuries does not mean that these persons do not suffer from such consequences, considering that not only that these witnesses are injured parties, but also the other persons present on the IMT Service premises at the time, who described how they had been treated and the resulting consequences they have suffered from such treatment. In other words, the lack of medical documentation does not, in any way, diminish the statements of the witnesses-injured parties that they suffered severe physical and mental pain and harm.

46. In this context, and with regard to the lack of medical documentation, the Appellate Panel again points to the general principle that proper findings about the crime commission cannot be reached by applying any specific formula. Article 15 of the CPC BiH (Free Evaluation of Evidence) is a manifestation of the old principle of *testimonia panneranda sunt, non numeranda* (evidence is being evaluated rather than counted). This principle highlights the evaluation of the value, gravity and quality of evidence, rather than its quantity, multiplicity or nature. Therefore, in establishing whether a fact exists or not, the Trial Panel is entitled to rely, in whole, on the evidence obtained in the form of a witness's testimony. Accordingly, the non-existence of documentary evidence or medical documentation concerning the consequences of the injured parties' physical ill-treatment does not diminish the strength of other evidence (the witnesses' testimony in the concrete case), which points to the consequences of the treatment accorded to the injured parties. On the basis of the injured parties' evidence in the concrete case, the Trial Panel primarily made findings concerning the consequences and the accused's guilt. The referenced incriminating acts were committed during the war, when the injured parties received no medical aid, wherefore it can be hardly expected that each person individually possesses any documentation related to the experienced suffering.

47. In relation to witness Orhan Cerić's testimony, the Appellate Panel indicates that this witness's credibility was not brought into question since he resolutely described the information he had obtained from the accused. However, since this witness's information was not directly related to the charges brought against the accused in the Trial Judgment, they would not have brought into question the substance of the event described in Section 2 of the contested Judgment had his credibility even been contested, because the Trial Panel rendered its decision about decisive facts on the basis of the completely credited testimony of witness S1. Therefore, witness Orhan Cerić gave evidence about the circumstances after the fact, so the witness's evidence in this regard cannot in any way bring into question the

substance of the event and the accused's role therein, as they were both proved on the basis of the other witnesses' evidence.

48. Also, the appeal did not bring into question the correctness of the Trial Panel's finding regarding the means of the referenced crime commission due to the lack of empty casings, or entry wounds on the killed persons' exhumed mortal remains. In this context, as also confirmed by expert witness Samira Mešić-Pašalić's evidence, it should be noted that the crime scene is a very specific site difficult to reach, namely a deep pit into which the bodies of killed persons were thrown. It is therefore hard to expect that all traces of the committed crime will be found in the manner as indicated by the defense. This is so particularly considering a large number of victims and the diversity of injuries, as well as the elapsed period of time between the individual killings and the subsequent throwing of the bodies in the pit, as well as the period until their exhumation, wherefore it is unjustified to expect that the circumstances on which the defense insists will be determined. However, where there is clear evidence concerning the fact of an individual's murder in the form of the witness S1's testimony, which was credited in whole, the referenced expert evaluation serves as a further piece of evidence proving that the bodies were indeed recovered at the referenced site and that the victims died violent deaths. Therefore, a correlation between the referenced expert evaluation and the testimony of witness S1, who had eye-witnessed the murders committed at the referenced site by the accused along with other persons, and the bodies recovered at the same site, results in the finding about a closed circle of the established facts in the contested Judgment, where the circumstances on which the defense insists do not bring into question such a finding. In other words, neither the witness S1's credibility nor the substance of the events which is the subject of the present proceedings was brought into question by the circumstances on which the defense insisted. The correctness of the Trial Panel's finding also was not brought into question by the grievance concerning the means of commission of the crime referred to in Section 2 of the contested Judgment (the *Magnum* pistol), considering that the accused personally does not contest his possession of the referenced pistol. On the other hand, the fact that the accused used this pistol in the concrete event ensues from the testimony of witness S1, who had eye-witnessed the event, and who was completely credited by the Court in this segment. The referenced finding is also upheld by this Panel.

49. With regard to the appellate grievance that the Trial Panel did not comply with the *principle of in dubio pro reo*, the Appellate Panel holds that the Trial Panel paid equal attention to the evaluation of evidence tendered by both the Prosecution and the defense,

and provided in the Trial Judgment a clear and reasoned evaluation of all evidence, individually and in combination with the other evidence, on the basis of which it found that the legally relevant facts and the accused's guilt indeed existed. Therefore, in formal and legal terms, the Trial Panel completely acted in compliance with the statutory obligations set forth in Article 15 of the CPC BiH and Article 281(2) of the CPC BiH. During the trial proceedings, the Trial Panel determined, beyond a doubt, all relevant circumstances on the accused's part, namely his membership in a military formation, the presence on the IMT Service premises, the ill-treatment of prisoners, taking the prisoners away and their execution. The Trial Panel explained each piece of evidence, individually and in combination with the other evidence, and on the basis of the referenced evidence found the accused guilty as charged. The Trial Panel also analyzed the theory of the accused Saša Ćurguz's defense, and in rendering its decision analyzed the defense's evidence and provided an adequate explanation for the inadmissibility of its theory, which remained uncorroborated with the tendered evidence.

iv. **Appellate grievances of the accused Saša Ćurguz**

50. The accused Saša Ćurguz believes that the Trial Panel made an essential violation of the criminal procedure provisions considering that the judges, who should have been recused from the trial in terms of Article 297(1)(b) of the CPC BiH, acted at the main trial. Specifically, the referenced violation was made because the same judges who were deciding in the concrete case had also decided in the trial proceedings and rendered the first-instance judgment of conviction in the case of *Željko Stanarević*, which concerns the same event in terms of the facts of the case. Also, in deciding on the facts in the two cases, the judges referred to the same witnesses' evidence, and in the same manner decided on the accused's acts and responsibility. The accused submitted that a judge cannot perform his/her judicial duty if there are circumstances raising doubts into his/her impartiality.

51. The accused further submitted that the Trial Panel also violated his right to the presumption of innocence since it failed to apply the rule of Article 3(1) of the CPC BiH, which affected the rendering of a lawful and proper judgment.

52. In addition, the accused believes that his right to a defense was also violated since he was not informed about the grounds for the charges brought against him. Specifically, paras. 11-12 of the contested Judgment indicate that the Indictment in relation to the accused was not exceeded although it is obvious that it was done, particularly considering the fact that new

victims and new injured parties (in relation to Sections 1 and 2) were added thereto. The only option to maintain this Indictment is to submit it for new confirmation, and only subsequently to enable the defense to re-examine the witnesses relevant to the new charges.

53. The accused further believes that the contested Judgment is based on the evidence on which it should not have been based. In addition, the accused submitted that the Court exceeded the charges by the contested Judgment and thereby also made an essential violation of the criminal procedure provisions for incorrect application of Article 280(1) of the CPC BiH. Specifically, Article 280(1) of the CPC BiH clearly stipulates that *the verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial or supplemented.*

54. The accused further submitted that his right to remain silent and the right not to incriminate himself were also violated because he had given evidence in the case of *Željko Stanarević*, before the same Panel which tries the case pending against him, and poses questions to him in relation to his military file. After reading the Judgment handed down in the referenced case, a conclusion can be drawn that the Trial Panel had already at the time rendered its decision against the accused without any trial.

55. The accused submitted that the contested Judgment enactment clause is incomprehensible and cannot be reviewed as such. Specifically, the Trial Panel indicates that the accused committed the criminal act in the manner that, following Saša Ćurguz's and D.D.'s instructions, witness S1 and other member of the VRS had dragged the killed persons away and thrown them in a pit (Section 2). Such a description does not show on the basis of which written document or oral instruction the accused was allegedly authorized to do so, and by which the command role was transferred upon him, since the accused had had no command powers. These omissions render the Judgment enactment clause incomprehensible, while the Trial Panel's reasoning also provides no reasons for which it considers this fact as established.

56. The accused submitted that Exhibit T151 and Exhibit T152 are absolutely unlawful, since, normally, the identification procedure is being carried out at police stations or prisons, in such a manner that a witness, whose anonymity should remain secret, should identify the suspect or some other person from among several, or at least eight, persons. Prior to such

an identification procedure, the police should obtain the suspect's consent for the procedure to be carried out, since otherwise the identification will constitute an invalid piece of evidence.

57. The accused further believes that, in the rendering of the contested Judgment, the Trial Panel made an essential violation of the criminal procedure provisions under Article 297(2) of the CPC BiH, since it misapplied the principle of presumption of innocence, the principle of *in dubio pro reo*, the principle of legality in terms of Article 3 of the CPC BiH, and made no conscientious evaluation of evidence, individually and in combination with other evidence (in terms of Article 281 of the CPC BiH).

58. The accused submitted that not only that Exhibit T-151 and Exhibit T-152 is unlawful but that the descriptions of the accused provided during the identification procedure are also incorrect. Specifically, witness Muhamed Anadolac described the accused as follows: "Saša had black hair, dark complexion, of average physical constitution, approximately 1.80 m height, with curly hair, and a wide nose." The accused indicates that he neither has nor has ever had curly hair, but rather that his brother had curly hair. In addition, witness Ismet Mešić described the accused as follows: "He was taller than me, that is, approximately 175-180 cm height, with a round face and a wide (boxer) nose, brown hair, dark complexion, wide shoulders, and a strong body-build", which, according to the accused, does not match his appearance description.

59. The accused submitted that the Panel credited the witnesses at the main trial even though their statements are contradictory and on the verge of discrediting their credibility, because their each statement differs from their trial evidence. In addition, the Trial Panel did not clearly indicate in the contested Judgment if at the relevant time Muhamed Anadolac, Ismet Mešić and Jasmin Vajlović were registered as conscripts with the Federation Ministry, considering that they wore civilian clothing.

60. The accused Čurguz submitted that it clearly ensues from the Letter of the RS Ministry for the Protection of War Veterans and Disabled Persons, with the enclosed Saša Čurguz's military personal file, that the accused was mobilized to the VRS on 10 July 1992, which was tendered as the defense's documentary exhibit, and used by the defense as documentary evidence that the accused did not participate in a widespread and systematic attack launched in the territory of the then Serb Municipality Bihać. Therefore, it remains unclear on what basis the Trial Panel found beyond a reasonable doubt that the accused was

a member of the VRS since 9 May 1992, and that he participated in the widespread and systematic attack launched in the territory of the then Serb Municipality Bihać.

61. The accused indicates that witness Muhamed Anadolac stated that the event had taken place on 13 June rather than on 5 September 1992, and that the very statements of the injured party concerning the circumstances pertaining to the event of 13 June 1992 are questionable since the witness changed both his statement (given during the investigation) and the main trial testimony. The credibility of the referenced witness is disputable considering that he has repeatedly changed his statements and provided different descriptions of the critical event.

62. The accused submitted that the Trial Panel did not take into account the testimony of witnesses Radivoje Vlatković and Anđelko Mandić presented by the defense at the hearing held on 29 December 2016. Also unclear is the Trial Panel's finding that witness Milan Rakić confirmed the assertions contained in the record of 10 February 2016, since he changed his statement at the main trial.

63. The accused indicated that he provided a description of his war history in the closing argument, indicating that he joined the VRS in mid-July, until which time he had taken shelter in the place of Nebljusi in Croatia, because, at the time, the population from BiH was not mobilized into the SAO Krajina until early July. The accused was mobilized to the military police for a couple of days, whereupon he was sent to the place of Mala Albanija to undergo training until 2 August 1992. The accused also indicated that he had left Bihać along with Jovo Brdar in mid-May, and was hiding until 10 July to avoid mobilization because he could not leave for Serbia, and that he attended the training until 2 August 1992.

64. The accused indicated that the Trial Panel incorrectly found, on the basis of someone's hearsay, that he was within the formation, while nobody actually saw the accused, nor can claim so with certainty. The accused also indicated that the Trial Panel disregards the documentary evidence, that is, the accused's military personal file and the witnesses' statements.

65. The defense further pointed to the unlawfulness of the documents related to the identification procedure, namely Exhibit T-152, considering that the injured party had consulted with and spoken with Muhamed Anadolac even before the identification procedure.

According to the defense, the procedure was also unlawfully conducted during the investigation stage, where Milan Rakić had given a statement under pressure and duress.

66. The accused submitted that the Trial Panel provided an unclear explanation that 24 years elapsed since the event, wherefore it credited the witnesses' evidence rather than their statements given during the early stages of the investigation conducted in 2008 and 2009. Also unclear is the Panel's explanation of the reasons provided in the Judgment v. *Željko Stanarević* for which it sentenced the accused in relation to Count 2 of the Indictment, namely that he was a VRS soldier since 9 May 1992, which is incorrect, as stated above, considering that the accused was registered in the military records since 10 July 1992.

67. The accused submitted that the defense objects that Milan Popović's statement was taken unlawfully, considering that, after being presented with his previously given statement, the referenced witness denied that he knows the accused and that it was unclear to him how the record contained that information. In addition, the accused submitted that the Trial Panel is guided by the statements of Miroslav Tankosić, who possessed no direct information, but rather just hearsay of also unknown origin.

68. The accused submitted that the Panel completely credited the witness S1's evidence given at the main trial, where he stated that the accused Saša Ćurguz had fired from a *Magnum* pistol caliber 9 mm, and killed at least 6, 7 or 8 men, while in the statement given during the investigation he stated that the accused Saša Ćurguz had fired at three prisoners. In addition, the original Indictment indicated that the accused deprived three prisoners of their lives, while the amended Indictment indicated that he had killed at least six prisoners, and that he was given a commander's role, by which the charges were exceeded, in the accused's opinion.

69. The accused further indicated that witness S1 testified that the accused had fired from the *Magnum* pistol, with a nickel-plated tube caliber 9 mm, but that the Trial Panel will not find any corpse with an occipital head injury inflicted by a *Magnum* pistol as described by witness S1. All caliber diameters were measured by forensic expert, who found that they belong to an automatic rifle caliber 7x8 mm. Also, the forensic expert in ballistics, whose examination was proposed by the defense, and also accepted by the Prosecution as indisputable evidence, confirms the fact that, among the referenced casings and rounds, there is no round belonging to a *Magnum* pistol from which the accused had allegedly fired.

70. The accused submitted that, in his trial testimony, the defense's witness Radivoje Vlatković confirmed that the accused had not possessed any *Magnum* pistol obtained from his grandfather in 1993. In addition, witness Anđelko Mandić stated that the accused had brought his grandfather's pistol from Sanski Most in 1993, while Milan Raičić could not remember that the accused had possessed any *Magnum* pistol.

71. The accused indicated that the Panel considered that it was not necessary to analyze individually the cause of death for each person recovered from the Bezdan pit at the Hrgan site, and that it did not determine in detail the cause of death for each corpse individually considering that, during the proceedings, the persons with whose killing the accused was charged, at least eleven of them, were not specified.

72. The accused indicated that, in the contested Judgment, the Panel credited witness Orhan Cerić and found no motives on his part to give false evidence, while the defense presented, in its closing argument, the fact that Orhan Cerić's sister, as a cantonal prosecutor, had conducted pretrial proceedings, which the defense unfortunately learned no sooner than at the proceeding completion, and thus could not examine the witness about the referenced facts.

73. The accused indicated that, in the Judgment enactment clause, the Trial Panel provided unclear and incomplete explanation, with no reliance on the documentary evidence and the witnesses' evidence, but rather completely credited witness S1, whose testimony is not corroborated with the documentary evidence. The Trial Panel relied on the Judgment handed down in the case of Željko Stanarević, thus violating the principle of presumption of innocence due to improper application of the principle of *in dubio pro reo* in terms of Article 3 of the CPC BiH, the principle of free evaluation of evidence under Article 281 of the CPC BiH, and the lawful procedure under Article 2 of the CPC BiH, at the same time violating the accused's right to a defense under Article 297(1)(d) of the CPC BiH.

74. The accused's appeal contested the witnesses' evidence indicating that the witnesses repeatedly changed their statements. To corroborate his appellate grievances, the accused quoted the witnesses' statements, particularly highlighting the segments of the witnesses' evidence given at the main trial, which differ from their respective statements given during the investigation. The accused believes that the evidence given by the witnesses at the main trial

is mutually harmonized considering that the witnesses had discussed the event at issue, which brings into question the referenced witnesses' credibility.

75. The accused also considers as disputable the credibility of the protected witness S1 considering that, in addition to being granted protective measures, he is a single survivor of the event at issue and a single person non-indicted for the crime of murder. Also, the referenced witness changed the statement he had given during the investigation, he is on the brink of being incriminated, and he had not even tried to prevent the murders.

76. The accused contests being identified by the witnesses considering that their description of his physical appearance differs from his real physical appearance, namely the accused indicates that their descriptions of the accused provided in the identification procedure are incorrect. The accused also indicates that the photos related to the accused's identification procedure were taken over from the CIPS Banja Luka, and that the accused's face was very elongated at the ID and passport photos from 2006.

77. The accused submitted that almost all war crimes cases require the application of substantive law effective at the time of the alleged commission of crimes by the accused, as charged under the Indictment, considering that the CC SFRY is more lenient to the perpetrator, and that it unequivocally ensues from Article 4 of the CC BiH that the CC BiH shall apply exceptionally if it is, as in the concrete case, the more lenient law than the law effective at the time of the act commission by the accused. The accused consistently maintains his position that he is not guilty of the acts as charged under the Indictment. Due to the foregoing, it is clear that the Court's finding that the accused is guilty as charged was based on a number of essential violations of the criminal procedure provisions, as well as the incorrectly and incompletely established facts.

v. Conclusion of the Appellate Panel

78. The Appellate Panel considers as ill-founded the accused's appellate grievance concerning violations of the Indictment identity considering that the prosecution amended the referenced Indictment pursuant to Article 275 of the CPC BiH, but not to the prejudice of the accused. Thus, this Panel holds that the same act, or the same factual event from the past is on trial, specifically, its substantial parts. The Indictment was amended in accordance with the results of the evidentiary proceedings, that is, in accordance with the eye-witnesses'

evidence, and that it does not exceed the scope of the factual description established in the original Indictment. A comparison between the wording of the consolidated and the amended indictments shows that the prosecutor's intervention merely changed the sequence of its allegations and specified the terminology, which does not affect the very substance of the factual description, all the more so because the amended Indictment did not state any aggravating elements by which the accused's position would have been made more difficult. It is important to note that, in the concrete case, the prosecution acted completely in compliance with Article 275 of the CPC BiH in the manner that it amended the Indictment in accordance with the evidentiary proceedings results, including the number of killed persons, while it gave to the defense quite a sufficient period of time to examine it and give its comments on the indictment. Therefore, it cannot be stated that the Indictment was amended to the prejudice of the accused and that his right to a defense was violated.

79. Also ill-founded are the appellate grievances that the accused's right to a defense was violated in terms of violations of his right to remain silent, considering that the Panel in this case neither evaluated his evidence given in the other case nor correlated it with the evidence in this case. The defense did not indicate that the Trial Panel's findings in the present case were in any way based on the witness's evidence from the other case where the accused gave evidence. Therefore, a decision on the accused's guilt shall be made in any concrete case based on the evidence tendered in that particular case. Therefore, the Appellate Panel holds that any appellate referral to violations of the right to a defense is ill-founded.

80. This Panel will also briefly refer to the appellate grievance concerning the accused's identification by the witnesses. Contrary to the referenced grievance, the Appellate Panel indicates that the identification² was carried out in such a manner that a photo album contained photos of various persons, rather than just those of the participants in the event; that this was in compliance with the rule of Article 85(4) of the CPC BiH, wherein no accused's consent was necessary, and in relation to which a record was also made. It follows from the foregoing that the lawful identification requirements were met in whole. In addition, the Panel notes that the period when the accused's photo was made does not constitute a decisive fact, considering that it was sufficient for the accused's identification as a participant

² Prosecution Exhibits: T-151 – Suspect Identification Record by the MUP USK of 17 June 2015, No. 05-04/03-5-308/15, with attached Photo-documentation of the MUP USK of 23 April 2015; T-152 – Suspect Identification Record by the MUP USK of 17 June 2015, No. 05-04/03-5-307/15, with attached Photo-documentation of the MUP USK of 23 April 2015.

in the critical act, while no photo included in the photo-documentation would have been relevant to him either.

81. With regard to the appellate grievance indicating that the accused had no authorization to instruct others what to do with the bodies of killed persons, the Appellate Panel holds that, concerning the referenced acts, no capacity of the accused within a military formation was relevant. In the concrete case, it was neither an act which would require special powers, nor an order issued by a superior person to his subordinates, but rather the communication among the participants in the critical event, where the accused instructed the others how to act in the given situation, which implies no issue concerning particular form of responsibility and powers that would be vested upon the accused.

82. In addition, the lawfulness of investigation was not brought into question by the appellate grievance that witness Orhan Cerić's sister took part in the pretrial activities, considering that Article 34 and Article 29 of the CPC BiH do not provide for an obligatory recusal. This is so because the referenced witness is not an injured party in the present case, and because the defense did not, in any way, point to any impartiality of the prosecutor seised of the case on account of her brother subsequently becoming a witness in the case. It is important to indicate that further investigation in the present case was both continued and completed by the Prosecutor's Office of BiH, wherefore the referenced prosecutor took no further part in the investigation activities, nor could in any way affect the ultimate outcome of the proceedings. Also, the Appellate Panel indicates that the defense raised this issue no sooner than in the appellate stage of the proceedings, but it did not satisfy the Appellate Panel that, despite due diligence and pro-activity, it was not possible to adduce new evidence³ in the trial proceedings, and that it would have affected the trial judgment had it been considered at the trial⁴. On the contrary, this evidence could have also been obtained and tendered with no obstacles during the trial proceedings, but this was not done despite the absence of any obstacles. The Panel further holds that the defense could have presented the referenced evidence earlier, namely that it is not the kind of evidence which, despite due diligence and caution, could not have been presented at the hearing in the trial proceedings.

83. As to the accused's appellate grievances pointing to the evidence of witness Milan Popović, who denied that he has known the accused, the Appellate Panel indicates that the Trial Panel examined this witness's statement given during the investigation and his trial

³ Witness Examination Record for Muharem Štrkljević, No. KT 6/06 RZ before the Cantonal Prosecutor's Office of Una-Sana Canton.

⁴ Second-Instance Judgment of the Court of Bosnia and Herzegovina in the case of the Prosecutor's Office of Bosnia and Herzegovina v. *Mirko Todorović and Miloš Radić*, No. ..., paras. 144-145.

testimony, and found that the reasons provided by the witness in support of the changed statement (that he was afraid and confused), are not of such a nature that they can indeed satisfy the Panel that the witness told the truth at the main trial, The Panel therefore credited this witness's statement given during the investigation. Thus, the witness did not provide a logical explanation that could satisfy the Panel that the change of this witness's evidence was justifiable.

84. With regard to the accused's appellate grievance contesting the Trial Panel's impartiality, that is, the obligation of recusal, the Appellate Panel indicates that this issue will be addressed in the part of the Judgment explaining the appellate grievances of the accused's Counsel indicating that violations of Article 6 of the ECHR were made.

85. When it comes to the appellate grievances pointing to the inconsistencies in the witnesses' evidence in order to contest both their credibility and the correctness of the finding of facts, in addition to the grievances concerning the accused's alibi and the means of the crime commission (a *Magnum* pistol), the Appellate Panel indicates that a comprehensive response to the referenced issues was already given in the reasoning addressing counsel's grievances, wherefore any repetition thereof would be inappropriate.

ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297(2) OF THE CPC BIH

i. The defense's appellate grievances

86. The defense believes that a substantial violation of the criminal procedure was made in para. 327 of the contested Judgment because the Trial Panel did not apply the rule of Article 281(2) of the CPC BiH, pursuant to which the Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence, and based on such evaluation, conclude whether the fact(s) have been proved, contrary to the Panel's indication in para. 52 that the Court was not obligated to comprehensively evaluate each item of evidence adduced at the main trial. The defense submits that the Panel should have evaluated each item of evidence and its correspondence with the rest of the evidence, exactly in compliance with the CPC BiH, because the ordinary court is obligated to describe in the judgment reasoning the process of individual evaluation of evidence, correlate each evaluated item of evidence with the rest of the evidence and conclude that a particular fact is proved.

87. The defense submits that, in the contested Judgment, the Trial Panel did not properly apply Article 3(2) of the CPC BiH, and that the referenced violation concerns both Section 1 and Section 2 of the contested judgment. The defense submits that despite the existent doubt with regard to the criminal acts' commission addressed in the referenced Sections, the Trial Panel did not apply the principle of *in dubio pro reo*, and thus made a violation of the criminal procedure.

88. The defense submits that the standard required for a conviction in relation to each count of the indictment is that of a proof beyond a reasonable doubt, and that any doubt or suspicion must be accepted in favor of the accused pursuant to the principle of *in dubio pro reo*. Due to the application of the principle of *in dubio pro reo*, the facts to the prejudice of the accused must be proved with certainty, unlike the facts in favor of the accused, which are considered as proved even if they are just likely to exist, that is, when there is a doubt into their existence.

ii. Conclusions of the Appellate Panel

89. With regard to the appellate grievances pointing to substantial violations of the procedure under Article 297(2) of the CPC BiH, the Appellate Panel indicates that the defense did not at all explain that the Court did not apply, or that it misapplied any provisions of the CPC BiH, in such a manner that could affect the rendering of a lawful and proper judgment. In other words, unlike the absolutely substantial violations of the criminal procedure, the existence of relatively substantial violations is the factual issue, which means that even a possible non-compliance with certain provisions of the CPC need not imply the issue of improper and unfair proceedings in whole. Relatively substantial meaning of these violations is being evaluated by taking into consideration the relation (consequences) of the violation and the lawfulness and correctness of the decision; the defense was obligated to prove the effects of the violation to which it refers on the rendering of a proper and lawful decision, which was not done in the concrete case (the defense did not explain how the detrimental consequences occurred).

90. In that context, ill-founded are the defense's grievances that the Trial Judgment is not reasoned because it can be concluded from the Judgment, viewed in whole, that the existent reasoning of the Judgment provides an option for the Judgment review, namely that the control of the logical process through which the Court reached its decision was provided, and

ultimately of the review if the decision findings are in compliance with the law. As indicated above, all aggravating circumstances on the part of the accused were proved beyond a doubt, while the Trial Panel established the decisive facts by crediting the eye-witnesses to the referenced events due to which the accused is on trial, and provided a comprehensive description of the process of the evidence evaluation, individually and in correlation with the rest of the evidence. The existing reasoning of the decision, wherein the Trial Panel referred to all key issues concerning the accused's role in the incriminating events in furtherance of the planned attack, is a logical consequence of the principle of free evaluation of evidence by the Court, pursuant to which a logical and psychological evaluation of the tendered evidence is being made independently from the statutory rules concerning certain evidence value, in addition to the judge's obligation to provide the reasons by which he/she was guided in the rendering of the decision, which was not done in the concrete case. In addition, the Appellate Panel indicates that it is not necessary to respond to all raised issues, that the Court's role is not to determine if all the views were completely reasoned, and that, in a situation where a comprehensive reasoning for the decisive facts established by the Court beyond a reasonable doubt was provided, as done in the concrete case, there cannot be any violation of Article 281(2) of the CPC BiH.

91. The Appellate Panel indicates that the issue of the Trial Panel's reasoning's was already dealt with in the other segments of this Judgment wherefore any repetition thereof would be irrelevant.

GROUND OF APPEAL UNDER ARTICLE 298(d) of the CPC BiH: VIOLATIONS OF THE CRIMINAL CODE

Standards of Review

i. General considerations

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

93. Where an error of law arises from the application in the Judgment of a wrong legal standard, the Appellate Panel may articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not

only corrects a legal error, but also applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

94. Where the Appellate Panel concludes that the Trial Panel committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Judgment in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

ii. Appellate grievances of the accused's defense attorney

95. The defense submits that the Trial Panel provided insufficient arguments in its Judgment proving that the accused indeed committed the criminal offense of Crimes against Humanity, whereby it made a violation concerning the misapplication of substantial criminal law. Specifically, the Trial Panel indicated that, in 1992, the offense of Crimes against Humanity formed part of customary international law, which absolutely contradicts the principle of legality. Criminal offenses, their underlying elements and related sanctions were provided for in the laws effective in both 1992 and 2017, thus it is absolutely wrong and contradicts the principle of legality to create criminal offenses by way of customs, because such approach creates an absolute legal uncertainty.

96. The defense submits that it is incorrect that it is a new criminal act for which its punishability would be based on the general principles of international law, and that there are no other possibilities to punish the criminal acts encompassed by this offense. Truly, our previous criminal legislation did not provide for this criminal offense as such. However, this criminal offense is such that, by the structure of its omissiveness and its constituting elements, it is not quite a new crime, but essentially only old criminal offense. It is new only by its general elements, but old in its incriminating acts which form the essence of its omissiveness, which were encompassed by other criminal offenses, to the largest extent by the criminal offense of Crimes against Civilians under Article 142 of the CC SFRY.

97. Since all these acts (other than apartheid for which no charges were brought in any case) were also criminalized in the previous legal system, the application of this incrimination as a new one pursuant to Article 7(2) of the ECHR, or Article 4a of the CC BiH, implying that it is an act or omission which carried no punishment at the time of its commission, is

incorrect. Such application is in violation of the principle of legality in the segment concerning the prohibition of retroactive application of the criminal code, which has been regularly highlighted in the criminal and legal literature as the most important segment of the principle of legality.

98. Even under the assumption that this criminal offense is applicable pursuant to the rules of Article 7(2) of the ECHR or Article 4a of the CC BiH, the principle of legality is being violated again in the segment related to the prescribed punishment (Article 3 of the CC BiH), which is inseparable from the principle of legality of offense. This is so because the principle of non-retroactivity does not solely imply a ban on punishability for the acts which were not criminalized at the time of their commission, or the imposition of a punishment more stringent than that provided for in the previous laws (also including the so called interim laws), but also the punishment which, at the time of its commission, was not prescribed for that offense, namely did not exist in the referenced laws. Since no punishment was provided for this criminal offense at the time of its commission, that is, a sentence of long-term imprisonment did not exist in the referenced criminal laws, it is clear that it is a non-applicable punishment because it was applied in violation of the principle of legality in relation to the mandatory requirement of predictability of punishment for that criminal offense at the time of its commission.

99. The defense further submits that, in the concrete case, the law that was in effect at the time of the alleged commission of the acts charged against the accused Čurguz should apply, namely the Criminal Code of the SFRY (CC SFRY), which was also adopted and effective in the Republic of BiH after its recognition as an independent state. The defense submits that the retroactive application of the CC BiH's provisions to the concrete case would not be justifiable, and that it cannot be categorized as an exemption pursuant to Article 15(2) of the Covenant on Political Rights or Article 7(2) of the European Convention.

iii. Conclusions of the Appellate Panel

100. The Appellate Panel concludes that the appellate grievances concerning the application of substantive law are ill-founded in whole.

101. There is no dispute for the Appellate Panel that at the time of commission of the crime charged against the accused, which satisfies the underlying elements of the criminal offense

of Crimes against Humanity under Article 172(1) of the CC BiH, the referenced act was not as such prescribed in the criminal code effective at the time (CC SFRY). It is also indisputable that, pursuant to the principle of legality, no criminal sanction may be imposed on any person for an act which, prior to being perpetrated, had not been defined as a criminal offense by law or international law⁵. Pursuant to the time constraints regarding the applicability of criminal law, the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall apply.⁶

102. On the other hand, Article 4a of the CC BiH, to which the Trial Judgment properly refers, provides that Article 3 and Article 4 of the CC BiH shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law. The rules of Article 7(2) ECHR and Article 15(2) of the ICCPR were adopted by such legal regulations, and exceptional derogation from the principles under Article 4 of the CC BiH enabled.

103. The Trial Panel properly indicates that the referenced position also concerns exactly this case since it involves an incrimination related to violations of international law. At the critical time, the criminal offense of crimes against humanity was criminalized from the aspect of both customary international law and the principles of international law. The Trial Panel provided a comprehensive and detailed line of arguments which are, in the Appellate Panel's view, completely valid and correct, and upheld in whole.

104. The Appellate Panel further highlights that, as a successor of the former SFRY, BiH has ratified both the European Convention on Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), and that these international documents are binding on BiH since they provide for a duty to put on trial and punish individuals for any act or omission which was, pursuant to the general principles of international law, criminalized at the time when it was committed, as crimes against humanity indisputably were. Thus, the appellate grievances challenging the Trial Panel's decision in this regard are ill-founded in whole, wherefore the Appellate Panel dismissed them.

⁵ Article 3 of the CC BiH: "(1) Criminal offences and criminal sanctions shall be prescribed only by law. (2) No punishment or another criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which no punishment has been prescribed by law."

⁶ Article 4 of the CC BiH: "(1) The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence. (2) If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall apply."

105. With regard to the foregoing, the Appellate Panel holds that, due to the fact that at the time of the crime commission the CC SFRY did not provide for crimes against humanity as a separate crime, which renders as ill-founded the defense's grievances that the adopted SFRY was more lenient to the perpetrators from the aspect of prescribed sentence; it considers this grievance irrelevant considering that the CC SFRY did not even provide for the referenced criminal offense.

GROUND OF APPEAL UNDER ARTICLE 299 OF THE CPC BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS

i. General considerations

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

107. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

108. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

109. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous".

110. Article 299 of the CPC BiH provides when a judgment may be contested on the grounds of an incorrectly or incompletely established facts. The decisive facts shall be determined directly through evidence or indirectly from the other facts (indicia or control

facts). Only the facts contained in a judgment can be considered as existent, and regardless the existence of the decisive facts, the judgment shall always provide the reasons for their existence. Otherwise, there shall be no established facts (incompletely established facts). If a decisive fact is not proved as it actually existed in the reality of an event, the facts shall be incorrectly established.

111. The Constitutional Court, with regard to direct or indirect circumstantial evidence, emphasizes that proving facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR.⁷ However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

112. The Appellate Panel, when considering an alleged error of fact, will refer to the facts and findings indicated in the defense's appeal. As indicated above, the standard to be applied for such an evaluation is that pursuant to which all appellate grievances will be addresses and a conclusion inferred if a certain decisive fact ensues from the adduced evidence.

ii. **Appellate grievances of the accused's defense attorney**

113. The accused's defense attorney submits that the contested Judgment incorrectly and incompletely established the facts considering the Trial Panel's finding that a widespread and systematic attack was launched on 23 May 1992 in the Municipality of Ripač, and after 10 June 1992 spread out to other places in the Bihać Serb Municipality area, including the villages of Ripač, Čukovi, Orašac, Klisa and Kulen Vakuf, and lasted at least through late July 1992. The Trial Panel based this finding on the established facts and the Prosecution's Exhibits T-9 through T-68, whose relevance was contested by the defense, about which the referenced Judgment made no decision.

114. The Trial Panel also finds in the contested Judgment that, according to the prosecution witnesses, the widespread and systematic attack was ongoing exactly in the

⁷ M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits of 22 April 2005, para. 36.

villages of Ripač, Ćukovi, Orašac, Klisa and Kulen Vakuf, as well as in the other villages in the area mostly inhabited by the Muslim population, subjected throughout the critical period to various forms of verbal, mental and physical terror, on a daily basis, and that the foregoing primarily resulted from the unlawful activities of members of the army and the police of the then Serb Republic of BiH, or the Republika Srpska, in such a way that they unlawfully searched and set on fire Muslim houses, and unlawfully abducted and imprisoned civilians. However, in responding to the prosecutor's question, all examined prosecution witnesses stated that, prior to 10 June 1992, no war activities had been launched in the territory of the villages in the Ljutačka valley. Contrary to the prosecution's allegation, many witnesses confirmed that the Bosniak population had been armed and that their weapons were seized when they surrendered.

115. The defense submits that the general referral to a common goal and furtherance of the state policy, as anticipated in the strategic goals of the Serb people adopted at the Assembly of the Serb Republic of BiH, can constitute a proof for neither the accused's *mens rea*, nor that the accused was aware of such a design only because he was an ordinary VRS soldier. The defense submits that the foregoing cannot be a standard for proving *mens rea*.

116. The defense submits that in order for the accused's acts to constitute crimes against humanity they must form part of a widespread or systematic attack directed against the civilian population, wherein the term widespread implies an attack which is of a large scale by its nature and directed against a large number of persons.

117. The defense submits that the accused Saša Ćurguz was not present in the territory of Orašci, Kulen Vakuf and Ćukovi villages, as confirmed by the witnesses for both the prosecution and the defense, and the documentary evidence tendered in the case record. Thus, the prosecution witness Milan Railić, who was a member of a Reconnaissance Platoon at Željava since the war outbreak, stated that, at the time, Saša Ćurguz was not among members of the reconnaissance team and that he does not know if Ćurguz was present during the Peace '92 operation. In addition, witness Miroslav Tankosić did not personally see the accused but rather heard that the accused had been present in the area at the critical time. On the other hand, witness Anđelko Mandić, a member of the Reconnaissance Platoon from the beginning, clearly indicates that, at the time, Saša Ćurguz did not take part in that military action.

118. The defense further submitted that, in the contested Judgment, the Trial Panel refers to the witnesses who had allegedly seen the accused on 13 June 1992 at the IMT Service facility, and thereby proves the fact that the accused indeed partook in the attack. The defense, however, believes that the Trial Panel made an error of fact, failed to apply the principle of *in dubio pro reo*, and that, given the referenced witnesses' inconsistencies, it should not have determined as a decisive fact that Saša Čurguz was indeed present at the IMT Service in the indicated time period.

119. The defense submitted that the accused had no military engagements at the time of the Peace '92 operation, which is confirmed by his military personal file, wherein the date of 10 July 1992 is indicated as the date of his mobilization. The foregoing is also confirmed by the witnesses who did not see the accused in the referenced territory in June 1992.

iii. **Conclusions of the Appellate Panel**

120. The Appellate Panel primarily notes that the defense made efforts to contest the existence of a widespread and systematic attack against the Bosniak population in the Serb Municipality Bihać by way of interpreting the tendered evidence before the Trial Panel.

121. The Appellate Panel addressed all the defense's grievances contesting the existence of a widespread and systematic attack via referrals and interpretation of the defense's evidence and, contrary to the grievances presented in the defense's appeal, found that the Trial Panel provided valid reasons in the reasoning of the contested Judgment, and explained to a sufficient extent the evidence on the basis of which the existence of a widespread and systematic attack was proved (the testimony of witnesses Besim Dupanović, Ismet Čirić, Milan Matijević, Miroslav Tankosić, Muhamed Hodžić, Husnija Šehić, Bekir Mešić, Ismet Mešić, Alija Kurtagić, Muharem Štrkljević, Mahmut Ramić, Mahmut Muharemović and Muhamed Anadolac, including the other documentary evidence listed in the contested Judgment, and the Findings and opinion by a military forensic expert). By pointing solely to certain items of the adduced evidence and evaluating them in isolation, the defense attempts to present that the general elements of the offense were not proved, as well as the accused's presence at the sites where the attack was launched. However, the evidence to which the defense refers (the testimony of the defense witnesses) cannot be viewed individually, in isolation, and with no correlation with the rest of the adduced evidence, in particular the tendered prosecution's evidence and the established facts. By presenting and explaining this appellate grievance, the defense disregards the Trial Panel's findings, as well as the rest of

the adduced evidence and the established facts rendered by the Trial Panel as relevant and taken into account in the rendering of the contested decision, that is, the testimonials dealt with in the segment of the Judgment addressing the existence of a widespread and systematic attack.

122. The Trial Panel provided a comprehensive explanation, supported with arguments, for each segment of the widespread and systematic attack individually, as well as for all elements and determinants of such an attack. Thus, on the basis of all tendered evidence, the established facts and primarily the evidence of witnesses who had direct information about the events at issue, the Trial Panel properly found that there was a certain pattern of conduct followed by members of the Republika Srpska Army in the treatment accorded to the Bosniak population.

123. Thus, the Trial Panel properly evaluated the evidence of the prosecution witnesses who, as indicated in the contested Judgment reasoning, pointed to the then situation in the Ljutačka valley area, described both their own experiences during 1992, and the other events they had eye-witnessed in relation to the treatment accorded by members of the Republika Srpska Army to the Bosniak population in that area. The witnesses confirmed that, at the critical period, the non-Serb civilian population was subjected to shelling, disarmament, restricted movement, seizure of property, removal from the territory and taking to camps. By correlating these witnesses' evidence with the tendered documentary evidence and the established facts, the Trial Panel properly found that the attack was widespread and systematic. It is obvious from all tendered evidence that the attacks launched in the territory of the Serb Municipality Bihać were not isolated by character, that incidents were not sporadic, and that crimes were not individual, but rather constituted a systematic mode of conduct and treatment of the Bosniak civilian population.

124. The manner in which the Trial Panel inferred its conclusion, that the *mens rea* on the accused's part exists, clearly ensues from the Judgment reasoning, which is also upheld by this Panel. Specifically, this Panel also holds that sufficient evidence was adduced to examine the *mens rea* on the part of the accused which would lead a reasonable trier of fact to conclude that the accused was aware of the existing attack, in addition to the referral to the case law justifying such findings. In that context, the Appellate Panel notes that it was proved beyond a reasonable doubt that the accused was present in the referenced territory where the attack was launched, and that he took part in the critical acts described in Sections 1 and 2 of the contested Judgment. Accordingly, as the contested Judgment definitely described

(which the appeal merely arbitrarily attempted to contest), the accused had reason to know and could have known that his acts formed part of a widespread and systematic attack against the civilian population, which quite sufficiently meets the required *mens rea* on the part of the accused. In this context, the Appellate Panel indicates that, apart from the arbitrary assertions that there is no *mens rea* on the part of the accused, the defense attorney for the accused also did not concretely specify the deficiencies of the contested Judgment. Regardless of the foregoing, the Panel also reviewed the contested Judgment along this line and found that the defense's appellate grievances are also ill-founded.

125. With regard to the appellate grievances indicating that the Bosniak population were armed, the Appellate Panel considers as proper the Trial Panel's findings that it was not a significant military organization which possessed a large quantity of weapons (but exclusively a small quantity of light weapons which were handed over), which cannot serve as any justification for the attack. Also, the grievances cannot contest the existence of an attack against any concrete civilian population⁸, nor can this justify launching an attack against a specific group of people. Therefore, any attack against the enemy's civilian population is unlawful, while crimes committed within such an attack can qualify as crimes against humanity, provided that all other requirements have been satisfied.⁹

126. The Appellate Panel holds that the defense neither offers any counter-arguments nor makes any efforts to present the state of facts differently in relation to that established in the contested judgment, but rather arbitrarily relies on the defense's presented evidence, while completely disregarding the tendered Prosecution's evidence, particularly the information of the consistent witnesses, who had also directly eye-witnessed the referenced events. As indicated above, the existence of a widespread and systematic attack is one of the essential elements of the criminal offense of Crimes against Humanity under Article 172 of the CC BiH, and the contested Judgment properly found that such an attack indeed existed. Such a

⁸ ICTY, Judgment of the Appeals Chamber in *Dragoljub Kunarac et al.*, para. 88: „Evidence of an attack by the other party on the accused's civilian population may not be introduced unless it tends to “prove or disprove any of the allegations made in the indictment”, notably to refute the Prosecutor's contention that there was a widespread and systematic attack against a civilian population. A submission that the other side is responsible for starting the hostilities would not, for instance, disprove that there was an attack against a particular civilian population.”

⁹ ICTY, Judgment of the Appeals Chamber in *Dragoljub Kunarac et al.*, para. 87: „As noted by the Trial Chamber, when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population. The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.”

finding clearly ensues from the consistent evidence of the prosecution witnesses, who had lived in the same or different villages in the Municipality of Bihać, and who almost identically spoke about the disarming of the Bosniak population, the property destruction and pillaging, unlawfully restricted freedom of movement and taking the population to camps.

127. With regard to the defense's contention that the Panel did not decide on its complaint concerning the relevance of tendered Exhibits T-9 through T-68, this Panel indicated that the referenced evidence was evaluated in the contested Judgment¹⁰, wherefore there is no dilemma that this evidence was relevant to the proper establishment of facts. The Panel therefore dismisses this grievance as ill-founded because, as indicated above, the judgment need not address each and every issue raised during the proceedings, while in the concrete case the mere evolution of evidence showed that the evidence was relevant.

128. When it comes to the accused's alibi, the Appellate Panel indicates that this issue was already explained in the foregoing segments of the judgment, wherefore there is no need for any repetition thereof.

COUNSEL'S APPELLATE GRIEVANCES CONCERNING VIOLATION OF ARTICLE 6 OF THE ECHR – RIGHT TO A FAIR TRIAL

i. Appellate grievances of the accused's defense attorney

129. The defense submits that this case is closely linked to the case pending before this Court against the accused Željko Stanarević. In addition, the cause of a violation of the accused Ćurguz's right to a fair trial are the facts that the trial proceedings were conducted by the same Panel of the Court of BiH; that the first-instance judgment of conviction in *Stanarević* was rendered on 23 June 2016, that is, at the time of the trial against Ćurguz; that the two cases addressed the same event charged against both Stanarević and Ćurguz; that the eye-witness is actually the witness S1, who gave evidence in both cases and was credited by the Trial Panel; and that, given that he first gave evidence in the case of *Stanarević*, the Panel was contaminated by this witness's evidence when he testified at the main trial pending against Ćurguz.

130. In addition, the defense submits that a comparison between the two trial judgments shows that they are almost identical, which particularly ensues from certain paragraphs,

¹⁰ See page 37, para. 35 of the contested Judgment.

identical in both judgments. The defense submits that the Trial Panel is contaminated with the key witnesses' evidence. The Panel had already decided on the essential elements of the criminal offense of Crimes against Humanity in *Stanarević*, and only made a copy-paste of the judgment rendered in the case conducted against Ćurguz.

131. The accused Ćurguz's right to a fair trial is violated because the judgment finding him guilty was rendered in the other case while the presentation of evidence was still not completed. Therefore, the Panel concluded beyond a doubt, on the basis of all presented evidence, that the accused acted with the discriminatory intent in the commission of individual criminal acts of which he was found guilty.

ii. Conclusions of the Appellate Panel

132. The Appellate Panel considers that the appellate grievance indicating that the same Panel decided in the referenced two cases is ill-founded. Specifically, the impartiality of the Court and the Panel seised of the case is implied, and if the defense points to impartiality, it should prove it. It does not merely suffice to arbitrarily indicate and conclude that the Panel members are contaminated by ruling in the other trial case conducted for the same event. The same Panel deciding in cases where the same event is on trial does not mean, in and out itself, that the Panel is contaminated, for the Panel shall comprehensively examine and analyze the case, which was done in the concrete case. The fact that the same Panel decided in the case concerning the same event, but a different accused, does not suffice for a conclusion that the Panel does not have objective impartiality. The Panel's decision in the case against *Željko Stanarević* exclusively focused on that accused, and did not in any way deal with the role of the accused Ćurguz, which was done in the present case, where the subject of the charges were the accused Ćurguz's acts; the judgment in *Stanarević* does not in any way concern any interest or the right of the accused Ćurguz. As indicated above, the Panel in the present case did not, in any way, take into account the accused Ćurguz's statement given in the other case, nor did it correlate it with the evidence pertaining to the present case. Even if certain segments of the contested Judgment are identical to the segments of the reasoning provided in the other judgment, this does not mean that they were merely copied, and that the reasoning remained unproved and uncorroborated with arguments, because the contested Judgment provided reasons for each finding therein, and corroborated it with appropriate evidence. Therefore, the defense's grievances advanced along this line are dismissed as ill-founded.

133. In view of the foregoing, and considering that the no fact or evidence was indicated in the appeal of the accused's defense, which would indicate that the Panel seised of the present case was indeed arbitrary in the rendering of its decision, the Appellate Panel notes that the referenced defense's grievance lacks the necessary factual and logical basis, and therefore dismisses it in whole.

DECISION ON SENTENCE

i. General considerations

134. The decision on sentence may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

135. The decision on sentence may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

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

137. Alternatively, the appellant may challenge the decision on sentence on the grounds that the Trial Panel misused its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with broad discretion in determining an appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel abused its considerable discretion.

138. In particular, the appellant must demonstrate that the Trial Panel gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to infer that the Trial Panel must have failed to exercise its discretion properly.

139. The Appellate Panel recalls that the Trial Panel is not required to separately discuss each aggravating and mitigating circumstance. So long as the Appellate Panel is satisfied that the Trial Panel has considered such circumstances, the Appellate Panel will not conclude that the Trial Panel abused its discretion in determining the appropriate sentence.

ii. **Appellate grievances of the Prosecution**

140. The Prosecution submits that the Trial Panel properly established the facts in the concrete case and correctly decided that the accused Saša Čurguz is guilty as charged. The Prosecution, however, submits that, in fixing the punishment, the Court did not adequately evaluate the aggravating and the mitigating circumstances, which ultimately resulted in imposing a more lenient punishment on the accused. The Prosecution submits that, in fixing the punishment, the Court took into account the circumstances affecting the imposition of a more or less stringent sentence, and on the basis of evaluation of those circumstances, selected a more lenient type of prescribed sentence (between a prison sentence and a long-term imprisonment, it selected the prison sentence), and thereupon imposed on the accused the sentence close to the medium prescribed magnitude of prison sentence.

141. The prosecution submits that the Court took into account the circumstances affecting the imposition of a lengthier sentence (aggravating circumstances), but did not give sufficient significance to the gravity of damage to the protected value – concretely, to the established fact that Section 2 of the Judgment found the accused guilty of taking part in the killing of eleven civilians, wherein the number of victims bears the weight as an aggravating fact which must be given a greater significance in fixing the accused's sentence.

142. The prosecution further submits that the Court did not take into account that the established manner of the commission of crime at issue is persecution by inhuman treatment and murder of prisoners, which constitutes a special manner of the crime commission on the ground of prohibited discrimination, which attributes to it the quality of a particularly aggravating circumstance which must be taken into account in fixing a sentence, and which must affect the rendering of a sentence lengthier than that imposed in the concrete case.

143. The prosecution also believes that, when it comes to the mitigating circumstances, the Court properly took into account that the accused has no prior convictions, that he is a father of two children, and that he was very young at the time of the crime commission, but also that the Court has overestimated these circumstances. Thus, the Prosecution submits that the

absence of prior convictions as an extenuating circumstance in terms of war crimes cannot have the same significance as in the case of other criminal offenses, because war crimes are specific criminal offenses linked to only exceptional circumstances such as war or similar.

144. In view of the foregoing, the Prosecution submits that, in fixing the sentence to the accused, the Trial Panel properly selected a more lenient type of sentence, but that within the selected prison sentence, it should have given more significance to the referenced aggravating circumstances and lesser one to the aggravating ones, and accordingly impose on the accused a sentence closer to the prescribed maximum prison sentence.

iii. Appellate grievances of the accused's defense attorney

145. The defense submits that the Court did not properly fix the punishment considering the circumstances affecting the imposition of a lesser punishment. Specifically, it ensues from the evidentiary proceedings that the accused is not an extremist by personality, or a person who would discriminate against members of other ethnic groups. The defense notes that, at the time of the alleged crime commission, the accused was age 20, namely that he was a young person and that the Court should take it into account as an extenuating circumstance. Also, the facts that during his entire life, the accused lived an exemplary life, and had an exemplary conduct and behavior in the society, with no prior punishments, that he was considered as an honest, esteemed and respected person in the environment where he had lived, directly point to the accused's positive personality and correct attitude towards the society and its values in general. The foregoing circumstances indicate that the accused is not a socially deviant or morally corrupt person, prone to unlawful and antisocial behavior, and that these facts should have been taken into account by the Court in fixing the punishment to the accused.

146. The defense submits that the accused is a family man and father of two minors, that he behaved properly throughout the entire criminal proceedings, and that these facts must be taken into account as extenuating in fixing the punishment.

iv. Conclusions of the Appellate Panel

147. Having reviewed the decision on sentence within the scope of the appellate grievances of the accused's counsel, as well as the accused's appeal in context of Article 308 of the CPC BiH (extended effect of the appeal), the Appellate Panel concluded that the accused's prison sentence was not properly fixed, and that the Trial Panel did not pay due

attention to equal evaluation of the extenuating circumstances on the part of the accused. Specifically, Article 48(1) of the CC BiH provides that the Court shall impose the punishment within the limits provided by law for that particular offense, having in mind the purpose of punishment and taking into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating).

148. Thus, the Appellate Panel holds that the Trial Panel did not sufficiently evaluate the circumstances concerning the perpetrator's personality, namely that he was age 20, a young adult at the time of the crime commission. The Appellate Panel therefore decided to revise the Trial Judgment with regard to the decision on sentence, and to impose on the accused a prison sentence for a term of 14 years.

149. On the other hand, the Prosecution unjustifiably indicates that the Court did not give sufficient significance to the degree of protected value, particularly to the manner of the crime commission, while it overestimated the extenuating circumstances, considering that the Panel comprehensively elaborated on the circumstances by which it was led to impose the first-instance sentence, including the aggravating circumstances. Considering the Court's conclusion that the particularly extenuating circumstances on the part of the accused were not taken into account, this Panel did not further address the prosecution's appellate grievances.

150. For the foregoing reasons, and pursuant to Article 313 and Article 314 of the CPC BiH, the Appellate Division Panel rendered its decision as stated in the Judgment enactment clause.

Record-taker:

PANEL PRESIDENT

Legal advisor-assistant

JUDGE

Nedim Muminović

Tihomir Lukes

LEGAL REMEDY NOTE: No appeal lies from this Judgment.