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Case Number: S1 1 K 005718 13 Krž 6

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Sitting in the Panel composed of Judges: Mirza Jusufović, Presiding  
Senadin Begtašević, Rapporteur  
Dr. Miloš Babić, member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

Jasko Gazdić

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SECOND INSTANCE JUDGMENT

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

Mr. Behaija Krnjić

**Counsel for the Accused:**

Mr. Velimir Marić, Attorney

**Number: S1 1 K 005718 13 Krž 6**

**Sarajevo, 17 June 2013**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Appellate Division Panel composed of Judge Mirza Jusufović, as the Panel Presiding, and Judges Senadin Begtašević and Dr. Miloš Babić, as members of the Panel, with the participation of Legal Advisor Bojan Avramović, as the minutes-taker, in the criminal case concerning the accused Jasko Gazdić, charged with the criminal offense of Crime against Humanity in violation of Article 172(1)(g) and (k), as read with Article 31 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon the appeals filed by the Accused Jasko Gazdić, Mr. Velimir Marić, Defense Attorney for the Accused, and the Prosecutor's Office of the Court of Bosnia and Herzegovina, from the Judgment of this Court No. S1 1 K 005718 11 Krl of 9 November 2012, after the Panel's open session held in the presence of the Prosecutor for the Prosecutor's Office of BiH, Mr. Behajja Krnjić, the Accused, and the Accused's Defense Attorney, Mr. Velimir Marić, on 17 June 2013 delivered the following:

**JUDGMENT**

The appeals filed by the Accused Jasko Gazdić, his Defense Attorney Mr. Velimir Marić, and the Prosecutor's Office of BiH **are hereby dismissed as unfounded**, and the Judgment of the Court of Bosnia and Herzegovina No. S1 1 K 005718 11 Krl of 9 November 2012 is hereby **upheld**.

**REASONING**

**PROCEDURAL HISTORY**

**TRIAL JUDGMENT**

1. Under the Judgment of the Court of Bosnia and Herzegovina (Court of BiH), No. S1 1 K 005718 11 Krl of 9 November 2012, the Accused Jasko Gazdić was found guilty of committing, in the way described in Items 1-5 of Section I of the Judgment enactment

clause, the criminal offense of Crimes against Humanity in violation of Article 172(1)(g) and (k), as read with Article 31 and Article 180(1) of the Criminal Code of Bosnia and Herzegovina, and acquitted of the charges that he committed the acts described in Items 1-4 of Section II of the Judgment enactment clause, whereby he would have committed the criminal offense of Crimes against Humanity in violation of Article 172(1)(g) and (k), as read with Article 31 and Article 180(1) of the Criminal Code of BiH.

2. The Accused Jasko Gazdić received, for the referenced criminal offense, a sentence of imprisonment for a term of seventeen years. Pursuant to Article 56 of the CC BiH, the time the Accused spent in custody, running from 20 April 2011 onwards, was credited towards the prison sentence. Pursuant to Article 188(4) and Article 189(1) of the CPC BiH, the Accused was relieved of the obligation to reimburse the costs of the criminal proceedings.

3. Pursuant to Article 198(2) and (3) of the CPC BiH, the injured parties were instructed to pursue their claims under property law in a civil action.

## **APPEALS**

4. The Prosecutor's Office of Bosnia and Herzegovina (the Prosecution of BiH, the Prosecution) contested the acquitting part of the Trial Judgment on the grounds of essential violation of the criminal procedure provisions (Article 297(1)(k) of the CPC BiH), incorrectly and incompletely established facts (Article 299(1) of the CPC BiH), and the sentencing (Article 300(1) of the CPC BiH). The Prosecution of BiH moved the Appellate Division Panel to render a decision granting the Prosecution's appeal, revoking the Trial Judgment in its acquitting part, finding the Accused also guilty of the referenced acts and sentencing him to a long-term imprisonment, or to render a decision revoking the contested Judgment in its acquitting part and ordering a hearing before the Appellate Panel.

5. The referenced Trial Judgment, namely its convicting part, was appealed by Defense Attorney for the Accused, Mr. Velimir Marić, on the grounds of: essential violation of the criminal procedure provisions (Article 297(1)(i) and (k) of the CPC BiH), incorrectly or incompletely established facts (Article 299(1) of the CPC BiH), criminal code violation (Article 298(1)(d) of the CPC BiH) and the sentencing. The Accused's Counsel moved the Appellate Division Panel to grant the appeal, render a decision revoking the Trial

Judgment and ordering a hearing, or to grant the appeal and render a decision revising the Trial Judgment and acquitting the Accused of the charges. Counsel also submitted a supplemented appeal indicating therein an essential violation of the criminal procedure provisions (Article 297(1)(k) of the CPC BiH) as a ground of his appeal.

6. The Accused Jasko Gazdić personally also filed an appeal on the grounds of: essential violation of the criminal procedure provisions (Article 297(1)(d) and (k) of the CPC BiH), incorrectly or incompletely established facts (Article 299 of the CPC BiH), criminal code violation (Article 298(d) of the CPC BiH). The Accused moved the Appellate Panel to grant the appeal and render a judgment acquitting him of the charges, or to render a judgment revoking the Judgment in its convicting part and ordering a new hearing before the Appellate Panel.

7. Mr. Velimir Marić, the Accused's Defense Attorney, submitted his response to the Prosecution's appeal and moved the Appellate Panel to dismiss the referenced appeal as ill-founded.

8. The Prosecution of BiH submitted their responses to both Counsel's original appeal and the supplemented appeal, as well as to the Accused's appeal, and moved the Appellate Division Panel to dismiss the referenced appeals as ill-founded and uphold the Trial Judgment in its convicting part.

9. At the Panel session held on 17 June 2013 pursuant to Article 304 of the CPC BiH, the parties to the proceedings and Counsel stood by their respective appellate grounds and arguments presented in writing.

10. The Appellate Panel reviewed the appeals' admissibility and timeliness, and concluded that they were both admissible and timely.

11. Having reviewed the contested Judgment in view of all the appellate grounds and arguments, pursuant to Article 306 of the CPC BiH, the Appellate Panel rendered the decision as stated in the enactment clause herein for the reasons that follow:

### **GENERAL CONSIDERATIONS**

12. 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.

13. 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 judgment, piece of evidence or proceedings of the Court he contests, and adduce clear and substantiated reasons in support of the appeal.

14. 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.

## **CONVICTING PART – GROUNDS OF APPEAL UNDER ARTICLE 297 OF THE CPC BIH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS**

### **STANDARDS OF REVIEW**

15. 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.<sup>1</sup>

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<sup>1</sup>Article 297 of the CPC BiH: **Essential violations of the criminal procedure provisions:** (1) The following constitute an essential violation of the provisions of criminal procedure: a) if the Court was improperly composed in its membership or if a judge participated in pronouncing the verdict who did not participate in the main trial or who was disqualified from trying the case by a final decision, b) if a judge who should have been disqualified participated in the main trial, c) if the main trial was held in the absence of a person whose presence at the main trial was required by law, or if in the main trial the defendant, defense attorney or the injured party, in spite of his petition was denied the use of his own language at the main trial and the opportunity to follow the course of the main trial in his language, d) if the right to defense was violated, e) if the public was unlawfully excluded from the main trial, f) if the Court violated the rules of criminal procedure on the question of whether there existed an approval of the competent authority, g) if the Court reached a verdict and was not competent, or if the Court rejected the charges improperly due to a lack of competent jurisdiction, h) if, in its verdict, the Court did not entirely resolve the contents of the charge; i) if the verdict is based on evidence that may not be used as the basis of a verdict under the provisions of this Code, j) if the charge has been exceeded, k) if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts. (2) There is also a substantial violation of the principles of criminal procedure if the Court has not applied or has improperly applied some provisions of this Code to the preparation of the main trial or during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict.

16. Considering the gravity and significance of the procedural violations, the CPC BiH distinguishes between the violations which, if found to be in existence, create an irrefutable assumption that they have negatively affected the validity of the imposed judgment (absolutely essential violations) and violations in relation to which the Court has discretion, in each concrete case, to evaluate whether the violation found affected or could have negatively affected the validity of the judgment (relatively essential violations).

17. Absolutely essential violations of the CPC BiH are specified in Article 297(1)(a) through (k) of the CPC BiH.

18. If the Appellate Panel found any essential violations of the criminal procedure provisions, it shall revoke the first instance judgment, pursuant to Article 315(1)(a) of the CPC, except in cases provided for in Article 314(1) of the CPC BiH.<sup>2</sup>

19. Unlike absolutely essential violations, relatively essential violations are not specified in the law, but rather exist in situations where the court, during the main trial or in the rendering of the judgment, did not apply or improperly applied a provision of the criminal procedure code, but only if this affected or could have affected the rendering of a lawful and proper judgment.

20. With respect to an allegation that a violation of the principles of criminal procedure could have affected the rendering of a lawful or proper judgment, 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 judgment. 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 judgment. That is, where the Appellate Panel is satisfied that a lawful and proper judgment 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.

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<sup>2</sup> Article 314. **Revision of the First Instance Verdict:** (1) By honouring an appeal, the Panel of the Appellate Division shall render a verdict revising the verdict of the first instance if the Panel deems that the decisive facts have been correctly ascertained in the verdict of the first instance and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts and in the case of violations as per Article 297, Paragraph 1, Item f) and j) of this Code.

**APPEAL FILED BY THE ACCUSED JASKO GAZDIĆ AND COUNSEL FOR THE ACCUSED**

**Sub-ground one: Article 297(1)(d) of the CPC BiH – The Accused and the Defense believe that the Accused’s right to defense has been violated**

The Appellate Panel concluded that the Accused’s right to defense has not been violated and therefore dismissed the Accused’s and Counsel’s appellate grounds as ill-founded.

21. Article 297(1)(d) of the CPC BiH provides that an essential violation of the provisions of criminal procedure shall exist if the accused’s right to defense was violated. The foregoing means that the rules of procedure were not applied or were improperly applied to the prejudice of the Accused in the way that he was deprived of his right to defense.

22. Within this appellate argument, the Accused believes that, as the party to the proceedings, he was in an unequal position in relation to the adverse party. The Accused based his view as such on the assertions that he was provided with no adequate assistance by his Counsel Dušan Tomić, and that his Counsel did not work in favor of his interests but rather in a third party’s interest. The Accused finds arguments for his assertions in the fact that Counsel did not inform him about the aspects of the case; that Counsel did not follow his instructions; that he never called out any witness proposed by the Accused; and that Counsel never delivered to him any documentary materials prior to tendering it into the case record as the Defense evidence. In addition, the Accused stated that his Counsel neither acted conscientiously and with due diligence, nor took any actions to collect documentary evidence in his favor. The Accused also stated that his Counsel summoned the Defense witness Miodrag Nikačević against his will and consent, as well as that, during the witness E’s testimony, Counsel disclosed to the third parties the names of persons entrusted upon him by the Accused (concerning one Ginić and the events concerning Džemo Rikalo). The Accused stated that, due to all the foregoing, on 26 June 2012, he intended to request his Counsel’s dismissal, but gave up since Counsel lured him into withdrawing his request for counsel’s dismissal. Ultimately, the Accused stated that Counsel misled him by maintaining that the Accused’s procedural situation was good. Therefore, the Accused believes that his defense by Attorney Tomić during the proceedings was inadequate and indicates that, despite the fact that he (Tomić) was appointed to him as an *ex officio* defense counsel, Tomić also contacted his (the Accused’s) sister and requested money from her to defend him.

23. The Accused's new appointed defense counsel, Attorney Velimir Marić, affirmed the foregoing Accused's assertions and indicated that the Accused did not have an adequate defense since, during the trial, that the Accused was on bad terms with his previous defense counsel, that all the foregoing ultimately also resulted in poor trial conditions to the prejudice of the Accused, whereby the principle of equality of arms in these criminal proceedings was violated.

24. Counsel further argued that the Trial Panel unjustifiably refused the Defense's proposal to examine witnesses Radovan Stanković and Neđo Samardžić, who at the relevant time held responsible and significant functions in the police and the army, and who could have significantly contributed by their testimony to the decisive facts resolution, whereby the Accused and the defense were denied a possibility to contest the evidence presented against the Accused. According to Counsel, the referenced right deprivation constitute a violation of Article 6(3)(d) of the ECHR because the balance between the Prosecution's and the Defense's evidence was disturbed, which is in violation of Articles 281, 263 and 299 of the CPC BiH.

25. The Appellate Panel dismissed the Accused's assertions that the concept of his defense was erroneously set up due to his *ex officio* defense counsel's conduct and that the Defense's evidence which, in the Accused's view, should have been presented, was not presented. The Appellate Panel holds that the foregoing complaints are ill-founded in whole, and presented quite arbitrarily. This is primarily because, during the trial proceedings, the Accused did not request his Counsel's dismissal in terms of Article 49(4) of the CPC BiH (he rather did so no sooner than the Trial Judgment pronouncement), on the grounds that Counsel exercised his duties irresponsibly, or because Counsel's conduct before the Court so indicated.

26. In addition, the case record status shows that, due to the fact that he had an *ex officio* counsel, the Accused was in no way prevented by the Court or his Counsel to personally present the facts and propose evidence in his favor, to pose questions to the witnesses, or to provide explanations concerning the witnesses' testimonies.

27. Contrary to the foregoing, the hearing transcripts' analysis shows that the Accused played a very active role in the examination of both his own witnesses and the Prosecution witnesses during the entire trial. The foregoing further supports the Panel's position, that is, points to the conclusion that the concrete case does not involve any denial of the right to adequate defense to the prejudice of the Accused.

28. As to the Accused's assertion that Counsel also requested money from his family members despite the fact that he was his *ex officio* counsel, and disclosed at the main trial the name of the person the Accused entrusted upon him, the Panel concludes that, even if all the presented assertions were true, they could have brought in question only the defense attorney's moral integrity, or could have amounted to a violation of duties and reputation of attorneys by the referenced Counsel, as prescribed by the relevant provisions the Code of Attorneys Professional Conduct, rather than led *a priori* to any violations of the Accused's interests concerning his right to defense.

29. Considering the trial proceedings' outcome, and the Accused's acquittal of the charges for certain criminal acts covered by the Indictment, it can be logically concluded that, nevertheless, the Defense's strategy had certain effects, which could not have been realistically expected had the Accused's Counsel indeed acted in the way as the appeal intended to present.

30. Accordingly, the Appellate Panel concluded that the Accused's complaint, that he was inappropriately represented by his Counsel whereby his right to defense was undermined, is ill-founded in whole, and dismissed it as such.

31. In addition, as stated above, the Accused's Counsel indicated within this appellate complaint that, as a result of the Trial Panel's unjustified dismissal of the proposal to examine witnesses Stanković and Samardžić, the Accused and the Defense were deprived of the opportunity to contest the evidence presented against the Accused, and that this deprivation is in violation of Article 6(3)(d) of the ECHR since it disturbs the balance between the Prosecution's and the Defense's evidence.

32. Article 263(2) of the CPC BiH provides that: "*If the judge or the presiding judge finds that the circumstances that a party tries to prove are irrelevant to the case or that the presented evidence is unnecessary, the judge or the presiding judge shall reject the presentation of such evidence.*"

33. Therefore, the quoted provision provides for an option that, once the referenced requirements have been satisfied, the presiding judge can reject the presentation of such evidence by the parties and defense attorneys with the view of removing any evidence which unnecessarily delays the criminal proceedings.

34. In view of the foregoing, and of the fact that the referenced witnesses were supposed to be examined about the circumstances pertaining, as a rule, to the general context of the events occurring in Foča during the relevant period, about which a large number of witnesses were already examined, which were already accepted as established facts, the Appellate Panel holds that the Trial Panel properly decided to reject the Defense's proposal to examine the referenced witnesses. Specifically, the information in possession of the referenced witnesses, or the circumstances in relation to which their examination was proposed quite certainly could not lead to the explanation/clarification of the decisive facts, particularly due to the fact that these witnesses are not eye-witnesses (as also confirmed by the Accused by stating that he even does not know the referenced witnesses), but rather persons who have certain circumstantial information which cannot be directly correlated with the concrete criminal events charged against the Accused.

35. Therefore, this Panel also upholds the Trial Panel's view that the testimony of Neđo Samardžić and Radovan Stanković, as a person previously convicted under the final judgment for his involvement in the act commission (Count 6 of the Amended Indictment), also charged against Jasko Gazdić, is irrelevant since the Accused is being prosecuted for the acts he personally undertook within his own intent, wherein a possible participation of other persons (proposed witness Stanković) is irrelevant to adjudication on this legal matter, and does not, in and out of itself, exclude the accused Gazdić's participation.

36. Also irrelevant is the fact which the Defense wanted to prove through witness Stanković's testimony concerning the ultimate destiny of the injured party-minor B.A. (her whereabouts still unknown), because this fact, in and out of itself, is not a proof that the Accused did not hold the referenced injured party for a certain period of time in order to abuse her sexually, as the Prosecution argued, and which was the subject of proof during the proceedings.

37. In view of the foregoing, the Appellate Panel fully upholds the Trial Panel's finding regarding the referenced Defense's complaint comprehensively analyzed and elaborated on in the Trial Judgment's reasoning.

**Sub-ground two: Article 297(1)(j) of the CPC BiH – the Defense submits that the charges were exceeded**

38. Within this appellate complaint, Counsel submitted that the Trial Panel violated the objective identity of both the Indictment and the Judgment by deleting from the related segment of the Indictment the phrase “... *with the aim of persecuting them from the territory of the Foča municipality...*” and thereby affected the qualification of the offense and brought into question the identity of the offense addressed in the Indictment, as a result of which the Judgment went beyond the limits of the concrete event description as provided by the Prosecution. Counsel submitted that the Prosecution was under obligation to amend the Indictment pursuant to the legally relevant facts established at the main trial. Counsel also added that the Court cannot convict the Accused of the “other” offense, even if this “other” offense is less serious than the criminal offense charged against him.

39. Counsel saw a violation of the Indictment objective identity also in the fact that the Trial Panel divided Count 3 and Count 7 of the Indictment in two sub-counts each, considering that in the referenced Counts of the amended Indictment the Prosecutor defined the offense, in terms of the facts to be addressed and decided on (objective identity), wherefore he should have accordingly followed the findings of fact and changed the factual description.

40. Counsel also finds a violation of the objective identity between the Indictment and the Judgment in Section 2 of the convicting part of the Judgment enactment clause, in which the Panel, in specifying the factual description, indicated the phrase “... *on an unidentified day in July 1992...*” instead of the charged period between 15 July 1992 and 20 August 1992. According to the Defense, the time of the criminal act occurrence is a relevant fact, which has been changed to the prejudice of the Accused.

41. The Indictment objective identity is, in fact, the event which is the subject of persecution, in relation to which the identity must exist between the factual description in the Indictment and the Judgment rendered based on it. The facts irrelevant to the mere act of commission of the criminal offense, which the Court added to or omitted from the Indictment factual description, do not constitute any changes to the offense identity, and they are allowed as such.

42. It should be noted that the appellant erroneously argued that the Court has interfered with the Prosecutor's right to solely define the subject of trial, and thus brought into question the Indictment objective identity by omitting from it the concrete allegation-facts which did not ensue from the main trial outcome, and that, in fact, the Court assumed the Prosecutor's function. To wit, there is a connection between the Court and the event charged under the Indictment, the details of which ensue from the main trial outcome. The charges are not exceeded as long as the Judgment remains within the scope of the criminal act which as such occurred indeed, regardless of whether it has been included, in whole, in the Indictment. The changes made by the Trial Panel by omitting the phrase "*... with the aim of persecuting them from the territory of the Foča municipality...*" from the factual description of Section 4 of the convicting part of the Judgment enactment clause have only led to the concrete event specification, rather than to another offense definition, wherefore the identity of both the Judgment and the Indictment remains preserved. Ultimately, the offense defined in the Judgment is less serious for the Accused than that defined in the Indictment.

43. Therefore, the Trial Panel's Judgment encompassed the same event and changed only the circumstances ensued from the main trial in relation to a more comprehensive description of the concrete event. The foregoing concerns the state of facts which is more favorable for the Accused and which does not exceed the limits of the event description provided by the Prosecution. The offense description provided in Section 4 of the Judgment convicting part differs from the factual description of the offense and the Indictment with regard to the circumstances irrelevant to the offense qualification itself, as it was set up in the Indictment, that is, the referenced facts do not constitute the criminal circumstances generally charged against the Accused. Accordingly, the referenced appellant's complaint is also ill-founded.

44. As to the Defense's argument, that the Trial Panel violated the objective identity between the Indictment and the Judgment by indicating in Section 2 of the enactment clause of the Judgment convicting part the phrase "*... on an unspecified day in July 1992*" instead of the charged period between 15 July 1992 and 20 August 1992, the Appellate Panel recalls that the Indictment identity has not been violated by the concrete specification of the time period (the Panel established that the referenced event occurred within one-month period) to the extent to which it would amount to some other or distinct offense, because this neither brings the charged event in question nor constitutes a decisive fact which would question the underlying element of the criminal offense of which

the Accused is found guilty. The Court was entitled to such a finding because it neither interferes with the offense definition nor questions, in any other way, the identity of the offense indicated in the Indictment. Therefore, in the concrete case, the factual description of the offense was specified pursuant to the state of facts established during the evidentiary proceedings, to which the Trial Panel was entitled because there is no dilemma that, even after making the referenced change, the Judgment still concerns the offense which is the subject of charges.

45. In addition, the Appellate Panel finds no violation of the Indictment objective identity in the fact that the Trial Panel divided Counts 3 and 7 of the Indictment in two sub-counts each, as the appellant indicated. If the factual descriptions of the referenced Counts of the Indictment are properly read out, it can be concluded, beyond a doubt, that the referenced criminal events were manifestly separate, and that, as such, they encompassed all essential elements of separate offenses, and therefore had to be separately evaluated. Furthermore, as properly noted by the Trial Panel, such acting of the Panel was also in the very interest of the Accused because he was convicted of a lesser degree of criminal activity in relation to that charged against him, considering that he is acquitted of the charges for certain criminal events thus determined.

**Sub-ground three: Article 297(1)(k) of the CPC BiH – the Defense believes that the Judgment enactment clause contradicts the reasons for the Judgment**

46. In this appellate complaint, Counsel finds contradictions between the Judgment finding that a widespread and systematic attack existed during the charged period (April 1992 - March 1993) and the fact that the Judgment reasoning presented the findings that an armed conflict existed in the critical territory and, according to the accepted facts adjudicated in the ICTY cases, lasted for almost ten days. Counsel supported this complaint with the arguments contained in the Trial Panel's decision to accept, in part, the facts established by the ICTY Chambers in *Prosecutor v. Dragoljub Kunarac and Milorad Krnojelac*, from which it ensues, beyond a doubt, that there was an armed conflict between two armies in the territory of both the city and the municipality of Foča. Therefore, by referring to the appropriate and already established facts, Counsel submitted that such accepted facts show that, at the time indicated in the Indictment (April 1992 - March 1993), no widespread and systematic attack could be carried out since these facts show that the armed conflicts in the territory of the town or municipality of Foča, ended by the Serb

forces taking over the control over the concrete territory ten days after the armed conflict outbreak.

47. The Defense properly points to the facts from which the conclusion ensues that, in a way, the armed conflict in the territory of the town and municipality of Foča ended to the largest extent ten days after its outbreak. The Defense, however, disregards the crucial fact concerning the definition of “attack” which needed to be proved as one of the general elements of the criminal offense at issue.

48. The fact that should be particularly indicated, and which the appellant disregarded, is the fact that, in the context of crimes against humanity, the term “attack” has a distinct meaning in relation to its meaning in the law of war. In the context of crimes against humanity, the term “attack” is not limited to the ongoing hostilities. It can also encompass situations where persons taking no active part in the hostilities are being abused, such as in the case of keeping someone in imprisonment, as in the concrete situation.

49. In addition, pursuant to customary international law, an attack can precede an armed conflict, it can last longer than the conflict or continue during the conflict, but it need not necessarily be a part thereof.

50. Therefore, the Appellate Panel dismissed as ill-founded the complaint of the Accused’s Counsel, that the enactment clause contradicts the Judgment reasons because the existence of a widespread and systematic attack does not correspond, in whole, with the duration of the armed conflict, as the Defense obviously indicated. The further reason supporting such a finding is the fact that the established facts show that the concrete acts of commission charged against the Accused were committed exactly in the indicated period of time, that is, during the existent widespread and systematic attack, about which the witnesses A, B, C, D, E, F and K gave evidence. The referenced witnesses’ testimony will be addressed in more detail within the appellate ground of “*Incorrectly and incompletely established state of facts.*”

## **GROUNDINGS OF APPEAL UNDER ARTICLE 299 OF THE CPC BIH: INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS**

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

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

52. 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 Judgment, 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.

53. 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.

54. 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 Judgment, 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".

55. 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.<sup>3</sup> However, proof of a fact by circumstantial evidence must be established beyond any reasonable doubt and tightly and logically interrelated so that the Trial Panel's factual conclusion is the only possible conclusion in light of the evidence. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed, sometimes circumstantial evidence, like the

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<sup>3</sup> M.Š., AP-661/04 (Constitutional Court of BiH), Decision on Admissibility and Merits, 22 April 2005, para. 36.

separate pieces of a puzzle when all put together, can be more compelling than direct eyewitness testimony, which can be subject to normal human error.

## **B. APPEALS FILED BY THE ACCUSED AND COUNSEL FOR THE ACCUSED**

56. Within this ground of appeal, the Defense also contested the Trial Panel's finding that the Accused's acts formed part of a widespread and systematic attack directed against non-Serb civilians, and submitted that not a single piece of evidence, testimonial or documentary, shows that the Accused's acts formed part of the attack. Counsel also submitted that it was even unproved that, at the time of crime commission, the Accused was within a formation forming part of the forces involved in the attack. Counsel added that, no sooner than the second half of 1992, the Accused was forcibly mobilized and deployed at the frontline towards Goražde.

57. Contrary to the Defense's appellate complaints, the Trial Panel provided valid reasons in the contested Judgment's reasoning, and sufficiently explained the evidence on the basis of which the existence of widespread and systematic attack was proved, and provided a comprehensive explanation of the issue of *nexus*, that is, the Accused's awareness and knowledge that his acts formed part of such an attack. By pointing just to some of the accepted established facts, taking them out of the context and evaluating them only individually, the Defense makes efforts to present that the general elements of the offense were not proved in the contested Judgment reasoning.

58. However, the established facts cannot be viewed in isolation, individually and with no correlation with the other admitted evidence. By presenting and explaining this ground of appeal, the Defense omits to take into account all the facts established and evaluated by the Trial Panel as relevant and taken into account in rendering the contested decision<sup>4</sup>, as well as the testimonial evidence evaluated in the part of the Judgment addressing the existence of a widespread and systematic attack. The Trial Panel provided a comprehensive explanation, supported with arguments, for each segment of the "*widespread and systematic attack*" individually, and explained all elements and determinants of such an attack. Thus, based on all tendered evidence, primarily the testimonies of the witnesses who possessed direct information about the events at issue,

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<sup>4</sup> The accepted adjudicated facts, as stated in paras.16- 24 of the Judgment.

the Trial Panel properly found that a certain pattern of conduct of members of the Serb military and paramilitary forces existed indeed.

59. Likewise, the Trial Panel properly evaluated the testimony of witnesses A, B, C, D, E, F and K. As indicated in the reasoning of the contested Judgment, the testimony of these witnesses pointed to the general situation in Foča and the surrounding villages, and described both their own experiences and mistreatment during 1992 and 1993, as well as the other events they eye-witnessed concerning the abuse of the non-Serb population in Foča and its surroundings by Serb military and para-military formations. All these witnesses confirmed that the freedom of movement of the non-Serb population was restricted; that Muslims were expelled on a mass-scale; houses of non-Serbs burnt down and mosques destroyed; men separated from women and children, and taken to the Foča Penal and Correctional Facility, while women and children were taken to the *Partizan* sport gym, and the so called *Karaman's* house, and apartments around Foča, and subjected to rape on a mass-scale. Having correlated these witnesses' testimony with the accepted established facts and the tendered documentary evidence, the Trial Panel properly found that the attack was widespread, systematic, and lasted during the period between April 1992 and late March 1993. It is apparent from all tendered evidence that the attacks in the territory of Foča and its surroundings were not isolated in nature, that incidents were not random and that crimes were not just individual, but rather that it was a systematic treatment of non-Serb civilians.

60. Also, in presenting the referenced ground of appeal, the Defense offered no counter-arguments, or presented the state of facts any differently in relation to that found in the contested Judgment. The Defense rather stated arbitrarily, and with no grounds in the tendered evidence, that no witness confirmed the Accused's participation in the widespread and systematic attack. As stated 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, so the contested Judgment properly found that such an attack existed indeed.

61. The next important issue is whether the Accused was aware that such an attack existed and that his acts formed part of the attack. In the reasoning of the contested Judgment, the Trial Panel presented both the evidence and the reasons on the basis of which it was established that the Accused was aware of the attack and that his acts formed part of the attack, and pointed to the fact that, during the period relevant to the

Indictment, the Accused was a member of the Army of the Serb Republic of Bosnia and Herzegovina (subsequently Republika Srpska), namely that he was in a formation within the armed forces which partook in the widespread and systematic attack. Having evaluated the tendered evidence and correlated it with the fact that certain duties and tasks were assigned to the Accused, as confirmed by both the Accused and the other witnesses (primarily Defense witness Miodrag Nikačević), that he was issued with the weapon and subsequently with an uniform, which he used in the commission of the charged acts, the fact of the mass-scale nature of the attack, and the comprehensive activities undertaken by the Serb forces in the territory under their control, the Trial Panel found that the Accused, as a member of the VRS formations which launched the attack, was aware of the events occurring on a daily basis.

62. Accordingly, the Accused was fully aware of his acts and their effects, and he wanted his acts to form part of the attack systematically carried out in the territory of Foča and its surroundings, whereby this last, general element of the criminal offense charged against him was satisfied.

63. Therefore, the Appellate Panel concluded that the Defense's appellate complaint, that the Judgment did not prove the existence of a widespread and systematic attack as one of the general elements of the criminal offense, is ill-founded in whole.

### **SECTION 1 OF THE CONVICTING PART OF THE TRIAL JUDGMENT ENACTMENT CLAUSE**

The Appellate Panel concludes that the state of facts concerning Section 1 of the enactment clause of the convicting part of the Trial Judgment was correctly and completely established and that the grounds of appeal advanced by the Accused's Counsel are ill-founded in whole.

64. By contesting his participation in the rape of the injured party A, the Accused pointed to the lack of credibility of her testimony as well as to the alleged inconsistencies and contradictions between the statement she gave during the investigation and her main trial testimony, and particularly to the fact that, despite their promise, the injured parties-witnesses A and B submitted no adequate medical documentation for a finding that they were at all subjected to any rape. In addition, the Accused pointed to the omission made

by both the Prosecution and the Trial Panel, including his Counsel, which is apparent from the fact that the presence of Sena Hukara, as the key witness who would have, in his opinion, greatly contributed to the clarification of decisive facts pertaining to the concrete criminal incident, was not ensured. Furthermore, the Accused particularly expressed his doubts concerning the truthfulness of the injured party-witness B's testimony, considering that he knew that she had had an intimate relationship with Uroš Radović aka Juro, in whose apartment the alleged rapes of both her daughter A and witness B took place.

65. Counsel submits that the factual allegations under Section 1 of the enactment clause of the Trial Judgment were not proved, and that they are based on the injured party A's unclear and imprecise testimony. By referring to the injured party A's testimony, Counsel contested the possibility that, during the critical period, she could have at all been present in the *Partizan* sport gym, as alleged in the Indictment, considering that at the time, no one was present in the referenced gym. In support of the foregoing, Counsel pointed to the testimony of the injured party-witness D, who stated that, in the summer 1992, the gym was empty. Counsel also submitted that the accepted established facts also show that, already in May 1992, busses were organized to transport civilians away from the town, and that around 13 August 1992 the remaining Muslims in Foča, mostly women and children, were taken to Rožaje. In contesting the finding under Section 1 of the convicting part of the enactment clause, Counsel particularly highlighted the contradiction between the injured party A's testimony and the finding that she was raped in August 1992. Specifically, the appeal indicated that, according to this witness's testimony, her village was attacked in April 1992, whereupon the witness, along with her mother, brothers and sisters, were taken to the *Partizan* sport gym, from which she was brought out on the first night and raped by a person unknown to her at the time, while, on the other hand, the factual description of the concrete incident indicated August 1992 as the time when the incident had occurred.

66. Contrary to the Defense's grounds of appeal, the Appellate Panel has held that the state of facts concerning Section 1 of the Trial Judgment enactment clause was established properly and completely. The Defense objected arbitrarily and with no arguments that the state of facts in the Trial Judgment was improperly and incompletely established.

67. The Appellate Panel concludes that, based on the proper evaluation of the key evidence-testimony of the injured parties-witnesses A and B, as well as the Accused's

evidence given in the capacity of a witness, the Trial Panel properly and reliably found that the Accused had indeed raped the injured party A at the charged time. This Panel also upholds the foregoing finding, in whole.

68. The appellate complaints advanced by the Accused concerning the proper and complete nature of the established facts are subsumed under the allegations that the examined witnesses did not tell the truth and that the tendered evidence does not point to the conclusion that they were raped. In the Appellate Panel's view, such complaints are ill-founded in whole because, apart from the arbitrary notes about their alleged inconsistency, they do not contain a single valid counter-argument or evidence which would, in any way, bring into question their substance, mutually concurrent and consistent in the decisive facts. Contrary to the foregoing, the Trial Panel credited completely and properly the examined witnesses, since their testimonies, being distinct only to the extent confirming that they were not learned but rather reflected different perception of different individuals in the abnormal, extremely stressful and degrading circumstances, clearly show beyond a doubt that the accused Jasko Gazdić is exactly the person who took the injured party A out the *Partizan* sport gym on the first night after their arrival there, that he brought her to the apartment used by Uroš Radović aka Jure and raped her there, and that no sooner than the following morning did he allow her to return to the sport gym.

69. For the foregoing reasons, the Appellate Panel accepts the reasons provided in the Trial Judgment reasoning concerning the criminal event described in Section 1 of the enactment clause of the Judgment convicting part. This is because the Judgment was rendered after the proper and lawful conduct of the proceedings, and because its reasoning provided, comprehensively and specifically, both the indisputable facts and the reasons for which the disputable facts were accepted as proved, and the valid evaluation of the contradicting evidence credibility (the statements given during the investigation and the main trial testimony), while the presented appellate complaints do not suffice to contest such a proper and complete finding.

70. The Accused's appellate complaint, that the witness under the pseudonym B, who testified about the circumstances addressed in Count 2 and Count 1 of the Indictment, was, in fact, in an intimate relationship with Uroš Radović aka Jura at the time of the criminal offenses commission, and that her testimony along this line cannot be credited, considering the substance of the referenced witness's testimony, is completely irrelevant. In her testimony, considered by this Panel as also sufficiently clear and credible, the

witness clearly described how she and her children were forcibly brought to and detained in the *Partizan* sport gym, from which she was repeatedly taken out and raped, along with other young girls and women brought there in the same manner. In view of the foregoing, the Panel considers as absolutely erroneous and ill-founded the Defense's conclusion that such a relationship between the injured party and Uroš Radović, whose apartment the Accused had also used for a certain period of time, and in which the acts of rape occurred, can be considered as a relationship based on a person's free will, which she tried to cover up by giving a false testimony, as the Accused's complaints at least intended to present.

71. With regard to the complaint lodged by the Accused's Counsel, that the criminal act could not have occurred in August 1992 since the witness A herself also testified that her village was attacked in April 1992, and that after the attack ended they were transferred to the *Partizan* sport gym, the Appellate Panel holds that the Trial Judgment provided a detailed and comprehensive analysis of the testimony of the witnesses, who gave evidence about the circumstances pertaining to this Count, and accordingly made a valid finding concerning the time of the crime commission, which is also fully upheld by this Panel.

72. The testimony of witness B, mother of witness A, who testified about the circumstances addressed in Counts 1 and 2 of the Indictment, shows that their village was attacked in April-May 1992, and that despite the fact that most houses in the village had been burnt down, the witness and her family, including the injured party A, stayed in the village until August, when they were transported by trucks, first to the Miljevina Police Station, and subsequently to the *Partizan sport* gym in Foča. Therefore, taking into account the referenced fact obviously disregarded by the appellant in advancing his complaint, it can be concluded that, after the capture of the village of Jeleč, the injured parties-witnesses were not immediately deported to the *Partizan* sport gym in Foča, but rather in August, and that on the first night after her arrival in the *Partizan sport* gym the injured party-witness A was taken out of the gym and raped in an apartment located in the immediate vicinity of the *Partizan sport* gym. Both witness A and witness B gave consistent evidence about the foregoing.

73. Such established facts show, beyond a doubt, that on the critical occasion in August, it was exactly the Accused who, on the first night after the arrival of the injured party A and her family in the *Partizan sport* gym, took the injured party A out of the gym, brought her to the apartment in the building located near the gym, raped her, and only in

the morning allowed her to return to the gym. Accordingly, the appellate complaints, indicating that the facts concerning this Count of the Indictment were erroneously established, are ill-founded.

**SECTION 2 OF THE CONVICTING PART OF THE TRIAL JUDGMENT ENACTMENT**  
**CLAUSE**

The Appellate Panel concludes that the facts concerning Section 2 of the convicting part of the Trial Judgment enactment clause were established properly and completely, and that the appellate complaints advanced by the Accused and his Counsel are ill-founded in whole.

74. The Accused considers as improper the Trial Panel's finding concerning the proof of fact under Section 2 of the enactment clause of the Trial Judgment convicting part, primarily because the key witnesses in the concrete case were not examined. The Accused added that his responsibility is based on the false testimony of the protected witness K. In addition, the Accused pointed to certain contradictions in the protected witness's statement given during the investigation and the trial testimony. The Accused particularly contested the witness's statement that she could know him from before the war, which was a decisive fact for which she could allegedly identify him as the perpetrator of the criminal acts. The Accused did not contest that the critical incident indeed occurred, but he did contest his own participation therein.

75. Similarly as the Accused, Counsel for the Accused believes that the facts indicated in Section 2 of the Trial Judgment enactment clause should not have been proved solely on the basis of witness K's testimony because it is tainted. Counsel particularly contested the possibility that the injured parties Amira and Ismeta Frašto, as well as Fatima Hasanagić, were present at all in the referenced apartment in Foča at the critical time, considering that they had already been in Rožaje, Montenegro.

76. Contrary to the Defense's appellate complaints, the Appellate Panel holds that the facts related to Section 2 of the Trial Judgment enactment clause were established properly and completely. The Accused and his Defense objected, arbitrarily and with no supporting arguments, that the state of facts in the Trial Judgment was not established properly and completely.

77. The Appellate Panel considers as proper the Trial Panel's finding that, in July, the Accused arrived along with one Vuković, Zeljo, Žaga and Tuta, in the building, or the apartment in which Bosniak civilians (women and children), refugees from the village of Paunci, had already resided; that he insulted and swore at them; and that on the way out of the apartment he abducted Ismeta and Amira Frašto, which Fatima Hasanagić tried to prevent, but the Accused came to her and pressed his pistol against her forehead threatening her that she would collect her brain around the room unless she stopped talking, and ultimately hit her in her shoulder with the pistol handle.

78. As to the Accused's complaints regarding this criminal act, the Appellate Panel observes that, essentially, the Accused did not even contest the event occurrence, but rather indicated that he was not the person who had arrived in the apartment along with other persons, and, accordingly, could not have committed the acts of which he was found guilty.

79. The Appellate Panel concludes that the Trial Panel properly evaluated the witness K's testimony and credited it quite justifiably, in whole. The Appellate Panel upholds the Trial Panel's finding that the referenced witness's testimony was concrete and consistent in both the description of the concrete incident itself and the Accused's identification. During both the investigation stage and the main trial, the witness provided a number of information unequivocally indicating that the Accused is exactly the person who, on the critical occasion, arrived in the apartment where she had been present, among other persons, and that he is exactly the person who made threats to them, swore at them, and ultimately hit Fatima Hasanagić with his pistol handle.

80. Thus, the witness confirmed that she has known the Accused for a number of years; that she worked, for a certain period of time, with his sister in the "22 December" Textile Factory in Foča; that she used to see him when he paid visits to his sister in the factory, as well as around the town; that she knows well that the Accused is a child born in a mixed marriage; and that she knows that he used to live in the place of Brod on the Drina river bank (Brod on Drina). In this Panel's view, the foregoing facts, correlated with the precise description of the critical event, lead to the conclusion that the referenced witness is credible, namely that this is a witness who had no reasons whatsoever to unjustifiably charge the Accused, as also properly noted by the Trial Panel.

81. The Appellate Panel has held that the Accused's complaints pointing to certain untrue allegations, and the inconsistencies in the statements given during the investigation

and at the main trial (such as the witness's statement given for the Record before the Prosecutor that she had identified the Accused as a participant in the attack on her village, while she did not mention him at all at the main trial in that regard), that his sister did not work in the factory for 20 years but rather for 10 years only, that he as Jasko would not dare walking around Foča in the civilian clothing as he would have been certainly killed, are not of such a nature that could bring into question the properly established state of facts. Therefore, the Appellate Panel dismissed the referenced complaints as ill-founded.

82. Ultimately, the Appellate Panel dismissed as ill-founded the complaints of the Accused's Counsel indicating that Muniba Đuderija was not killed in July, as the Trial Judgment found, but rather in June, and that the injured parties Amira and Ismeta Frašto, and Fatima Hasanagić, were present in Rožaje at the relevant period, rather than in Foča, considering the above accepted Trial Panel's findings and the fact that no arguments or reasons were provided for the advanced assertions in support of their reasonableness.

### **SECTION 3 OF THE CONVICTING PART OF THE TRIAL JUDGMENT ENACTMENT** **CLAUSE**

The Appellate Panel concludes that the facts concerning Section 3 of the convicting part of the Trial Judgment's enactment clause were established properly and completely and that the complaints advanced by the Accused and Counsel are ill-founded in whole.

83. By contesting the rape of the injured party C, the Accused tried to contest the credibility of key witnesses C and J. The Accused pointed to certain contradictions between their respective statements given during the investigation and the main trial testimony, and indicated that the alleged third person, who was present in the apartment and raped the injured party C, was not him but rather Slobodan Ćurčić.

84. Counsel submitted that his client could not have possibly raped the injured party C considering that the injured party and witness J were in Rožaje during the critical period.

85. The Appellate Panel nevertheless concludes that the Trial Panel properly evaluated all tendered evidence, individually and in combination, provided clear reasons supported with arguments, and on that basis properly found that the Accused is guilty of the injured party C's rape.

86. Witness C confirmed that, on 18 or 19 August 1992, at around 10 P.M. in the evening, two soldiers, Miodrag Nikačević and one Tuta, had come to her family house, took her and witness J out of the house without telling them where they were taking them, drew them to Miljevina, in front of a house into which witness J was brought, and after a certain period of time returned her to the car, whereupon they drove to Foča, and stopped in front of a building located across from the MUP Foča building. The witness also stated that, after a while, three other soldiers came and took them to an apartment in the building in front of which they had stopped. In the referenced apartment, the witness learned that the name of one of the three soldiers was Jasko or Jasmin, because the two other soldiers had called him by this name. The witness noted that the referenced person, introducing himself to them, told them that his parents were in a mixed marriage. The witness also added that, at that moment, she also learned the name of the other soldier, namely that he was one Radović, whereas she had not learned the third soldier's name. The witness confirmed that she and witness J sat for a while on a couch in the same room with the three soldiers, who drank alcohol and smoked; that subsequently the person who had introduced himself to her as Jasmin grabbed her hands and took her to the other room, and despite the fact that she had had her period, raped her under the threat of using his weapon; that he thereupon ordered her to return to the room where witness J had stayed, whom he also threatened "*do not even try, if you leave this room, you will be killed, you will be killed instantly.*"

87. As the contested Judgment reasoning properly indicated, this witness's testimony is confirmed, in whole, by witness J, who had been along with her abducted from their family house on the critical day and taken to the apartment in Foča. Thus, witness J identically described the development of the critical events on 18-19 August 1992. Witness J confirmed in whole the witness C's statements concerning the way and the time of their abduction from their house by the referenced two soldiers and their arrival, first in front of the house in Miljevina where one of them raped her, and their subsequent taking to an apartment in Foča, where they saw three other soldiers, among whom she identified the Accused, who did not even hide his name considering that he introduced himself to them. Witness J confirmed that the Accused took witness C to the other room, from which she heard witness C begging the Accused not to touch her, telling him that she is a mother of two children. Witness C testified almost identically about the foregoing.

88. Contrary to the Defense's assertions, the fact that there were certain inconsistencies in these witnesses' testimony (such as that the apartment was on the

second or third floor, certain differences in the description of persons who brought them in, whether the three soldiers took them over in front of the building or in the apartment) do not bring into question the witnesses' evidence. They are testimonials, where the witnesses were exposed to a very stressful situation and a great fear. Therefore, it cannot be realistically expected that all participants in the event have completely and identically perceived the situation, equally observed all details, and that 20 years since the event they will have the same recollection of the event, identically give an account about it, and describe the development of the event, particularly in the situation when several statements are being given, as in the concrete case. It is realistic and certain that eye-witnesses to an event will notice different details, and that their testimony will also differ in certain details, namely that someone will offer more or less information, and that each new recollection of memories will provide a different mosaic of the event, which is ultimately affected by the very way in which the examination was carried out. The sense of the evidence evaluation is apparent exactly from the foregoing, and the Trial Panel provided clear reasons, supported with arguments, for which these witnesses' testimonies were credited, which the Defense's appeal contested unsuccessfully.

89. Therefore, the Appellate Panel has also held that the testimony of witnesses C and J, concerning the way in which the witness-injured party C was raped, were convincing. Considering that even during the investigation phase these witnesses provided consistent and identical descriptions of the events in all essential elements concerning these facts, the complaints advanced by both the Accused and his Counsel had to be dismissed as ill-founded.

90. Considering the above accepted Trial Panel's findings, the Appellate Panel dismissed as ill-founded the complaint of the Accused's Counsel indicating that during the relevant period the injured party C and witness J were in Rožaje rather than in Foča, and that therefore the Accused could not have possibly raped the injured party, because the referenced assertions were supported with no arguments or explanations proving their justifiability.

**SECTION 4 OF THE CONVICTING PART OF THE TRIAL JUDGMENT ENACTMENT**  
**CLAUSE**

The Appellate Panel concludes that the facts concerning Section 4 of the convicting part of the Trial Judgment enactment clause were established properly and correctly and that the appellate complaints advanced by both the Accused and Counsel are ill-founded in whole.

91. By advancing the complaint concerning the finding of facts under the referenced Section, the Accused contested his participation in the rape of the injured party D. The Accused indicated that it was only due to the circumstances that he was present on the critical site at the critical time, and that after a certain number of Bosniak women and children were brought into the apartment he left the apartment never to return again, since he knew what could happen there. The Accused pointed to certain contradictions between the witness D's and witness F's testimony, particularly with regard to the inconsistencies between the statements they gave during the investigation stage and at the main trial. The Accused believes that the charges were not proved, namely that he did not perpetrate the criminal offense at issue.

92. By contesting the Accused's participation in the injured party D's rape, the Defense particularly pointed to the Accused's testimony. The Accused stated that he had left the apartment prior to the concrete incident itself and never returned to it. The Defense also highlighted certain inconsistencies in the witness D's testimony, and stated that this witness was not credible and that it was her interest to give false evidence against the Accused, considering that she knew none of the remaining alleged co-perpetrators. Ultimately, the Defense believes that the Accused's responsibility should not have been based solely on the injured party D's testimony, because it is insufficient, and because the conviction for this charge is based exclusively on the injured party's statement that she was raped.

93. The Appellate Panel nevertheless concludes that the Trial Panel properly evaluated all tendered evidence, individually and in combination, presented clear reasons, supported with arguments, and on that basis properly found the Accused guilty of the rape of the injured party D.

94. The Trial Judgment contains a comprehensive explanation of the reasons for which the Court decided to credit witness D's statements (given both during the investigation and the main trial). The witness stated that she was, along with witness F and other persons,

taken outside the *Partizan* sport gym in Foča, and brought to an apartment in the building located in the immediate vicinity of the MUP building; that they first sat in a room where she heard Slobodan Čurčić addressing a young man in a uniform, sitting on the couch edge, by the name of Jasko Gazdić. The witness is also consistent in her statements that from that room they were taken to the other one, from which they took one by one of them, and that, when it was her turn, they took her to the adjacent room, where she saw a man, with his trousers stripped off, and a pistol in his hand; that he ordered her to strip off and lick his sex organ, which she had to do; that thereupon Gazdić and Čurčić entered the room and raped her from behind (her back) and thereupon left the room.

95. Witness F identically described the sequence of the events at issue, from the moment of their stay in the *Partizan* sport gym, the arrival of a group of soldiers in the gym, including Slobodan Čurčić whom she had known from before and who told her that they would take them to an apartment to save them (that witness D and her child were also among those persons), to their interment in an apartment located across from the Police Station building, where they saw several soldiers in uniforms, including the accused Jasko Gazdić, whose name she learned because all soldiers addressed each other with their names. The witness particularly highlighted that she remembered the Accused's name. In addition, witness F confirmed that, after being moved to the other room, those soldiers entered the room after 10-15 minutes, and first took the injured party D to another room; that she could not see what was happening with the injured party D, but could hear her screaming and crying; that thereupon the injured party D was brought back to the room unconscious; that she saw blood on the injured party D's underwear because she was buttoning her trousers.

96. As properly indicated in the reasoning of the contested Judgment, the decisive facts in these witnesses' testimonies are also affirmed by witness G, who was along with the injured party D and witness F held in the *Partizan* gym. This witness confirmed that, on the critical day, soldiers unknown to her entered the gym; that one of them approached her sister-in-law and told her something; that thereupon first witness F and her child, her daughter, witness D and her daughter, Kadira with her children, and Fatima Aljukić with her daughter were taken out. Witness G also added that no sooner than three days after she left Foča, a group of women, including her daughter, arrived in the place in which she had taken refuge. Her daughter told the witness G that no harm was done to her, but that witnesses F and D were taken to other rooms (in the above referenced apartment). Witness G also stated that witnesses F and D never told her anything about their suffering,

but that she had once overheard a conversation between witness F and her mother, when witness F told her mother that she had been raped, and that the worst of them all was Jasko Gazdić, but they said nothing about witness D. In addition, witness G clearly indicated that she is aware that the injured party F kept crying after all that had happened to her, while witness D kept secret all that, indicating that she generally did not speak a lot.

97. As indicated above in relation to the concrete charge under the Indictment Count at issue, the appeal contested the credibility of witness D's and witness F's testimony, and pointed to contradictions between the statements these two witnesses gave during the investigation and their respective main trial testimony, whereby the complaint on the ground of incompletely and incorrectly established facts was satisfied according to both the Accused and the Defense.

98. Contrary to the foregoing, the Appellate Panel concludes that, with regard to the evaluation of evidence concerning this charge, the Trial Panel provided quite valid and comprehensive reasons for its finding that certain facts were proved, and explained in a satisfactory manner how witnesses D's and witness F's testimony was evaluated in connection with both the testimony the Accused gave in the capacity of a witness, and that of witness G.

99. Witness D, the key witness for this Count of the Indictment, and at the same time the direct victim of the criminal act, provided a consistent and reliable description of the critical night-related events, which is, in relation to the decisive facts, fully consistent with the description provided by witness F.

100. The issue of "inconsistency of evidence" given by witness D has been already adequately addressed and dealt with in the contested Judgment, which quite clearly found that certain minor inconsistencies raise no doubts in the Panel regarding the finding that the Accused, along with others, participated in the rape of witness D.

101. Primarily, witness D provided a very clear description of the way in which she was, along with others, brought to the apartment where she clearly heard one of the soldiers addressing the Accused as Jasko Gazdić (the Accused also confirmed that Slobodan Ćurčić addressed him like that), and that the Accused is exactly the person who had raped her in the other room, along with the above mentioned Ćurčić and Vuković, whose sex organ she had to lick at that moment.

102. As the Trial Panel, the Appellate Panel also credited all segments of this witness's testimony concerning the charge at issue, and has no doubts into this witness's credibility. Therefore, all the complaints advanced by the Accused and the Defense contesting the referenced witnesses' testimony are ill-founded and unsupported with any evidence of adequate probative value.

103. The disputable details, such as the inconsistency between the testimony of witness D and witness F regarding the sequence of their taking to other rooms to be raped, or imprecisions in witness D's testimony concerning the moment when she learned the name of the third person whose sex organ she was forced to lick while being raped by the Accused, to which both the Defense and the Accused pointed, can have no effect whatsoever on the creation of a different understanding of the Accused's responsibility and participation in the referenced act, in relation to what is already found under the Trial Judgment.

104. In addition, the Accused's appeal unjustifiably considers as illogical the witness D's explanation that, considering her position while being raped, she could conclude that exactly the Accused raped her. Specifically, considering the time spent by the witness, along with other women, in the apartment before the very act of rape, which realistically enabled her to memorize those persons' appearance and voice/conduct, and correlate that with the obvious position of the injured party (she was not fully turned around), as also properly noted by the Trial Panel, the realistic conclusion is that the injured party could clearly see the Accused entering the room and thereupon raping her. The witness described the foregoing very clearly, and made a clear distinction between the rape to which she was subjected by Ćurčić (he was very violent) and that of the Accused (he was not that violent and he kept laughing).

105. Therefore, the Appellate Panel fully upholds the Trial Panel's finding that the Accused's acts, comprehensively described in the contested Judgment, satisfied the underlying elements of the criminal offense of Crimes against Humanity committed through the act of rape, which was proved beyond a reasonable doubt.

**SECTION 5 OF THE CONVICTING PART OF THE TRIAL JUDGMENT ENACTMENT**  
**CLAUSE**

The Appellate Panel concludes that the facts concerning Section 5 of the convicting part of the Trial Judgment enactment clause were established properly and correctly and that the appellate complaints advanced by both the Accused and Counsel are ill-founded in whole.

Under this section of the Trial Judgment finding of facts, the accused Jasko Gazdić was found guilty of the criminal offense of Crimes against Humanity perpetrated by the act of assisting in the commission of the crime of rape of the injured party E at the time, in the place and in the way described in the enactment clause of the Judgment.

106. The Accused's appeal indicated that, obviously, the injured party confused the Accused for some other person, and that the testimony of the injured party-witness E is contradictory. In addition, the appeal presented the alleged inconsistencies by comparing the statements given during the investigation stage with her main trial testimony.

107. By contesting the Accused's participation in aiding and abetting the act of rape of the injured party E rape, the Defense particularly highlighted the Accused's testimony. The Accused denied having anything to do with the incident at issue. The Defense also submitted that the referenced witness's testimony is a false testimony, and indicated that the witness's interest was to have anyone whatsoever charged with this crime since she knew none of the remaining persons. The Defense ultimately indicated that the Accused's responsibility should not have been based solely on the injured party E's testimony, which was tainted.

108. The Appellate Panel considers as reasonable and justified the Trial Panel's finding that the Accused is guilty of the charged act and that the referenced witnesses' statements, primarily regarding the Accused's identity, are beyond a doubt, wherefore the appeals' allegations to the contrary are irrelevant to any further discussion.

109. The Appellate Panel notes that had the injured party possibly erroneously identified the Accused, such identification could have been clarified in cross-examination, but the Accused did not do so. Obviously, neither the Accused nor his Counsel exercised the referenced right of theirs, nor requested the witness to provide a comprehensive description of the Accused to confirm their allegations that the witness had confused him

for someone else, that is, to prove that the witness E allegedly did not know the Accused at all.

110. It is indisputable for the Panel that witness E indeed knew the Accused; that on the critical occasion the Accused arrived in her apartment, along with Janko Janjić aka Tuta; that under the threat of his knife, punched her in her head and took her to the apartment located in the building known as *Beautiful Brena* (Lepa Brena); and that he repeatedly raped her there during the night.

111. Specifically, both these appeals were essentially aimed at undermining the witness's credibility through the evaluation of certain alleged inconsistencies taken out of the context and, in the Panel's view, unjustifiably given the crucial relevance in the formation of an overall understanding of the commission of the crime at issue. Neither this Panel nor the Trial Panel has any doubts in the credibility of this witness's testimony. This is so primarily because the Panel considers as acceptable the witness's statement concerning the Accused's identification. The witness has known the Accused well already since the pre-war period and has no doubts whatsoever into his identity.

112. The Panel will now refer to the complaints primarily contesting that the Accused had ever had any contacts with one Tuta, who raped the injured party, considering that the Accused stated that Tuta was not a person he socialized with and was not a member of his unit. Accordingly, the Appellate Panel concludes that the Accused's referenced complaint is ill-founded and arbitrary, as it contradicts the testimony of both the injured party E and the Defense witness Miodrag Nikačević, properly accepted by the Trial Panel as credible. The Defense witness Miodrag Nikačević testified, at the hearing held on 30 May 2012, that he had known the Accused by sight; that he knew that the Accused, along with mentioned Tuta, Zeljo, Trifković and Jure, was a member of the so called "black group" that was present on the streets and caused problems; and that they were all men from "Ćoso's unit", all of which is ultimately confirmed by witness E, who testified about the acts taken by the Accused, by which he enabled the other person (Tuta) to rape her.

113. In addition, the Accused or the Defense tried unsuccessfully to point to alleged inconsistencies in the referenced witness's testimony and indicated that, in her evidence given before the Supreme Court of the FBiH on 24 July 2012, the witness mentioned no knife, while at the main trial she stated that the Accused had threatened her with the knife.

114. When asked by Counsel why she did not state for the record, in the presence of the Panel Presiding, its members and the record-taker, that the Accused threatened her with the knife, the witness responded “... *I know that I stated, but now, who was and how, there were many of them, and I do not know what happened when.*” When the question was repeated, the witness also responded: “*I maintain what I have said.*”

115. There are no significant inconsistencies between this witness’s testimony and the one she gave before the Supreme Court on 24 July 2002. The witness’s other statements given before the Prosecution on 17 August 2011 and 7 June 2006 are fully consistent with her main trial testimony. Thus, in this Panel’s view, the existent discrepancies obviously resulted from different manners in which the witness was examined several times. Also, it is logical to expect that this witness’s testimony must differ in certain details, particularly because it is irrational to expect that a person interprets his/her experiences almost identically time and time again.

116. The Panel concludes that this witness’s testimony is reliable and consistent in its essential segments. The Panel particularly notes the fact that, in describing her suffering, the witness presents only what she has truly seen and experienced. That the witness’s testimony is not just a “serial testimony” is apparent from the act’s specific nature and the manner of its commission. Specifically, the witness spoke about the Accused’s act which is apparent in her abduction, the received blows and threats, while on the other hand, the witness pointed to the other person who had raped her, as a final act. This means that the witness has no reason to charge the Accused unjustifiably, and to add more criminal activity than that which is objective.

117. In view of the foregoing, the Appellate Panel fully upholds the Trial Panel’s finding that the Accused, pursuant to one Tuta’s order, threatening her with the knife and punching the injured party in her face, brought the injured party to Tuta’s apartment, knowing that she would be raped, which constitutes assisting in the commission of the crime of rape.

## ACQUITTING PART – PROSECUTION’S APPEAL

### GROUND OF APPEAL UNDER ARTICLE 297 OF THE CPC BiH: ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

#### **The contested Judgment contradicts the reasons for the Judgment and contains no reasons on the decisive facts (Article 297(1)(k) of the CPC BiH)**

118. Within this ground of appeal, the Prosecution argued that, in the segment of the Judgment acquitting the Accused of the charges, the Trial Panel omitted to clearly and properly decide on the Accused’s guilt for the acts charged, for which it had more than sufficiently clear and concrete evidence on the basis of which it could have done so. Specifically, in the Prosecution’s view, the Trial Panel omitted, in the explanation of the acquitting sections of the Judgment, to state the reasons by which it was led to render such a decision, and that the reasons presented in certain sections contradict, to a large extent, the reasons and the facts which were fully established and accepted as proved in the sections finding the Accused guilty as charged. Therefore, having made such a decision in the acquitting part of the contested Judgment, the Trial Panel made essential violations of the criminal procedure provisions which constitute the ground of appeal under Article 297(1)(k) of the CPC BiH.

119. Considering that, by explaining this complaint in relation to the individual charges of which the Accused was acquitted, the Prosecution points to a different state of facts, that is, contests the Trial Panel’s concrete finding or evidence evaluation, and thereby addresses the factual basis of the Trial Judgment arguments, the Appellate Panel will respond to this complaint, that is, to the issue of the Accused’s responsibility in relation to the acquitting part of the Trial Judgment, within the appellate ground of incorrectly and incompletely established state of facts.

120. In this Panel’s view, the enactment clause of the Judgment is not incomprehensible in relation to its acquitting part, and it contradicts neither itself nor the reasoning, as the Prosecution’s appeal indicated. The judgment would be incomprehensible if there were doubts about the Panel’s findings, that is, if the Panel’s findings were incomprehensible, which is obviously not the case here. Specifically, the decision concerning the acquitting part of the contested Judgment is very clear, and the reasons presented in the reasoning

of the decisive facts do not contradict it, wherefore the referenced Prosecution's appellate complaints are unfounded. Therefore, the Appellate Panel concludes that the proper and valid nature of the Trial Panel's finding, that the Accused' responsibility for the concrete charges is unproved, undoubtedly ensues from the comprehensive evaluation of the tendered evidence, individually and in correlation, with regard to which the contested Judgment provided quite clear and concrete reasons, including the reasons for which, unlike others, certain witnesses' testimonies and their segments were accepted as true and reliable, and on which the Trial Judgment finding of facts is based, which is also fully upheld by this Panel.

### **GROUND OF APPEAL UNDER ARTICLE 299 OF THE CPC BiH: INCORRECTLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS**

121. Pursuant to Article 284(c) of the CPC BiH, and due to the lack of proof of fact, the Trial Judgment acquitted the Accused of the charges that, by the acts described in Sections 1, 2, 3 and 4 of the Judgment enactment clause, he committed the criminal offense of Crimes against Humanity under Article 172(1) of the Criminal Code of BiH, namely: under sub-paragraph g) in relation to Section 1 and 3 of the acquitting part of the enactment clause; under sub-paragraph k) in relation to Section 2 of the acquitting part of the enactment clause and under sub-paragraph g) in relation to Article 31 of the CC BiH concerning Section 4 of the acquitting part of the enactment clause, all as read with Article 180(1) of the CC BiH.

#### **SECTION 1 OF THE ACQUITTING PART OF THE TRIAL JUDGMENT**

122. Under the referenced Section of the contested Judgment, the Accused was acquitted of the charges that, in August, he took out the injured parties A, B and Sena Hukara from the *Partizan* sport gym, brought them to an apartment and raped them, whereby he would have committed the criminal offense of rape under Article 172(1)(g) of the CC BiH.

123. By contesting the Trial Judgment's finding regarding this charge, the appeal correlated the factual descriptions of Count 1 (the rape of the injured party A) and Count 2 (the rape of the injured parties A, B and Sena Hukara) of the Amended Indictment, their context of time, evidence, consistency of the injured parties' testimony, and the acts taken

by the Accused. The appeal indicated that, according to the Prosecution, the referenced charges are based on the identical evidence, that is, the testimony of witness A and witness B, which as such provide sufficient basis to find the Accused also guilty of Count 2 of the Amended Indictment, rather than to acquit him of this charge. Accordingly, that is, pursuant to the findings related to Count 1 of the Amended Indictment, the Prosecution argues that the Accused also treated the injured parties B, A and Sena Hukara almost identically, all of which ensues from the testimony of the injured parties A and B, as well as from the Accused's testimony. Therefore, the Accused's identification is indisputable also with regard to his responsibility concerning Count 2 of the Amended Indictment, that is, Section 1 of the acquitting part of the Judgment.

124. The Appellate Panel, as well as the Trial Panel, concludes that, indisputably, the injured parties A, B and Sena Hukara were raped while being detained at the *Partizan* sport gym, namely that on the critical night they were taken out of the gym, brought to an apartment, where the three women were raped by the same person. However, what was disputable and what had to be resolved in the present case is whether the perpetrator of the rapes at issue was the accused Jasko Gazdić.

125. The inconsistencies in the testimony of witness A and witness B, which the Prosecutor did not consider as inconsistencies at all, are in this Panel's view huge and significant inconsistencies, which the contested Judgment presents on pages 94 and 95 of its reasons. The Judgment evaluated the observed inconsistencies, and correctly finalized its evaluation with the reasons for which it considers that the evidence on the Accused's identification is insufficient to satisfy the standard of proof beyond a reasonable doubt concerning the Accused's guilt under this Count of the Indictment.

126. Specifically, a comparison between the referenced witnesses' statements given during the investigation phase and the main trial evidence gives a general impression that the witnesses are uncertain about the Accused's identity, as the Trial Judgment presented very clearly. In explaining the vagueness of her statements given during the investigation in relation to the Accused's identity, witness A stated at the main trial that she does not remember his appearance and that she possibly learned from her mother about his physical appearance. When asked by the Panel President to explain how she knows that he (the Accused) is the same person who took her out of the gym on the first night, considering that she stated that she does not remember his appearance, the witness responded: "*Well, I cannot recall now precisely by his appearance.*" With regard to the

clear identification of the accused as the person who raped her, witness B was also not resolute. At the main trial, witness B stated that she thinks that the Accused is the same person who took out her daughter-injured party A on the first night after their arrival in the *Partizan* sport gym. After being asked to clearly respond whether this was the same person, the witness stated: “*Well, I do not know. I assume that he is.*” Therefore, there are many inconsistencies, r uncertainties in the testimony of witness A and witness B, as the Trial Judgment properly noted.

127. As to the Prosecution’s allegations, that the acts’ identical nature, the injured parties, the context of time, and the site of the acts commission lead to the conclusion that the Accused exactly was also the perpetrator of the referenced charged act, the Panel notes that the pattern of conduct, in and out of itself, does not *a priori* mean that these acts were the Accused’s acts. This is so particularly because the mere evidence undoubtedly shows that the apartment in question was used by a large number of soldiers, that a large number of women were brought there to be raped, and that all this supports the theory that, in the case at issue, the Accused need not be the perpetrator of the referenced charged act, but possibly someone else.

128. Despite the particular sensibility for these witnesses’ suffering which has caused permanent effects on their health and lives, as well as the expressed reasonable fear, this Panel could not reach the necessary extent of probative conviction that the it was none other than the Accused who perpetrated the acts of rape at issue.

129. Therefore, having evaluated all the circumstances in their entirety, as the Trial Judgment also properly found, the Appellate Panel could not conclude, beyond a reasonable doubt, that the rapes at issue, which were perpetrated beyond any doubt, were indeed committed by the Accused. Therefore, being led by the principle of “*in dubio pro reo*” laid down in the CPC BiH, pursuant to which “*a doubt with respect to the existence of facts constituting elements of a criminal offense or on which the application of certain provisions of criminal legislation depends, shall be decided by the Court judgment in the manner more favorable to the accused,*” this Panel upholds as valid the Trial Panel’s finding that it is not proved that the accused Jasko Gazdić indeed committed the criminal offense as charged.

## **SECTION 2 OF THE ACQUITTING PART OF THE TRIAL JUDGMENT**

130. Under this section of the Trial Judgment's finding of facts, the Accused is acquitted of the charges that, with the intent to inflict serious bodily, and particularly mental harm, on several occasions, in the evening hours, he abducted Remza Kurtović from the apartment and brought her back in the morning, thereby causing a great fear in the other women, who were afraid that they would also be taken away, as they supposed that Remza was taken outside to be raped.

131. The Prosecution argues that the Trial Panel did not at all take into account witness H's testimony. In the Prosecutor's view, this witness's testimony shows that the Accused repeatedly visited the apartment in which the women and children, refugees from the place of Đičevo-Foča, were placed, and took away the injured party Remza Kurtović during the night and brought her back in the morning, wherefore the other women greatly feared for themselves and their children, given their assumption that she was taken away to be subjected to rape. The Prosecution argues that all the facts, about which witness H gave evidence, should have been accepted and properly evaluated by the Trial Panel as the facts of decisive importance in deciding on the Accused's responsibility for these acts, whereby the underlying elements of the criminal offense set forth in Article 172(1)(k) of the CC BiH would be satisfied in whole.

132. However, contrary to the Prosecutor's different appellate complaints, the Appellate Panel concludes that, in this segment of the contested Judgment, the Trial Panel completely and properly established all the facts relevant to adjudication in this criminal matter. The Trial Panel acted in full compliance with Article 281(2) of the CPC BiH, conscientiously evaluated the referenced witness's testimony, as well as the general circumstances pertaining to the charged period, and, based on such an evaluation, made the finding on all the facts essential for the proper clarification of all disputable issues, primarily the issues highlighted by the appeal: the existence of a *nexus* between the Accused's acts and the intensity of fear inflicted on the injured parties in terms of the occurrence of the resulting violation of their mental integrity.

133. Considering the fact, that only witness H testified about the referenced circumstances and the present fear, but could not confirm with certainty that the injured party Remza Kurtović was taken out to be subjected to rape, but rather assumed so, it

cannot be concluded with certainty that all the underlying elements of this offense have been satisfied. Specifically, the Appellate Panel accepts the fact that this witness, as well as the other detainees, felt certain fear due to the Accused's and other persons' conduct, apparent from the abduction of certain persons from the apartment and the general situation in the Foča territory. However, the Appellate Panel concludes, as also found by the Trial Panel, that no fear of such intensity existed, at least as presented in the referenced witness's testimony, which would cause great suffering or serious injury to body or mental health, which constitutes an essential element of this charged act.

134. Specifically, in paras. 325 and 326 of the contested Judgment, the Trial Panel made proper findings concerning the referenced circumstances, from the fact that the fear felt by the witness when the Accused took Remza Kurtović out of the gym, was not particularly explained, that the witness did not speak about a possible fear and its intensity felt by the other women, but rather spoke generally of the existent fear of uncertainty in what could happen to them, to the fact that the Accused's participation in the referenced event (which is indisputable, but does not, in and out of itself, imply his state of mind in terms of intent to inflict great suffering or serious bodily or mental harm whose existence would invoke criminal responsibility)", undoubtedly leads to the presented finding. For the foregoing reasons, this Panel also does not accept the Prosecution's theory presented in their appeal, that the Accused's treatment of Remza Kurtović, as explained by the witness, caused great fear in other persons, in terms of the resulting consequences apparent from their mental integrity violation, which constitutes an essential element of the referenced charged act.

135. Accordingly, considering that the Prosecutor's appeal did not reasonably bring into doubt the Trial Panel's finding in the acquitting part of the contested Judgment, it is clear that the Trial Panel acted properly by acquitting the accused Jasko Gazdić of this charge pursuant to Article 284(1)(c) of the CPC BiH. Therefore, this segment of the Trial Judgment is upheld pursuant to Article 315(2) of the CPC BiH.

### **SECTION 3 OF THE ACQUITTING PART OF THE TRIAL JUDGMENT**

136. Under the referenced section of the contested Judgment, the Accused was acquitted of the charges that, in the way comprehensively described in the enactment clause of the relevant part of the Judgment, he took over the injured party-minor B.A., at

the time only age 12, from a man, kept her for himself for around one month, and over the same period went with her in different apartments, where he sexually abused and raped her, and thereupon handed her over to another man, whereupon her whereabouts have been unknown ever since.

137. The Prosecution contested the Trial Judgment with regard to this concrete charge and referred to the testimony of witness E, who gave account of the referenced circumstances. The witness pointed to a large number of important facts showing that the Accused is responsible for the commission of the act charged against him under this Section. The Trial Panel did not at all take into account the referenced facts, it rather just noted that witness E's testimony was scant in details and inconsistent with regard to the facts at issue, which is incorrect, according to the Prosecution.

138. The Prosecution argues that the Trial Panel's omission is apparent from the fact that it did not consider witness E's evidence given about the concrete circumstances in the context of the generally known facts addressing the systematic rapes of women in the Foča territory, whereby a conclusion could be clearly drawn that the Accused's responsibility for the referenced act charged against him exists indeed.

139. Having considered the foregoing Prosecutor's appellate complaints, indicating that the facts were incorrectly and incompletely established in the contested Judgment, and having comprehensively examined its substance, and reviewed the case record, the Appellate Panel concluded that the referenced complaints are ill-founded. The Appellate Panel also concluded that the facts were established properly and completely, and that the contested Judgment contains valid and acceptable reasons provided for all the decisive facts on the basis of which it rendered the decision acquitting the accused Jasko Gazdić of the charges for the referenced act.

140. The Appellate Panel concluded that, in evaluating the evidence, or the witness E's testimony, which is the Prosecution's single evidence presented regarding this Count of the Indictment, the Trial Panel properly applied the principle of *in dubio pro reo*, because many inconsistencies were found in the statements of the witness, who is both the injured party and the eye-witness to the crime. Therefore, the Appellate Panel also concludes that the accused Jasko Gazdić's participation in the charged acts has not been proven beyond a reasonable doubt.

141. The presumption of innocence is one of the basic principles of criminal law. The requirement related to this presumption is that the Prosecution must prove beyond a reasonable doubt that all the acts satisfying the essential elements of the criminal offense exist indeed.

142. The Appellate Panel holds that, having observed the problem of inconsistency between the witness's statements given during the investigation and the main trial testimony, the Trial Panel used proper standards to evaluate this witness's credibility.

143. Along this line, the Trial Panel first examined the witness's main trial testimony. The foregoing evaluation shows that the witness indicated Jasko Gazdić as the perpetrator of the criminal offense at issue, and as the person who took over minor A.B. from one Stanković, held her for himself for around one month, and during this period took her in different apartments, where he sexually abused her, and thereupon handed her over to one Ginić, whereupon her whereabouts have been unknown ever since.

144. The Trial Panel properly observed all the inconsistencies concerning the decisive facts pertaining to this criminal offense, and paid due attention to the inconsistencies between this witness's main trial testimony and her statement given during the investigation. In this Panel's view, the Trial Panel had reasons to find that the witness is inconsistent and uncertain about the decisive facts: the surrender of victim B.A. to the Accused by one Stanković, the description of the victim's rape by the Accused and the moment when the Accused handed the victim over to one Ginić. Considering that no other witnesses' testimony confirmed the referenced witness's testimony, the Trial Panel's finding remains proper and based on the tendered evidence.

145. Specifically, at the main trial, witness E testified that she heard that minor B.A. had been handed over by one Stanković to the Accused, but immediately added that she was uncertain about whether he had sold or given her away. In addition, in testifying about victim B.A.'s hand-over to one Ginić by the Accused, the witness stated that she was not certain about whether the Accused actually sold her or just gave her away. When asked if the foregoing statement was just her assumption, the witness explained that these men did nothing which was not in their own interest. The witness explained by the lapse of time all the differences/inconsistencies between her main trial testimony and her previously given statements, as well as her uncertainty about whether the victim was sold or handed over.

146. Also, in relation to the rape of injured party B.A., witness E testified at the main trial that she knew that the accused Gazdić had sexually abused minor B.A.; that she was once present in a flatlet when the Accused had a sexual intercourse with the injured party; that she once even heard the injured party shouting in her sleep: *“Let me go, Jasko, let me go, f... the train which brought you here.”*

147. At the main trial, however, in responding to the Prosecutor’s question of whether the Accused had any sexual intercourse with the Accused in the flatlet in her presence, witness E responded: *“Sexual intercourse. Yes. Yes”*; and when the Prosecutor asked her if that sexual intercourse was taking place in front of her, the witness responded *“It was like this, a couch was placed on one side, and further over there, on the other side. I was here, and they were over there. Thus, he sometimes slept there over the night.”* The Trial Panel properly found that this response indicated that the witness did not concretely described the act of rape, about which she should have known the tiniest detail had it indeed occurred, considering her statement that she was present in the same room in which the referenced rape allegedly occurred. Therefore, the Trial Panel properly found that this witness, consciously or unconsciously, and probably with the intention to have someone held responsible for the rape of both her and the injured party B.A., which is certainly a very painful and tragic experience for them, has convinced herself into something which is untenable and lacks the factual support. Also, the Appellate Panel finds further reason supporting such a view in the fact that no sooner than at the main trial did the witness correlate the Accused with the act of rape of the injured party B.A., while during the investigation phase she disregarded such an essential fact and did not mention it at all, which is completely illogical considering the decisive importance of this fact.

148. In rendering this decision, the Appellate Panel particularly took into account that, quite understandably, the witness cannot recall all the details pertaining to a certain event, given the time distance, or the elapsed period of time between the event occurrence and the testimony day. This Panel also accepts the fact that each witness has different ability to observe and remember smaller or irrelevant details related to the event, particularly because this witness is at the same time the injured party/victim, who had an extremely traumatic experience. This Panel, however, concludes that, in the concrete case, the differences in her statements are not apparent just from the details, which could be justified in certain situations, but that they also differ in the essential and decisive segments, particularly in those related to the very act of rape, which the witness did not mention at all during the investigation phase, while at the main trial she described it in a

shallow and incomplete manner, and thereby brought the Accused's guilt into a serious doubt.

149. The Appellate Panel therefore concludes that the Trial Panel properly found that the facts concerning the injured party's take-over by the Accused from one Stanković, his keeping her for one month to sexually abuse her, and the Accused's act of her surrender to one Ginić, were not established with certainty based on this witness's testimony, but rather indicate just a possibility, or a certain likelihood, that these events occurred in the manner as described in the Indictment, which does not suffice pursuant to the principle of *in dubio pro reo*.

150. Therefore, based on such a testimony, unsupported either directly or indirectly with any other testimony, the Court could not reliably conclude, on the basis of the generally known facts addressing the systematic rapes of women in the Foča territory, as the Prosecution's appeal also invoked, that the accused Jasko Gazdić indeed committed the criminal offense in the manner, at the time and on the place as charged under this Count of the Indictment. Thus, by applying the principle of *in dubio pro reo*, the Trial Panel rendered a proper and lawful decision and acquitted the Accused of the referenced charges.

#### **SECTION 4 OF THE ACQUITTING PART OF THE TRIAL JUDGMENT**

151. Under the referenced Section of the contested Judgment, the Accused is acquitted of the charge that, in the way comprehensively described in the enactment clause of the relevant segment of the Judgment, he assisted in the rape of the injured party E in the way that, along with another man, he took her to an apartment, knowing that two soldiers were already there, and being aware that they would rape her.

152. In challenging the Trial Judgment's finding regarding this concrete charge, the Prosecution referred to the testimony of witness E who gave evidence about these circumstances. Witness E stated that the Accused arrived in the apartment, already knowing in which apartment the injured parties E and B.A. were present, and, along with one Bakara, took them to an apartment where he handed the injured party E over to two soldiers, who were already there in the apartment, and who raped her, along with the above mentioned Bakara, whereupon the Accused came back in the morning hours, and returned her and B.A. to the first apartment. According to the Prosecution, all the foregoing

shows that the Accused had the awareness or knowledge of the purpose for which the injured parties were abducted, as well as the knowledge that the soldiers were already present in the referenced apartment, in which way he enabled them and one Bakara to rape the injured party E. The foregoing contradicts the Trial Panel's finding that the Accused was not aware that the two soldiers were already there in the referenced apartment.

153. In considering the Prosecutor's appellate complaints, indicating that the tendered evidence undoubtedly shows that the Accused is responsible for the rape of injured party E in the capacity of an aider and abettor, the Appellate Panel concludes that the facts were established properly and completely, and that the challenged Judgment contains valid and acceptable reasons for all decisive facts, on the basis of which it was decided to acquit the accused Jasko Gazdić of the charges for the referenced act.

154. The Appellate Panel upholds the Trial Panel's finding concerning the proof of acts undertaken by the Accused, namely that he is the person who, along with another man, took the injured party to the apartment and handed her over to the two soldiers, who raped her. The Appellate Panel also upholds the Trial Panel's view that the Accused's subjective element-*mens rea* was not satisfied, namely that the Prosecution did prove the existence of the Accused's intent to assist the two soldiers and the person who had brought the injured party, along with him, to the apartment where the acts of rape took place, and to perpetrate the crime at issue.

155. Specifically, Article 31 of the CC BiH defines the responsibility of an accessory as:

*(1) Whoever intentionally assists another in perpetrating a criminal offence shall be punished as if he has perpetrated the offence himself, although the punishment may be reduced.*

*(2) The following, in particular, shall be considered as assisting in the perpetration of a criminal offence: giving advice or instructions as to how to perpetrate a criminal offence, supplying the perpetrator with tools for perpetrating the criminal offence, removing obstacles to the perpetration of the criminal offence, and promising, prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, the traces of the criminal offence or the objects acquired by the perpetration of the criminal offence.*

156. The essence of this term is that the accessory, physically or mentally (morally), or by act or omission undertakes certain acts by which he/she assists the perpetrator in the

offense perpetration. The subjective requirement is that: 1) the accessory is aware that, by his/her acts, he/she assists the perpetrator in the perpetration of the offense, and 2) must be aware of the essential elements of the criminal offense.

157. Even though the Accused indeed undertook certain acts that preceded the act of rape of the injured party, the existence of intent in his acts was not proved, wherefore they could not constitute the act of assisting other perpetrators in furtherance of the criminal offense, considering that the Accused did not, by his acts, enter the criminal zone of the criminal offense at issue as an accessory.

158. Therefore, having considered the Prosecution's complaint advanced along this line, and upon examination of the witness E's testimony, the Appellate Panel concluded that the Trial Panel properly found that it was not proved that the Accused was aware that, by his acts, he assisted in the prohibited act of perpetration. Therefore, the Prosecution's appeal had to be dismissed as ill-founded, and the Judgment upheld in this segment.

**GROUND OF APPEAL UNDER ARTICLE 298 OF THE CPC BIH: VIOLATIONS OF  
THE CRIMINAL CODE  
STANDARDS OF REVIEW**

159. 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.

160. 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.

161. 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 Verdict 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.

## **APPEAL FILED BY THE ACCUSED AND COUNSEL FOR THE ACCUSED**

The Appellate Panel does not consider as well-founded the complaints advanced by the Accused and the Defense with regard to the criminal code violation under Article 298(d) of the CPC BiH.

162. The criminal code violation under Article 298(d) of the CPC BiH exists when the Court subsumes the properly established facts under an improper statutory provision and applies the law that should not have been applied, or improperly applies the law that should have been applied.

163. Both the Accused and Counsel submitted that the Criminal Code of the SFRY<sup>5</sup>, rather than the CC BiH should have been applied to the concrete case, because it was in force at the time of the alleged commission of the criminal offense, as well as because it was the law more lenient to the perpetrator.

164. The Defense also referred to a case conducted before the Court of BiH in which the CC SFRY was applied.

165. The appellate complaints advanced by both the Accused and the Defense concerning the application of substantive law are completely ill-founded.

166. Specifically, there is no dispute that, at the time of perpetration of the offenses charged against the Accused, which satisfy the underlying elements of the criminal offense of Crimes against Humanity under Article 172(1) of the CC BiH, the referenced criminal offense was not criminalized as such in the law effective at the time (CC SFRY).

167. Also, there is no dispute that, pursuant to the principle of legality, no punishment or any other criminal sanctions 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<sup>6</sup>. Pursuant to the time

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<sup>5</sup>See: Decree with the Force of Law concerning the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialistic Federative Republic of Yugoslavia adopted as the Republic law during the imminent danger of war or during the state of war (Official Gazette of the RBiH, No. 6/92) and the Law on Confirmation of Decrees with the Force of Law (Official Gazette of the RBiH, No. 13/94).

<sup>6</sup>Article 3 of the CC BiH: "(1) Criminal offences and criminal sanctions shall be prescribed only by law. (2) No punishment or any other criminal sanctions may be imposed on any person for an act which, prior to being

constraints regarding the applicability of the criminal code, the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence, and 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.<sup>7</sup> However, Article 4a of the CC BiH, to which the Trial Judgment properly referred, 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. Article 7 (2) of the ECHR and Article 15(2) of the ICCPR were adopted by such legislation, and derogation from the principle laid down in Article 4 of the CC BiH enabled.

168. The Trial Panel properly indicated that the referenced position concerns exactly the present case because the charge at issue encompasses violation of the rules of international law. At the critical time, the criminal offense of crimes against humanity was a criminalized offense from the aspect of both customary international law and the principles of international law. The Trial Panel provided comprehensive and exhaustive arguments which are, according to the Appellate Panel, fully valid and proper, and thus also accepted in whole.

169. The Appellate Panel further considers as proper the Trial Panel's position that as a successor to 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, and that these international documents are binding on it, since they provide for the obligation to prosecute and punish persons for any act or omission which, at the time when it was committed, constituted a criminal offense, pursuant to the general principles of international law, which crimes against humanity are beyond a doubt. Therefore, the appellate complaints challenging the Trial Panel's decision along this line are completely ill-founded and dismissed as such.

170. The Defense's appeal indicated that the CC SFRY was the more lenient law to the perpetrator rather than the applied Code. The Appellate Panel observes that, due to the

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perpetrated, has not been defined as a criminal offence by law or international law, and for which no punishment has been prescribed by law."

<sup>7</sup>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

fact that, at the time of the crime commission, the CC SFRY did not criminalize crimes against humanity as a separate criminal offense, from which it ensues, *prima facie*, that the referenced law could be the more lenient law. However, as indicated above, Article 7(2) of the ECHR and Article 15(2) of the ICCPR, which are identical to Article 4a of the CC BiH, allow for exceptional derogations from the principle of legality and do not preclude prosecution and punishment of the Accused in the concrete case. Therefore, pursuant to the existing sentencing system, the Trial Panel could impose a certain sanction for the criminal offense prescribed by international law. Such course of action is identical with the jurisprudence of the European Court of Human Rights, which has examined the requirements of the principle of legality under Article 7 of the ECHR, which has never questioned the sanction that has been imposed at present times for the offenses committed during the period when this course of action was not sanctioned as a criminal offense.<sup>8</sup>

171. The final confirmation of justifiability of the Trial Panel's position, also upheld by this Panel, further ensues from the ECtHR's Judgment in *Šimšić v. Bosnia and Herzegovina* No. 51552/10 of 10 April 2012, where the appellant challenged the 2007 judgment of conviction for crimes against humanity concerning the offenses committed in 1992, to which, *inter alia*, the ECtHR referred in its Introduction to the Judgment in *Maktouf and Damjanović v. Bosnia and Herzegovina* of 18 July 2013. Thus, the position taken in *Šimšić v. BiH* is that, concerning the criminal offenses in the above referenced cases falling within the criminal offense of Crimes against Humanity, introduced in the national legislation in 2003, the Court of BiH, as well as the Entity courts have no other option but to apply the 2003 Criminal Code of BiH. In the concrete case, the ECtHR, *inter alia*, examined the application in relation to Article 7 of the Convention on Human Rights and Fundamental Freedoms and found that it is manifestly ill-founded.

172. Therefore, the complaint concerning the application of the more lenient law and the appellant's referral to other cases where the law that was in force at the time of the criminal offense perpetration was applied is neither relevant nor justified.

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occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall apply."

<sup>8</sup> *Kolk and Kislyiy v. Estonia*, No. 23052/04 and No. 24018/04 ECHR 2006/I.

*Penart v. Estonia*, No 14685/04 ECHR 2006-I.

## **GROUNDINGS OF APPEAL UNDER ARTICLE 300 OF THE CPC BIH: SENTENCING**

### **STANDARDS OF REVIEW**

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

174. 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. 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.

175. 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.

176. 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.

177. 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.

**APPELLATE ARGUMENTS OF THE DEFENSE, THE ACCUSED AND THE PROSECUTOR'S OFFICE OF BIH**  
**REGARDING THE SENTENCING UNDER ARTICLE 300 OF THE CPC BIH**

178. The Accused, his Counsel, as well as the Prosecutor, appealed the sentencing decision pursuant to Article 300 of the CPC BiH.

179. The Prosecutor argued that, due to a number of inconsistencies and erroneous findings in the acquitting part of the Judgment, it is quite clear that the 17-year prison sentence is not proportionate with the Accused's responsibility. Accordingly, the Prosecutor moved the Appellate Panel to render a decision granting the Prosecution's appeal, revising the acquitting part of the challenged Judgment, and finding the Accused also guilty of the referenced acts, whereupon the Accused will receive a sentence of long-term imprisonment.

180. The Accused and the Defense presented quite opposite views in relation to that of the Prosecutor. In their opinion, the Trial Panel made a completely erroneous finding with regard to the Accused's responsibility for certain Counts of the Indictment. Accordingly, the Accused and his Defense proposed to the Appellate Panel to render a judgment of acquittal, or, if the Appellate Panel dismisses the advanced proposal, the Defense proposed that the Trial Judgment be revised by imposing on the Accused a considerably reduced prison sentence.

181. In view of the foregoing standards concerning the referenced ground of appeal, the complaints advanced by the Prosecutor, the Accused and the Accused's Defense with regard to the sentencing are ill-founded in their entirety.

182. Specifically, in fixing the sentence, the Trial Panel took into account all relevant circumstances and gave them a specific weight, as a result of which the Accused received a 17-year prison sentence. Therefore, the Trial Panel first properly found that the Accused acted as the perpetrator and accessory in systematic rapes of women, particularly accentuating the act of rape of minor A., who was only age 12 at the time.

183. In addition, the Trial Panel properly took into account the Accused's personal situation, particularly his prior convictions, as well his persistency and readiness to fully complete the furtherance of the offenses. The Trial Panel also properly evaluated the other aggravating circumstances related to the Accused, the degree of criminal activity resulting from his acts, the degree of danger for the protected value as well as the mere act of

commission of the crime. Thus, the reasoning of the challenged Judgment properly indicated that the ultimate effects of the Accused's acts are apparent from the injured parties' physical and mental pain, as well as their degradation. Therefore, considering the thus established state of facts, the Appellate Panel also upholds all the facts highlighted and given a certain weight by the Trial Panel. The Appellate Panel concludes that the imposed 17-year prison sentence is completely adequate and proportionate with the gravity of the committed crime and the Accused's degree of guilt.

184. In view of the foregoing, the Appellate Panel also dismissed as ill-founded the Prosecutor's and the Defense's appellate arguments advanced in relation to the imposed sentence.

185. For all the foregoing reasons, pursuant to Article 310, as read with Article 313 of the CPC BiH, it was decided as stated in the enactment clause of this Judgment.

**Minutes-taker:**

**PANEL PRESIDING**

**Legal Advisor**

**J U D G E**

**Bojan Avramović**

**Mirza Jusufović**

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