No: X-KRŽ-06/202
Sarajevo, 12 January 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, the Panel of the Appellate Division of Section I for War Crimes, composed of Mirza Jusufović, the Presiding Judge, and judges Dragomir Vukoje and John Fields, as the Panel members, with the participation of the legal officer Medina Hababeh, the record-taker, in the criminal case against the accused Željko Lelek, for the criminal offence of Crimes against Humanity in violation of Article 172(1) of the Criminal Code of Bosnia and Herzegovina (CC BiH), ruling on the Appeal of the BiH Prosecutor's Office no. KT-RZ-89/06 of 20 August 2008 and the Accused's Appeal filed by his defence lawyers Fahrija Karkin and Saša Ibrulj of 19 August 2008, against the Judgement of the Court of Bosnia and Herzegovina no. X-KR-06/202 of 23 May 2008, at the session held in the presence of the Prosecutor of the BiH Prosecutor's Office Božidarka Dodik, the Accused himself, and his lawyers Fahrija Karkin and Saša Ibrulj from Sarajevo, on 12 January 2009 handed down the following

J U D G E M E N T

The Accused's Appeal filed by his defence lawyers Fahrija Karkin and Saša Ibrulj is hereby **dismissed as unfounded**, while the Prosecution Appeal is **partially granted**, so the part of the Trial Judgement of the Court of BiH no. X-KR-06/202 of 23 May 2008 **relating to sentencing is hereby modified** and the Accused Željko Lelek is now **sentenced to 16 years of imprisonment** for the Crimes against Humanity, of which he was found guilty, in violation of Article 172(1)(h) CC BiH in conjunction with subparagraphs d), e), f) and g) of the same Article, as read with Article 29 CC BiH in relation to Sections 2 and 4 of the Trial Judgement, and all in conjunction with Article 180(1) CC BiH. The time spent in custody from 5 May 2006 onwards shall be credited towards this prison sentence pursuant to Article 56 CC BiH.

The rest of the Trial Judgement is hereby upheld.

Reasoning

1. The Judgement of the Court of Bosnia and Herzegovina (Court of BiH) no. X-KR-06/202 of 23 May 2008 found the Accused Željko Lelek guilty of the acts described in the operative part of the Judgement: Crimes against Humanity in violation of Article 172(1)(h) in conjunction with subparagraphs (d) (*Count 2 of the Amended Indictment*), (e) *(Count 4 of the Amended Indictment)*, (f) *(Counts 2 and 3c of the Amended Indictment)* and (g) *(Counts 3c and 3d of the Amended Indictment)* CC BiH, as read with Article 29, in relation to Sections 2 and 4 of the Trial Judgement *(same as the Counts of the Amended Indictment),* and all in conjunction with Article 180(1) CC BiH.

2. For this crime, the Trial Panel sentenced the Accused Željko Lelek to 13 years of imprisonment. Pursuant to Article 56 CC BiH, the time spent in custody between 5 May 2006 and the day he is to begin serving his term in prison shall be credited towards the prison sentence. Pursuant to Article 188(1) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), the Accused shall reimburse the costs of the criminal proceedings incurred in relation to the convicting part of the Judgement. Pursuant to Article 189(1) CPC BiH, the Accused is exempted from the costs incurred in relation to the acquitting part of the Judgement and the one dismissing the charges, and these costs shall be borne by the Court.

3. Pursuant to Article 198(2) CPC BiH, the injured parties Mirsada Tabaković, the witnesses S, A, D and others have been advised to take civil action to settle their property claims.

4. The same Judgement acquitted the Accused of the charges that he committed the criminal offence of Crimes against Humanity in violation of Article 172(1)(h) in conjunction with sub-paragraphs (a) and (g) CC BiH as described in Sections 1, 3a and 3b of the operative part of the Trial Judgement *(corresponding to the Counts of the Amended Indictment),* while the charges for the acts described in Counts 1 and 2 of the initial Indictment (whereby the Accused would have committed the criminal offence in violation of Article 172(1)(h) in conjunction with (a) CC BiH) were dismissed because the prosecutor dropped them at trial.

5. Prosecutor of the BiH Prosecutor's Office and the Accused, through his defence lawyers, appealed the Judgement within the statutory deadline.

6. In its Appeal lodged with the Court on 20 August 2008, the prosecution contests the Judgement for: essential violation of criminal procedure provisions of Article 297(1)(h) and (k) and (2) CPC BiH, violation of the criminal code under Article 298(1)(b) CPC BiH, the erroneously and incompletely established state of facts (Article 299(1) CPC BiH), criminal sanction (Article 300(1) CPC BiH); the prosecution proposes to the Appellate Panel of the Court of BiH's War Crimes Section to grant the entire Appeal as grounded, overturn the contested Judgement and, pursuant to Art. 315 CPC BiH, order a trial to eliminate the violations of the criminal procedure provisions, re-adduce the evidence in relation to which the state of facts has been erroneously and incompletely established, and subsequently, find the Accused guilty of all crimes as charged and sentence him to a long-term imprisonment, in accordance with law.

7. Also, on 19 August 2008 the Accused filed an Appeal, through his lawyers, Fahrija Karkin and Saša Ibrulj, for the state of facts being erroneously and incompletely determined, misapplication of the criminal code and the decision on sentence, moving the Appellate Panel of the Court of BiH to modify the contested Judgement and acquit the Accused on the basis of Art. 284(c) CPC BiH for lack of evidence, or, alternatively, to modify the legal qualification of the crime of which he was found guilty in the Judgement into the War Crimes under Article 142 CC SFRJ and, consequently, alter the sanction by reducing the prison term significantly, or, alternatively, to overturn the contested Judgement, order retrial and presentation of the same and new evidence.

8. In its response to the Appeal, the prosecution generally proposes to the Appellate Panel to dismiss the defence Appeal as unfounded; the prosecution elaborated in detail on individual arguments of the defence Appeal.

9. On 12 January 2009 the Appellate Panel held a session pursuant to Art. 304 CPC BiH where the prosecution presented its Appeal and responded to the defence arguments, and the defence was satisfied to only state that they entirely stand by their arguments and proposals as made in writing.

10. The Appellate Panel re-examined the contested parts of the Judgement and decided as stated in the operative part for the following reasons:

1. With reference to the convicting part of the Judgement
1.1. General considerations

11. In this part of the contested Judgement, the Accused Željko Lelek was found guilty of the acts and offenses alleged in Counts 2, 3c, 3d and 4 of the amended Indictment i.e. that during a widespread and systematic attack by the Serb army, police and Serb paramilitary formations against Bosniak civilian population in the area of the Višegrad Municipality, as a member of the reserve force of the Public Security Station Višegrad, knowing about the attack, throughout April, May and June 1992, he persecuted Bosniak civilian population on political, national, ethnic, cultural, religious grounds by taking part in the severe deprivation of physical liberty in violation of fundamental rules of international law, unlawful imprisonment, rape and torture, and other forms of sexual violence, and forcible transfer of the population at the time, place and manner described in the operative part of the Judgement.
12. Having thoroughly reviewed the content of the Judgement and all the evidence individually and in relation to each other, and viewed through the perspective of the arguments made in the Appeal (including the prosecution arguments related to the acquittal and to the part dismissing charges against the Accused), this Panel found such arguments uncorroborated by any properly and completely established body of facts in the contested Judgement. In general, the Judgement contains valid and acceptable reasons for all decisive facts. As a matter of fact, the Judgement first lists the presented evidence, presents its actual substance, reveals its internal and external contradictions and assesses the evidence from both possible aspects: substance and credibility; it then elaborates in detail on all of its assessments, and applying this methodological and procedural approach, it demonstrates the underlying evidence for each fact it finds determined in accordance with the "beyond a reasonable doubt" standard, no matter what category a fact falls in; this will be elaborated in detail hereunder.

1.2. With reference to the general element of the criminal offence – existence of widespread and systematic attack

13. As regards the convicting part of the Judgement, the defence Appeal is principally focused on contesting the underlying elements of the general element of the offence which is portrayed as a widespread and systematic attack against civilians, in this case, the Bosniak population, as a primary object of the attack. The defence Appeal is principally focused on contesting the Accused's knowledge of such an attack in the territory of Višegrad at the

relevant time, arguing that his personal attitude as an alleged perpetrator is not properly and completely determined or elaborated in the contested Judgement in terms of objective acts and objective consequences.

14. Following the arguments of the Appeal, we shall first deal with the general element of the criminal offence of Crimes against Humanity and whether its requirements are met in the case at hand.

15. The existence of the general (*chapeau*) element of the criminal offence of Crimes against Humanity in violation of Article 172 of the CPC of BiH (the existence of a widespread or systematic attack against the civilian population) has not been challenged by the defence Appeal. However, the Appellate Panel has done a special analysis of whether the underlying elements of such an attack have been satisfied. The defence Appeal contested the *nexus* between the acts of the Accused and this attack, that is, the prohibited acts having been committed as part of this attack and the Accused's knowing of such an attack. Following the presented evidence, the Trial Judgement answered this question affirmatively. Under the Judgement, the Accused Željko Lelek was a member of the MUP of the Republika Srpska during the period between 4 April 1992 and 30 June 1996 (Certificate of the RS MUP, Višegrad Public Security Station, dated 15 August 2002), and at the relevant time, in May–June 1992, he committed the criminal offences; the Accused made a personal contribution to these crimes, and this Panel fully supports such findings and legal assessments.

16. The analysis of the mental state (*mens rea)* of the Accused at the time of the perpetration of the offence should be limited to the determination of (1) the *intent* to commit the criminal offence, in combination with (2) the *awareness* of a broad context in which the criminal offence is occurring.[1] That the Accused Lelek was aware of the contextual basis into which his underlying crimes fit and that he was aware of the nexus between his acts and this context, or that he at least run a risk of having his acts become part of the attack characterised above, is best demonstrated by his status of a policeman and his activities falling within the scope of his regular police duties, which, beyond any doubt, allowed him to have an insight into everyday developments in Višegrad and the surrounding area in connection with the persecution of the Bosniak civilian population. As rightly concluded in the Trial Judgement, Željko Lelek was a person, who, as opposed to ordinary people, was certainly in a position in which he had a full insight into and the knowledge about the developments, all in the situation of a well-established pattern of frequent

[1] See the Decision of the Trial Panel in case Kupreškić et al., 14 January 2000, para. 556

crimes and intense presence of local Serb military and police forces (which he himself was a member of), as well as various paramilitary units and military formations from Serbia. The Panel finds additional corroboration to this finding (as the prosecutor rightly noted) in the Accused's testimony about protecting and helping his Bosniak neighbours leave Višegrad, which suggests that he was aware of the attack on this population.

17. The Appellate Panel notes that when elaborating on these elements, which the defence finds disputable, the Trial Judgement (pp. 21-23) provided a clear and reasoned position and arguments proving that the required underlying elements of the attack characterised above have been satisfied; this Panel accepts this position without reservations. Moreover, the Panel finds that the Accused not only knew of such an attack but that the actions which he undertook himself or with other persons rather include a higher degree of criminal behaviour when considering the nature of these offences, their notoriousness, political circumstances in which they were happening and whose object was principally the civilian Bosniak population. It is unlikely that the Accused did not know that those misdeeds were part of a broad context and plan because at that time he was a member of the police forces proven to have been actively participating in the taking away of the Bosniak civilians from their own homes for interrogation at the police station where they were tortured. This is all the more so because the Accused was evidently present in the urban area and its surroundings where many serious crimes were indisputably committed for the sole purpose of forced transfer of the Bosniaks from Višegrad.

18. Quite the contrary, this Panel concludes that all of his acts and activities in the relevant period fit into the well-established crime pattern and nothing singles them out from the context of the attack, particularly when viewed through the individual crimes which this Panel too found beyond a reasonable doubt to have been committed by the Accused being fully aware of the gravity of their consequences.

19. In this regard, a personal attitude of the Accused towards the perpetrated crimes and his knowledge of all the elements of the objective perpetration are clear, and such attitude may not be treated as the execution of orders or particular official actions. As a policeman, the Accused must have known about the unlawfulness of the severe deprivation of liberty, torture, rape, unlawful detention and moving out of the Bosniak civilians only from Višegrad, of which he was found criminally responsible. Finally, such offences are outlawed in the countries of all civilized nations and in all legal systems

and they constitute severe violations of international humanitarian and applicable law and they cannot be subject of impunity, because even if those were the orders issued by his superiors as the Accused argues, he must have known that they were unlawful and, under the circumstances, he could have distanced himself from them if he could not have refused to execute them.

20. Considering the presented factual grounds, this Panel did not find questionable the existence of *dolus specialis* or discriminatory intent on the part of the Accused, which is required for persecution of the civilian Bosniak population, on which the Trial Panel provided sufficient and for this Panel acceptable reasons.

1.3. In relation to Count 2 of the operative part of the Judgement

21. This Section of the Judgement covers several different sets of events of which the Accused was found guilty. Both the prosecution and defence appeals challenged the findings of the Trial Panel under sub-sections a), b) and d) of this Section of the Judgement.

In relation to sub-sections a) and b)

22. The first set of criminal acts of which the Accused was found guilty in the contested Judgement includes severe deprivation of liberty of the injured parties Hasan Ahmetspahić and Nail Osmanbegović and torture of the injured parties Zejneba Osmanbegović and her mother. The Court did not accept the legal qualification of forced disappearance offered by the Prosecution in relation to the first two persons above, finding that these acts constitute the elements of the criminal offence of Crimes against Humanity in conjunction with severe deprivation of liberty, which is why both the prosecution and the defence filed their appeals.

23. The essence of the part of the prosecution Appeal relating to this charge boils down to the assertion that the Court's conclusion about the legal qualification of the relevant acts is wrong because, the prosecution argues, all required elements of forced disappearance have been fulfilled. This is reflected in the prosecution's challenging of the Trial Panel's conclusion that „ *there is no evidence as to what the Accused specifically knew would happen to them once they were taken away, nor is there evidence that the Accused knew about the fate awaiting them at the time he unlawfully deprived them of liberty and took them away"*; and, in the opinion of the prosecution, such a conclusion on the nonexistence of intent on the part of the Accused constitutes an essential

violation of the criminal code (Article 298(b)) and an essential violation of the criminal procedure provisions (Article 297(1)(k) CPC of BiH).

24. As for the specific charge in this Count of the Indictment, the defence Appeal contests the credibility of the testimony of the witness Zejneba Osmanbegović, pointing to the contradictions between her prior statement given to the SIPA during the investigation and her trial testimony, which, in the opinion of the defence, constitutes the grounds for filing an appeal for the erroneously and incompletely established state of facts.

25. On the contrary, the Appellate Panel notes, in relation to the assessment of evidence of this crime, that the Trial Panel offered valid and exhausting reasons for which it took certain facts as proven or unproven (with respect to the omitted factual description), and that it explained and elaborated in a satisfactory manner how it had evaluated the witness testimonies, specifically of the witness Zejneba Osmanbegović.

26. First of all, before reaching the final conclusion on the guilt of the Accused, the contested Judgement presented all relevant evidence. During the first-instance proceedings, the following witnesses testified to the above circumstances: prosecution witness Zejneba Osmanbegović and the defence witnesses Božo Tešević, Željko Šimšić and Rade Stanimirović. The Trial Panel assessed their testimonies and the presented documentary evidence in accordance with Art. 281(2) CPC BiH.

27. The key witness to these two sub-counts of the Indictment, who was also a victim of one of the criminal acts, Zejneba Osmanbegović, described in a consistent and reliable manner the events that happened in the relevant evening. The fact that the Trial Panel did not evaluate the evidence the way the defence would have liked it and that it did not analyse each and every sentence this witness said in the investigation and at trial, does not make this part of the Judgement flawed or incomplete but rather it makes it clear and focused on the essential elements of the relevant acts.

28. The issue of “inconsistency of the accounts“ that this witness gave has already been adequately considered and addressed in the contested Judgement which offers a quite specific conclusion that some minor inconsistencies do not undermine the Panel’s conclusion that the Accused participated as a co-perpetrator in the apprehension or severe deprivation of liberty of Hasan Ahmetspahić and Nail Osmanbegović and in torturing the injured party Zejneba Osmanagić and her 80-year old mother.

29. First, the witness Osmanbegović described very clearly the arrival of the Accused Lelek with Oliver Krsmanović and Gordana Andrić in her house. She said that they had brought with them Hasan Ahmetspahić, who was all covered in blood and so scared he could not talk. Following certain events described in detail in the Trial Judgement (pp. 28-29.), they took away Nail and Hasan at around 3:30 a.m. without any explanation. Shortly after they were taken away Hasan was found dead in the Drina River. Her husband Nail has never been found.

30. Both this Panel and the Trial Panel found the testimony of this witness fully credible when she testified about the relevant acts of severe deprivation of liberty and torture, and there are no dilemmas about her credibility. Therefore, the Panel finds all defence objections to the credibility of this witness unfounded and inadequately corroborated.

31. The moot details pointed by the defence may, in no way, affect the creation of a picture about the responsibility and participation of the Accused in the relevant acts different from the one determined in the Trial Judgement. The trial testimony of this witness and the identification of the Accused were completely reliable and consistent, which is why this Panel does not have any doubts regarding the participation of the Accused in these events as found by the Trial Panel. It is necessary to underline again the particular gravity of the acts perpetrated when the Accused came to the house of unprotected civilians together with the other two armed followers in the middle of the night, bringing with him Hasan Ahmetspahić all covered in blood, which, beyond any doubt was a memorable scene for the witness and difficult to suppress or forget. Under the circumstances, this scene itself was enough to fill people with horror and it was a precursor of the events which followed soon. That such behaviour of the Accused bore with particular severity on the injured parties follows from the fact that they saw the Accused as their fellow-citizen and particularly as a person ensuring order and lawfulness, and also someone they could rely on and seek help and protection from.

32. It is necessary to emphasise that in case of such criminal offences it is realistic to expect the witness-victim to focus all his/her attention to the situation, which lasted for over three hours in this case, and for the persons being tortured it certainly seemed to last forever. However, it is also realistic to expect that a high level of stress and fear affects the ability of the victim to observe and memorize precise details or sequence of the events independently from the entirety and the main course of the event.

33. Even if the Accused was not present in the room when the injured party Zejneba sat on Hasan's stomach, it is clear that the Accused consented to all actions taken by Gordana and Oliver that night. This is because it was the Accused himself who lead the violent group that night, and that subsequent events took place after the Accused had asked the witness and her mother to take their clothes off. Therefore, the Judgement clearly sets out strong and convincing facts from which the existence of both intellectual and voluntaristic element on the part of the Accused can be inferred in relation to his involvement in the relevant acts or his decisive contribution to the act of torturing of the two women, as required for co-perpetration under Article 29 CC BiH.

34. The theory advanced by the defence through the testimonies of the witnesses Božo Tešević, Željko Šimšić and Rade Stanimirović that they had never seen the Accused in the company of Gordana Andrić and Oliver Krsmanović lacks a necessary quality to provide his alibi for that night. Even if they had never seen them together before – the allegation found by this Panel to be unrealistic but a mere defence theory – the fact is, given that it was all happening after midnight, that these witnesses cannot claim that the Accused was not with the mentioned people at that time that night. They simply cannot claim something which they have not seen or eye-witnessed, or about which they do not have any knowledge, even indirect one.

35. This position of the Court is further supported by the testimony of the witness M.H. who testified in the main trial that, among others, the Accused and Oliver Krsmanović raped her. All of this leads to the conclusion that the Accused, Krsmanović and other members of military formations had opportunities to see each other during the relevant period.

36. Therefore, this Panel finds the allegations of these witnesses irrelevant in contesting the findings and arguments of the Trial Panel in relation to this incident.

37. As for the arguments in the prosecution Appeal related to the legal qualification of the acts found to have been perpetrated by the Accused, the Panel finds them unfounded and it fully supports this conclusion of the Trial Panel.

38. It should be recalled that „Court is not bound to accept the proposals […] regarding the legal evaluation of the act“ (Article 280(3) CPC BiH), meaning

that the Court is not bound to accept any proposals of the Prosecutor and that it is independent when determining the facts in accordance with the substantive criminal law and that it may anyway have a position regarding the legal evaluation of the act different from the Prosecutor's one as set forth in the Indictment, as long as it adequately reasons such position.

39. This Panel holds the Trial Judgement to have provided exhaustive reasons for not accepting the legal evaluation of the Accused's acts from the Indictment. Following the citation of the elements of both underlying crimes in violation of Art. 172(1)(i) and (e) CC BiH, the Judgement provided a reliable analysis of the requirements to be fulfilled in case of both acts, as well as its conclusion as to why it considers that the requirements for the act of severe deprivation of liberty (subparagraph e)) have been satisfied and why those for forced disappearance (subparagraph (i)) have not been satisfied.

40. The Prosecution Appeal specifically contests the Court's conclusion above and it makes a counter-thesis that the Accused had knowledge about what would happen to the people deprived of liberty after they had been taken away, or that he knew about the fate awaiting them – their violent death.

41. The Appellate Panel notes that even though it is indisputable that non-Serb civilians were being taken away from their Višegrad homes at the relevant time and that they have most often went missing after that, it does not automatically mean that the Accused was not only aware but that he also intended to remove the injured parties from protection of law for a long period of time. This is particularly so when tested against the "beyond a reasonable doubt" standard.

42. This Panel also emphasises that, even though the two persons have not been seen alive after they had been taken away, the Prosecutor did not offer any evidence proving that the Accused specifically knew what would happen to them after they had been taken away or that he knew about the fate awaiting them at the time he unlawfully deprived them of liberty and took them away.

43. The Appellate Panel notes that both legal qualifications, the one offered by the Prosecution and the one applied by the Trial Panel, have the same weight under criminal law and are sanctioned by the same type and length of punishment. However, this Panel also notes that, on the basis of the determined facts, there exist only the essential elements of the criminal offence of severe deprivation of liberty in violation of Article 172(1)(e) CC BiH.

In relation to sub-paragraph (d)

44. As for the violations of the criminal procedure and the erroneously and incompletely established state of facts, the Prosecution Appeal also contests the convicting part of the Judgement addressing this sub-count where, on pp. 36 – 39, it omits the factual description of the event of disappearance and taking away of Fehim Tabaković, Ferid Tabaković, Izet Tabaković, Fahrudin Cocalić and Ismet Memišević from their houses in the Dušće settlement.

45. Generally speaking, the Trial Panel finds a reason for drawing this factual conclusion in the fact that none of the witnesses to the events that indeed happened could reliably and with the necessary degree of certainty identify the Accused, on the one hand, and on the other hand, in the fact that their statements in relation to his concrete acts were not sufficient to find him conclusively responsible.

46. The Appellate Panel notes that all presented reasons for lack of evidence for the relevant factual determinations are concrete and logical, considering that none of the witness who testified about this circumstance managed to persuade the Court to conclude within the "beyond a reasonable doubt" standard that this act was perpetrated by the Accused himself. This Panel has no doubts about the perpetration of this act. However, as to the crucial issue - whether the criminal responsibility for its perpetration may be imputed to the Accused, it is not possible to give an affirmative answer with the necessary and requested reliability based on the witness testimonies.

47. More specifically, Mirsada Tabaković, Vezira Tabaković, Mujesira Memišević and the witness C testified to this circumstance. A comparison of their testimonies, depending on the stage of the proceedings, reveals certain inconsistencies and uncertainty and one could say that those are either the „hearsay" testimonies, meaning indirect ones, or the witnesses were giving „serial testimonies". However, considering the "beyond a reasonable doubt" standard, no conviction may be handed down on the basis of the testimonies of such quality.

48. What was disputable in the testimony of Mirsada Tabaković and a reason for the Trial Panel not to find sufficient the details concerning her identification of the Accused is the fact that she admitted that two soldiers were present when the criminal offence was perpetrated and her husband and brother-in-law taken away, and that she was not sure about the name of one of the soldiers, although he looked familiar to her.

49. The Prosecution Appeal clarifies the testimony of the witness Vezira Tabaković saying that she is not claiming that the Accused killed the injured parties but rather that he took them away. A conclusion about the reliability of her testimony may be drawn on the basis of her identification of the Accused in the courtroom, invoked by the Appeal, when she states the following, *"It is very likely it was him. But he was wearing a uniform... This is the one, I'm sure."*

50. This Panel also finds it obvious that this is a hypothetical statement, that is, probability rather than a reliable testimony. This is more so if one considers that it was only after the war that the witness heard from Mirsada that her husband and sons had been taken away by Lelek, meaning that she bases her statement on the statement of the witness whose allegations concerning the identity of one of the culprits that evening this Panel too did not find absolutely reliable.

51. Regarding the objections to the "high standards for proving the identity of perpetrators", the Panel notes that these standards, too high or not, must ensure a thorough respect for the principle of legality under Article 2 CPC of BiH, the rules of which, combined with the guaranteeing function of this Code, are supposed to provide that no innocent person be convicted; in the case at hand, this principle has been reinforced with the *in dubio pro reo* rule. This Panel notes that Trial Panel was guided only by such requirements when drawing its conclusions.

52. The Appeal incorrectly argues that the only thing the Trial Panel said about the testimony of the witness C is that it was confusing. The contested Judgement previously stated (p. 38 paras. 3 and 4) that the witness testified that she heard from Kadira Cocalić about Ferid Tabaković and his two sons, Faruk Cocalić, Džemo Zukić and his son being taken away, and that she did not eye-witness their taking away although during the investigation she did not mention the Accused Lelek in the context of this. It is evident that this is an indirect witness which is in itself a reason enough to treat this testimony with the necessary caution with regard to handing down a conviction by applying the "beyond a reasonable doubt" standard.

53. In addition, having elaborated in detail the testimony of this witness in relation to the taking away of the men including Ismet Memišević, who, according to her, was beaten up by many people, including the Accused Lelek, the contested Judgement concludes that her testimony relating to the identity

of the persons who took him away was confusing. This Panel shares this conclusion.

54. This position of the Court is also corroborated by the fact that this witness was the only one who mentioned the taking away of Ismet Memišević and that there is no other evidence to support her allegations to lead to a different conclusion by the Court.

55. To have an understanding of the situation different from the one found by the Trial Panel to be useless are the allegations of the Appeal that the witness C corrected her statement clarifying that Leka, not the Accused, beat Memišević, as she stated in the investigation. This Panel opines that this witness added that she was sure to have seen the Accused together with other soldiers taking away their men, including Memišević, on that day, probably in order to leave the Accused in the criminalized zone in any way and to make her testimony more credible.

56. The foregoing reasons render unfounded the allegations of the Prosecution Appeal that the contested Judgement did not fully address the subject of the charges in this part, that the reasoning of the Judgement is contradictory i.e. there is not substantiation with regard to the key facts, and that this Judgment is for this reason faulty in relation to the state of facts.

57. The Trial Panel assessed the entire body of evidence in accordance with the imperative provision in Art. 290(7) CPC BiH and it set out precisely and fully the reasons for which it found the relevant factual determinations proven (or unproven), particularly evaluating the credibility of the contradictory evidence, and it gave the reasons guiding it in the determination of the concrete criminal responsibility, applying all along the relevant provisions of the criminal code to the Accused and his act.

1.4. In relation to Section 3c of the operative part of the Judgement

58. In this section of the findings of the Trial Judgement, the Accused Željko Lelek is found guilty of Crimes against Humanity – rape and torture of the injured party M.H., at the time and place and in the manner described in the operative part of the Judgement.

59. The defence finds the testimony of the witness M.H. inconsistent, summarizing the alleged inconsistencies and/or comparing her prior statement to her trial testimony. It also notes that the identity of this witness was not

protected in the SIPA statement, while she was a protected witness at trial, and, as a consequence, the effect of cross-examination was considerably reduced.

60. The Appellate Panel finds the Trial Panel's assessment of the Accused's responsibility for this crime well-founded and reasonable, noting that the accounts given by this witness, particularly those referring to the identity of the Accused, are logical, and therefore any counter-arguments in the Appeal may not be subject of any further discussion.

61. The Appeal is essentially aimed at discrediting this witness by way of evaluating some alleged inconsistencies by taking them out of the context, and in the opinion of this Panel, the Defence attaches to them the unnecessarily crucial importance in creating the big picture of this crime. Just like the Trial Panel, this Panel too has no doubts about the credibility of the testimony of this witness, primarily because it finds incontrovertible the witness M.H.'s testimony concerning the identification of the Accused. She knew him well before the war and she does not have any dilemmas about his identity.

62. Here the Panel shall discuss the objections to the identification of the Accused by the witness. Among other things, the witness mentioned that the Accused was one of those who escorted the convoy when she left Višegrad. The Appeal finds her allegations uncorroborated because the witness D, for whom she said to have been in the convoy, mentioned neither her nor the Accused escorting the bus.

63. The Panel emphasises that because of the confusion and lack of precise identification of the Accused by the witness D, the Trial Panel could not give credence to the key parts of her testimony, with which this Panel agrees. It is likely that for this reason the witness D did not mention the Accused being in the bus because she obviously did not know him at the time, whereas the witness M.H. specifically said that the Accused was sitting in the front, with the driver.

64. Considering the Appeal arguments, this Panel finds irrelevant the fact insisted upon by the defence that the witness said in her first statement that she set off to Sase to her sister and, in the second, that she was having a walk when Lukić came by and threw her in the car, because, as the Panel concludes, the only important and indisputable fact is that Milan Lukić took the injured party to the Vilina Vlas Spa and kept taking her there on a daily basis.

65. In relation to the date of rape, the defence is wrong to argue that according to the witness M.H. the rape occurred on 5 or 6 June 1992, offering an alibi to the Accused for those days in the form of testimonies of the defence witnesses Vidoje Mikavica and Dejan Šimšić. The Panel does not want to question the credibility and accuracy of the testimonies of these witnesses because they are not relevant in determining whether this crime was committed or not, considering that the witness said that she was brought to the Spa in early June and she did not specify the date. Then, day after day, mistreatments and rapes followed, and one of those days, not being able to specify when, the Accused arrived. She said, "*second, third or maybe the fourth, I apologize I may not be able to remember when exactly, Željko Lelek arrived in the room.*" Therefore, the witness is not sure which particular day the Accused came, which makes sense, considering the trauma she has been through, the lapse of time and her sense of disorientation in that period. For that reason the concocted alibi for the Accused for those two days is unfounded and irrelevant to the time the crime was committed.

66. In the context of certain inconsistencies in the testimony of this witness accentuated in the Appeal, the Panel stresses that due to the lapse of time and interpolation of many other events in the victim's life, or the attempts to suppress in her consciousness the hardship she had been through, loss or information distortion are reasonable. However, when a traumatic experience is evoked, as it has been shown in practice before, a victim may often single out from her memory very clearly the image of the perpetrator and the unfortunate event itself, whereas s/he is often incapable to describe in detail the sequence of other events taking place before or after that, which only leads to the conclusion that this is not an account constructed subsequently.

67. The testimony of the defence witness Dragoljub Ivanović did not undermine the final decision of this Panel because only one allegation by this witness -- that the injured party is a semi-literate person -- speaks about the purpose of his testimony: to discredit this witness. It is not clear what this remark is supposed to mean -- that such people are not capable of speaking about their hardships or that they should not be trusted because no matter what ordeal they have been through they cannot credibly testify about it. Naturally, such reasoning implied by the witness Dragoljub is found by the Panel to be unacceptable and it is calculated to be in favour of the Accused.

68. This witness said that when he asked the witness M.H. if she had experienced any violence before, she said yes, only once, and this Panel assesses this in the context of everything said above. This answer means that

the witness did not want to reveal any details to this person, for the reasons known to her only, be it shame and shyness or mistrust, and she gave this answer only to satisfy his curiosity about something she did not want to talk about. This conclusion is also supported by the fact that even if she had not been raped by Lelek it is evident that she was raped by Lukić on multiple occasions, and in that case such answer would be imprecise, and this only leads to the above-presented conclusion.

69. That the witness was at the Vilina Vlas Spa and that she was raped there by the Accused, among others, is supported by what she said about other Muslim women being there, subjected to the same tortures. First of all, the witness D, as well as a certain Jasmina, of whom the witness said, "...*Jasmina looked miserable, she was in a corner... and he* (meaning the Accused) *approached Jasmina*", she heard later that Jasmina jumped off the window. The defence witness Petar Mitrović also confirmed these allegations when he says that he went to the Spa together with the Accused and that they found out there that their Bosniak neighbours were killed, and that Jasmina Ahmetspahić jumped off the window. This witness actually connected the Accused with the time and place of the acts under this Count of the Indictment.

70. On the basis of the testimony of the witness M.H. the Trial Judgement (pp. 40-43.) reasoned its conclusion very clearly and precisely that the acts of the Accused constitute the elements of the criminal offence of rape outlawed by Art. 172(1)(g) CC BiH, and that this rape constitutes the act of torture as well. This is because the witness was brought to the Vilina Vlas Spa to be sadistically abused by the perpetrators only because she belongs to a particular ethnic group and for illicit discriminatory purposes. Before this instance of rape she was sexually abused on multiple occasions and the Accused raped her while she was in such physical and mental pain, despite her obvious suffering, and this was all done to severely humiliate her and degrade her dignity.

71. For all the foregoing reasons this Panel has no doubts about the criminal responsibility of the Accused for these crimes. The Accused was aware of all prohibited purposes for which the witness would be raped and he wanted such an outcome, and his intent includes both rape and torture of the injured party as its implication.

1.5. In relation to 3d of the operative part of the Judgment

72. The Trial Judgement found the Accused guilty under this Count of the Indictment as well, that is, of Crimes against Humanity committed through a grave sexual violence against the injured party C.

73. The Appeal arguments boil down to an interpretation of the testimony of this witness different from the interpretation of the Trial Panel's and to its alleged contradictions. However, if both accounts – the statement given to the SIPA during the investigation and her trial testimony – are analysed in their entirety and in conjunction with other evidence, and if they are placed in the overall context of developments and acts of the Accused in the relevant period, it becomes clear that a comparison between these accounts does not reveal any inconsistencies in relation to the relevant factual determinations.

74. In the first place, the Trial Panel properly concluded that the Accused was not a member of Momir Savić's unit, which the witness did not argue at all, but that she rather saw him on that occasion with the people whom she recognized as persons she knew from before.

75. This Panel notes that it is evident that at the relevant time, when the widespread and systematic attack was underway, there were various military and paramilitary units in the territory of the Višegrad Municipality, and their activities in that period could not be delineated, so it is quite realistic that the Accused was in the company of Ljubiša Savić, Zoran Tešević and others who were members of Momir Savić's unit.

76. Therefore, the Appeal arguments are unfounded in this regard, and the allegations made by the defence witnesses Nenad Stefanović, Nikola Savić, Goran Savić, Brane Tešević, Srđan Vučičević that the Accused had never been with them are unconvincing considering the serial nature of their testimonies in relation to this factual circumstance.

77. The Panel suggests to the defence that it could have clarified any noted inconsistencies in the witness testimony during cross-examination, in particular those relating to the identification of the Accused, however the defence did not do it. Obviously, the defence did not exercise this right for the reasons it only knows, and it did not ask the witness to provide a detailed description of the Accused to verify its allegations, that is, prove that the witness C does not know the Accused.

78. This Panel finds it undisputable that the witness C knew the Accused and that he came at the relevant time to her house and demanded money and gold. He also looked for her daughter, son and husband, and not finding anything, in the witness' words, "he continued to sadistically abuse her". He beat her and he made her "fondle his sex organ," during which time he cursed her "Turkish mother" and asked her if she was "disgusted because he was a Serb."

79. It clearly ensues from the statement that this witness gave to the SIPA (no. 17-04/2-04-2-132/06 of 20 March 2006, p. 6) that the witness did not specify anywhere the date of the arrival of Željko Lelek and of this crime, because, as she put it „*we stayed there for several days ... during which time Željko Lelek and many others … would come every day, two or three times. On one occasion Željko Lelek took off his trousers and asked me to fondle him ... He threatened me and forced me to take his sex organ in my hands...*" This also clearly shows that the defence allegation about the witness not having mentioned the taking of the sex organ in her first statement while she mentioned it in her second statement, is completely untrue.

80. The defence unsuccessfully tried to build the Accused's alibi by alleging his presence at the funeral of Vlatko Trifković on 14 June 1992 because it is clear that the witness was not sure about the date of this crime, either the date or the month, and for the reasons stated above (in section 3c) this does not affect the reliability of the testimony in relation to the relevant parts.

81. When the defence lawyer asked her why she was talking about an identifiable date - 13 June 1992 – and if that was the exact date when the relevant events took place (the circumstances referred to in Section 2 subsection d) of the Trial Judgment), the witness answered, "*... well, I don't know, I may have confused the dates because I do not remember, I am an illiterate woman...*"

82. There are no major departures in the testimony of this witness in comparison to her prior investigative statement. And the existing departures are, in the opinion of this Panel, a product of different examination styles during the investigation by police and the prosecutor's office, and at the main trial when a statement is subject of direct- and quite often very exhausting cross-examination during the proceedings with adversarial features. It is logical to expect differences in details between her testimony and her prior statements, or for her to remember at the main trial what she did not say before.

83. The Panel finds the testimony of this witness reliable and consistent in the relevant parts, and it particularly notes that in describing her hardships, that is, grave sexual violence, the witness testifies about what she indeed saw and experienced. That this is not a "serial statement" is obvious from the specific nature of the act itself and the manner of its perpetration. In the first place the witness says that the Accused was a nice and decent man before the war, that he did not do any harm to anyone. So, this means that she has no reason to charge him spuriously.

84. The witness C was subjected to force and threats to her life and physical safety when the Accused arrived in her house armed with another person, requesting money from her, and then, using his dominant position and power, and her helplessness, he cursed and assaulted her and in general behaved violently.

85. The Appellate Panel fully supports the conclusion of the Trial Panel that the acts of the Accused Željko Lelek, described in detail in the contested Judgement (pp. 42-43.), constitute the elements of the criminal offence of Crimes against Humanity committed by way of "grave sexual violence", which is, in the opinion of this Panel, proven beyond reasonable doubt.

1.6. In relation to Section 4 of the operative part of Judgement

86. This finding in the Trial Judgement is related to two acts committed in May 1992: assisting the imprisonment of Muslims in the police station and torturing a young man named Salko. The Trial Panel determined that the Accused is responsible only for the participation in the first act, that is, in the unlawful imprisonment of several Bosniaks.

87. Both the prosecution and the defence appealed this count of the Indictment.

88. The Defence Appeal analyses the testimony of the witnesses-victims of this crime: Suad Dolovac, Suad Subašić and Enver Džaferović, trying to discredit these witnesses using the theory that their imprisonment was justified, in short, for subversive activities and perpetration of crimes (see Appeal, p. 14.). Through defence witnesses the Appeal is also trying to prove that the Accused was not with the police i.e. that he did not have any powers in the detention unit and in the detaining of people therein because of the job he held at the time: material and technical equipment officer (MTS).

89. The Prosecution Appeal contests the part of the finding of the Court where it did not determine the responsibility of the Accused for the torture of the young man Salko, underlining that the witness Enver Džaferović was absolutely certain in his testimony as to what he saw when it comes to the perpetrators and the way of torturing this young man. The Appeal argues that it is not clear why this act of the Accused is not qualified as another inhumane act if the Trial Panel found it indisputable that the Accused was forcing Salko, half dead, to slap his own face.

90. Following a thorough analysis of the contested part of the Judgement insofar as contested by the Appeal and after a careful and full evaluation of all evidence adduced in relation to the relevant factual determinations, the Appellate Panel found both the prosecution and the defence appeal arguments absolutely unfounded and the Trial Panel's decision proper and well-founded.

91. The following witnesses-victims testified to this count of the Indictment: Suad Dolovac, Suad Subašić and Enver Džaferović, describing in detail their stay at the police station where they were detained in a room with bars on the door. The Panel does not doubt the allegations made by the witnesses Subašić and Dolovac about the presence and activities of the Accused at the police station i.e. that he occasionally performed the duty of a duty police officer and that he had the key and controlled the entrance to their cell. The witness Džaferović said he knew from before the Accused Lelek as well as his father Čedo.

92. In developing the defence Appeal arguments according to which the Court one-sidedly evaluated and accepted only the evidence that confirmed the responsibility of the Accused, it accentuates the testimonies of a number of defence witnesses who build a theory about the alleged impossibility of the Accused to have access to the detention facility or any links with it. Therefore, they all agree that at the relevant time the Accused was in charge of material and technical equipment, which, according to them, was a very demanding post requiring the Accused's constant presence.

93. The Panel finds these allegations unpersuasive and obviously aimed at concocting an alibi for the Accused. The Trial Judgement treated them properly and fully and it did not find them reliable, and this Panel agrees with that. The fact that the list of witnesses emphasised by the defence does not include Milan Miličević, Mirko Pecikoza and Miladin Nikolić, supports these conclusions because their testimonies do not suit the defence since they

confirm the allegations made by the injured parties that the Accused held the post of the duty officer in the station i.e. they saw him in the duty room and he had access to the keys of the detention room.

94. Finally, all prosecution witnesses confirmed that they were unlawfully imprisoned as civilians, that no criminal proceedings were conducted against them and that they were not deprived of liberty as members of the enemy army, but they were rather brought to the police station from their houses, in civilian clothes, without any weapons and without having been informed of the reasons for imprisonment.

95. The Trial Judgment rightly concluded that the Accused, being a police officer who was present at the police station, which was unequivocally proven, had to know that these people were imprisoned arbitrarily in the absence of any legal proceedings.

96. Contrary to the defence theory, the Accused demonstrated with his actions his will to decisively contribute to the perpetration of the relevant crime i.e. he acted as a co-perpetrator within the limits of direct intent. He had the „key to freedom“ with regard to the victims of the unlawful imprisonment and captivity i.e. he had the key of the door of the cell where they were placed and he decided when an individual will be taken out or brought in.

97. Everything said above indicates that the acts of the Accused, as the Trial Panel rightly determined, constitute the elements of the criminal offence of unlawful imprisonment in violation of the rules of international law, and therefore all unresolved issues according to the Appeal have been settled convincingly and in a substantiated manner, and the criminal liability has been proven to satisfy the „beyond a reasonable doubt” standard.

98. As for why the Accused’s torturing of the young man Salko is left out in the factual description, this Panel just like the Trial Panel has taken a position that the only thing that was incontrovertibly determined is that somebody brutally beat this young man, that Lelek was at the police station when he arrived and that he derided the young man and ordered him to slap his own face.

99. However, contrary to the prosecution’s arguments, the testimony of the three above-mentioned witnesses who testified to this circumstance are significantly inconsistent, and applying the principle *in dubio pro reo* a

conclusion is drawn that this charge was not proven to meet the required imperative standards.

100. More precisely, the differences are obvious when the witness Džaferović alleges that the Accused Lelek pulled the young man out from the cell at one point after he was brought to the station, he took him to the corridor and started beating him, and the witness saw this from the cell; however, the other two witnesses Subašić and Dolovac claim that the young man was beaten by the people whom they could not see from the cell, in the corridor immediately after he was brought. Furthermore, these two witnesses said that, after this young man was brought back to the room, Milan Lukić came the same day, approached the bar and grabbed the young man by his head, banged it against the bars causing him to lose consciousness, while the witness Džaferović did not mention this characteristic moment or Lukić's presence in general.

101. Therefore, for the foregoing reasons, and given the variety of events, it was not possible to determine with certainty that, first, Lelek indeed beat this man, and second, that the acts he undertook indeed caused serious bodily injuries, which must be satisfied in case of the criminal offence of torture either in the capacity of co-perpetrator or accessory.

2. In relation to the acquitting part of the Judgment

102. Pursuant to Art. 284(1)(3) CPC BiH (Art. 284(c) of the amended CPC), for lack of evidence that the Accused committed the acts, the Trial Judgement cleared him of the charges described in Sections 1, 3(a) and 3(c) of the contested Judgement (*corresponding to the respective Counts of the amended Indictment*) of Crimes against Humanity in violation of Art. 172(1)(h) in conjunction with (a) and (g) CC BiH.

2.1. In relation to Section 1 of the operative part of the Judgement

103. This Section of the findings of the Trial Judgement relates to the liquidation of at least four civilian Bosniak men at Sase on the Drina river bank in the spring of 1992, when the Accused and other people forced these Bosniaks to step into the river up to their waist and then they shot them dead by automatic rifle fire.

104. The prosecution Appeal contests this part of the Judgement for the erroneously established state of facts in terms of Art. 299(1) CPC BiH, which

led, in the opinion of the appellant, to a misconclusion about the key facts, and it is obvious that the Court could and should have found the Accused Lelek guilty of the acts described in this Count of the Indictment on the basis of the testimony of the witness K.B. The Appeal confronts the court's conclusion that no judgement may be based exclusively or decisively on the evidence gathered pursuant to Art. 11 or 14-22 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses (hereinafter: the Law on Protection of Witnesses).

105. In evaluating this piece of evidence and building its argument that the prosecution evidence for this charge is insufficient, the Court started from the fact that there is one single eye-witness to this event and that his/her identity remained undisclosed to the defence, meaning that for the defence this was an anonymous testimony.

106. The appellant's theory that the anonymity of the witness for the defence does not prevent it from cross-examining him or challenging his credibility through cross-examination devised to challenge the validity of the Trial Panel's conclusion that no conviction may be based on such testimony, is simply unacceptable! Given that the defence did not know the identity of the witness, it is irrelevant whether the protective measures under Art. 14-22 of the Law on Protection of Witnesses should have been applied in the case of this witness.

107. Since the imperative norm of Art. 12(8) has not been satisfied requiring a disclosure of the identity of the protected witness not later than at the time of the witness testimony in court in order to allow the defence to prepare for the examination, it is clear that here we are not dealing only with the protective measures envisaged in Art. 5-13 (save Art. 11) of this Law. Thus, it is evident that regardless of different modes of protection of the witness K.B. used in this case, anonymity is an incontrovertible consequence, that is, the defence did not know the identity of this witness, which ultimately has the same procedural effect as the measures provided under Art. 14-22 of the Law on Protection of Witnesses: the impossibility of basing a conviction exclusively or to a decisive extent on the evidence gathered pursuant to the quoted articles.

108. The discrediting of the witness K.B. should not be focused only on his trial testimony because it would be a considerable limitation of the defence right if the Accused did not know the identity of the witness. As a matter of fact, this is why the defence did not exercise its right to cross-examination of this witness. This Panel notes that the contested Judgement gave enough

reasons backed by arguments, among other things, thoroughly analysing and invoking the relevant provisions of: CPC BiH (Art. 91); the Law on Protection of Witnesses (Art. 4, Art. 13(2), Art. 14-22, Art. 23); ECHR (Art. 6(1) on fair trial and Art. 6(3)(d)); Art. 14 ICCPR; the interpretation of the UN Human Rights Committee in the document UN CCPR/C/79Add.75 of 9 April 1997, paras. 21 and 40; ECtHR judgements in *Kostovski* (20 November 1989), *Doorson v. The Netherlands* (26 March 1996) and *Van Mecheleni et al. v. The Netherlands* (23 April 1997); all of this in the context of guaranteeing a minimum right to the defence to examine the prosecution witness as required under Art. 6(3) ECHR.

109. Part of this right certainly involves the necessary information about the witness identity. In support of this position the contested Judgement quotes the ECtHR Judgement *Windisch* (27 September 1990), which is ignored by the prosecution, stating that the defence that was deprived of the necessary information about the witness was faced with insurmountable difficulties when checking his/her trustworthiness or credibility.

110. In addition, when seeking a balance between the effects of anonymity and the right to cross-examination, the Trial Panel bore in mind that the Accused's right to a fair trial would be breached if the Defence were not given a possibility to observe the witness during direct-and cross-examination or the possibility of confrontation (*Van Mechelen et. al*). This is all under the assumption that the decision is to be based on such evidence "to a decisive extent".

111. It was exactly for these reasons that the Trial Panel rightly limited the role of the testimony of the protected witness by attaching it the importance of corroborating evidence, as noted in par. 2 on page 25 of the contested Judgement, pursuant to Art. 23 of the Law on Protection of Witnesses. With such assessment the Trial Panel properly noted that where there is no other decisive Prosecution evidence that could be corroborated by a testimony of an anonymous witness, it is to be concluded that the prosecution failed to prove beyond a reasonable doubt the allegations in Count 1 of the Indictment, and therefore the Accused was cleared of these charges.

2.2. In relation to Section 3c of the operative part of the Judgement

112. This Section of the contested Judgement cleared the Accused of the charges of rape, crudely insulting, cursing and beating the injured party A at

the Vilina Vlas Spa in April 1992, whereby he would have committed the criminal offence of rape in violation of Art. 172(1)(g) CC BiH.

113. The Prosecution Appeal does not dispute that there were some inconsistencies in the testimony of this witness, but the Court misinterpreted the moment of identification of the Accused by the injured party because it is not about her being unable to identify him at the prosecutor's request but it is rather that she did not look at him at all, and she did so only when the counsel asked her to. The Appeal therefore argues that the Court, misinterpreting the testimony of Witness A in favor of the Accused, in this way caused that the state of facts be incorrectly and incompletely established, while the Judgment thus violated the criminal procedure provisions under Article 297(1)k) and 299 (1) BiH CPC.

114. The Appellate Panel, just like the Trial Panel, finds it indisputable that the witness A was raped on multiple occasions by different people while she was at the *Vilina Vlas* spa. However, what was disputable and what needed to be solved in this case was whether the Accused Željko Lelek raped her.

115. What the prosecutor sees as certain inconsistencies in the testimony of this witness this Panel sees as major and significant ones; they are meticulously set out in the reasoning of the contested Judgement on p. 46. Following an assessment of the identified inconsistencies the Judgement properly finishes its analysis with the conclusion as to why it deems the evidence on identification of the Accused insufficient to satisfy the "beyond a reasonable doubt" standard in relation to the culpability of the Accused for this Count of the Indictment.

116. Following a comprehensive analysis of the prior investigative statement and live testimony of this witness, this Panel concludes that the identification of the Accused by the injured party in the courtroom is just one of the factual circumstances to which this Appeal is trying to attach capital importance completely ignoring the importance of the dubious probative value of the identification of the Accused in the courtroom as an evidential step, and there is ample ICTY and Court of BiH case-law on this matter.

117. More specifically, a comparison of the relevant statements gives a general impression that the witness is not sure about the identity of the Accused, as was very clearly set out in the Trial Judgement. So in her statement given to the Prosecutor's Office during the investigation she said that Milan Lukić, who also raped her, referred to one of the rapists by his last name Lelek; however at

trial she said it was Željko Šušnjar and that Lukić referred to him as Žele or Željko. In her first statement the witness did not at all mention Šušnjar as a participant in the wrongdoings. There are many inconsistencies in the testimony of the witness A because her account in the direct examination is different from the one in the cross-examination, whereas both of them differ from her prior statements, and the Trial Judgement rightly notes all of it.

118. Despite being sensible about the ordeal through which this witness has been and which have left far-reaching consequences on her health and life, as well as the reasonable fear for which she could not look at her rapists, this Panel does not find enough evidence to believe that the Accused is the person who raped her.

119. On balance, just like it was properly determined in the Trial Judgement, this Panel could not determine beyond a reasonable doubt that this rape, which unequivocally happened, was perpetrated by the Accused. Therefore, applying the fundamental *in dubio pro reo* principle of the CPC BiH according to which "a doubt with respect to the existence of facts composing the characteristics of a criminal offence or on which depend the application of certain provisions of criminal legislation, shall be decided by the Court with a verdict and in the manner that is most favourable for the accused," this Panel notes that it was not proven that the Accused Željko Lelek perpetrated the charged crime.

2.3. In relation to Section 3(b) of the operative part of the Judgement

120. The Accused has been cleared of the charge that, in June 1992, he arrived in the *Vilina Vlas* spa where Bosniak women were unlawfully detained, including the witness D who, among others, was raped by the Accused Željko Lelek.

121. The prosecutor points in her Appeal that the Judgement describes on p. 47 the testimony of the witness D as "questionable" because she gave different accounts in the investigation and at trial, that her identification of the Accused is not reliable, that she seemed to be confused, for which reasons the Accused was cleared of this charge. The Appeal finds this reasoning incorrect for omitting important parts of the testimony of this witness and for misinterpretation of some other allegations. The Appeal argues that the Trial Panel used puns and took the meaning of the testimony of this witness out of the context, and had the Court taken a different approach and made a proper assessment it would have found that this was an honest witness who

endeavoured “with her modest vocabulary” to explain how she found out and why she was sure that the Accused himself was one of the rapists.

122. Resorting to such arguments, the appellant, without principle, does the same thing to which it objects in the Trial Judgement. More specifically, using the *papa in boca* method (putting words in one’s mouth) and probably because of the witness’ modest vocabulary, the appellant is trying to explain what the injured party did not really say. Thus the Appeal polemicizes with the conclusions of the Judgement stating, among other things, why there are doubts about the testimony of this witness whereas the Judgment states that the witness said that her son was killed before she was brought to the spa, and that she later said after her escape from the spa (the *Vilina Vlas* Spa) she went home to look for her son. The Appeal warns that these findings of the Trial Panel have been taken out of context as it is quite clear from her testimony that she was looking for her son’s body; this follows from her words “I did not find my son when I came. I only found some of his hair.” According to the prosecutor this is the basis for the argument that the witness was explaining that she did not find her son’s body but rather some remains of his hair at the place where he was killed (!). Obviously, the Appeal resorts to an interpretation of the testimony of this witness the way it suits it, and not the way the injured party testified *at litem,* and the way the Trial Panel correctly set out in the reasoning of its Judgement.

123. Furthermore, in presenting its arguments the Appeal sticks to its interpretative approach to the testimony of the witness D, explaining what the witness meant about the factual circumstance in relation to her knowing the identity of the witness. It explains her testimony given at the main trial when she said that she did not know Lelek by his face but rather by his name. In addition, the Appeal alleges that the Trial Panel failed to assess the testimony of the witness D together with other evidence, principally with the testimony of the witness M.H. with whom she talked and who confirmed to her that she had been raped by the Accused; for all these reasons there exist essential violations of Art. 297(1) and 299(1) CPC BiH.

124. Considering everything said above, the Appellate Panel concludes that the Appeal did not challenge the accuracy of the statements of the contested Judgement in which the witness D first said to the Prosecutor's Office that she knew the Accused Lelek, and she repeated that at the main trial, but immediately added the she did not know who he was at the time these things were happening, that she found it out from another woman, but she did not say any details about such second-hand identification of the Accused, and thus

neither the correctness or the accuracy of the final conclusion of the Court according to which such testimony of the protected witness D, essentially confusing, cannot be a basis for conviction under this Count of the Indictment, because, as the Judgement claims, "*in the key parts they* (confusing witness' statements-Appellate Panel's remark*) do not point to a reliable recognition and identification of the Accused as the perpetrator."*

125. If this is viewed from another aspect according to which the Appeal itself feels the need to interpret the testimony of the witness D the way it suits it, than this very fact affirms the Court's conclusion made above or that, at least, the principle *in dubio pro reo* is affirmed in favor of the Accused.

126. For this reason this Panel also concludes that a detailed analysis of the testimony of this witness does not offer a basis for conviction because in the key parts it does not point to a reliable recognition and identification of the Accused as the perpetrator.

3. In relation to the part of the Judgment dismissing the charges

127. In this part of the Judgment, pursuant to Art. 283(3) CPC BiH (Art. 283(b) of the amended CPC BiH), after the prosecutor dropped the charges at trial, the Court dismissed Counts 1 and 2 of the initial Indictment; under these Counts the Accused would have committed the criminal offence in violation of Art. 172(1)(h) in conjunction with (a) CC BiH.

128. The Prosecution Appeal argues that the Court wrongly applied Art. 283((1)(c) CPC BiH (probably referring to subparagraph (b)) in conjunction with Art. 38 and 275 of this Code when rendering the decision as to which charges in the Indictment should be dismissed. This is explained with the fact that, in this case, the prosecutor did not drop the charges but rather amended the Indictment, and it is concluded the Court did not act properly when, in the part of the contested Judgment dismissing the charges, it ruled on the counts of the Indictment which no longer existed.

129. Analyzing these arguments of the Appeal, the Appellate Panel found that the Prosecutor filed the amended Indictment on 31 March 2008 and this Indictment left out the criminal acts under Counts 1 and 2 of the previous Indictment (no. KT-RZ-89/06 of 16 November 2006) so that the previous Counts 3, 4, 5, and 6 became Counts 1, 2, 3, and 4 in the amended Indictment,

and at the hearing held on 18 April 2008 the Prosecutor explicitly, verbally dropped the charges that were left out.

130. Therefore, contrary to the Appeal arguments, the filing of an amended indictment the way the Prosecutor did it may not be treated as only the amending of the Indictment in terms of Art. 275 CPC BiH but also as the dropping of the charges under Counts 1 and 2 of the Indictment. This is because the quoted provision allows the prosecutor to amend the indictment during the main trial where the evidence produced at the main trial suggests that the factual situation has changed in relation to the one described in the Indictment, which indeed happened in this case, but only in relation to other Counts of the Indictment (3, 4, 5, and 6), while in case of these two Counts, as they deal with separate criminal acts, charges were dropped in terms of Art. 38 CPC BiH.

131. For the reasons above, and considering that the Prosecutor dropped the mentioned separate charges explicitly and verbally, and as required by Art. 283(b) CPC BiH, the Judgment dismissing this part of the charges was to be rendered, as properly done by the Trial Panel.

132. Therefore, in the Panel's opinion, the First Instance Court was completely correct in taking the decision in question, having applied the cited legal provision in conjunction with Article 38 and 275 of the CPC BiH.

4. In relation to the application of substantive law

133. The following ground pointed to by the appeal is the misapplication of substantive law, given that the Court, if it found sufficient evidence that the Accused committed the criminal offence, could have legally defined it as a criminal offence referred to in Article 142 of the CC SFRY which was applicable and in force at the time of the commission of the criminal offence.

134. It is undisputed, in the Panel's opinion, that the First Instance Court, in applying the substantive law and legal definition of the offence correctly applied the provisions of the applicable Criminal Code of BiH which entered into force on 1 March 2003. More specifically, contrary to the allegations made in the appeal, there has been no violation of the principle of legality and temporal validity of the law, as stipulated in Article 3 and 4 of the same Code.

135. In particular, the principle of legality is prescribed by both the national Criminal Code (Article 3 of the CC BiH) and Article 7(1) of the European Convention on Human Rights (ECHR), which has priority over all other laws in BiH (Article 2.2. of the BiH Constitution), and Article 15(1) of the International Covenant on Civil and Political Rights (ICCR).

136. Article 7(1) of the ECHR provides "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

137. On the other hand, Article 15(1) of the ICCR provides "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."

138. As it can be seen from the foregoing, these provisions stipulate the prohibition of the imposition of a heavier penalty, while not determining the consequent mandatory application of the (most) more lenient law (if it was amended on several occasions) to the perpetrator, in relation to the penalty that was applicable at the time of the commission of the criminal offence.

139. However, Article 7(2) of the ECHR provides "This article 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 the general principles of law recognized by civilized nations." Likewise, Article 15(2) of the ICCR provides "Nothing in this article shall 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 law recognized by the community of nations."

140. Thus, the cited provisions represent exceptions from the rule as defined in Article 7(1) of the ECHR and Article 15(1) of the ICCR.

141. The same exception is also provided for in Article 4a of the CC BiH which stipulates that Articles 3 and 4 of this Code 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. By this Article, the provisions of Article 7(2) of the ECHR

and Article 15(2) of the ICCR have been adopted in their entirety, thereby providing for an exceptional derogation from the principle enshrined in Article 4 of the CC BiH as well as derogation from the mandatory application of a more lenient law in the proceedings involving criminal offences pursuant to international law. This is exactly the case in the proceedings at hand, since the acts of the Accused, as the first instance Verdict reasons, at the relevant time, constituted a crime in violation of the provisions of international law, as well as a violation of the highest values protected by any existing legal order.

142. In the context of the foregoing, it should be noted that the State of BiH, as a successor state (legal successor) of the former Yugoslavia, ratified both the ECHR and ICCR, hence these treaties are binding on the State and the courts of Bosnia and Herzegovina have to apply them. Article 4a is therefore merely a national legal reminder since it is not a requisite for the application of these treaties and it shall apply in the prosecution of any war crimes defined in Chapter XVII of the Criminal Code of BiH, the title of which is "Criminal Offences against Humanity and Values Protected by International Law".

143. The customary status of punishability of war crimes and stipulation of individual criminal responsibility for the commission thereof in the period of 1992 have been recognized by the UN Secretary General[2], hence it is indisputable that in 1992 crimes against humanity were integral part of international customary law.

144. In view of the foregoing, this criminal offence can, in any case, be included in the "general principles of international law" referred to in Article 4a of the CC BiH. Hence, regardless of whether it is viewed from the position of international customary law or from the position of "the principles of international law", it is indisputable that Crimes against Humanity constituted a criminal offence in the relevant time period or more precisely, that the principle of legality has been satisfied. Finally, in relation to Article 7(1) of the ECHR, the Panel notes that the application of Article 4a is additionally justified by the fact that the imposed sentence is, in any case, more lenient than the death penalty which was in force at the time the criminal offence was committed thereby satisfying the application of the principle of the temporal validity of the criminal code, which is contrary to the unfounded allegations from the appeal that it constitutes a violation of this principle (retroactive application of the applicable law).

[2] The UN Secretary General report in relation to paragraph 2 of the Security Council Resolution No. 808 of 3 May 1993, paras. 34-35 and 47-48.

145. Finally, in support of the foregoing, the Court points to the Decision of the Constitutional Court of Bosnia and Herzegovina in the *Abduladhim Maktouf* case, concluding that the issue of the application of the CC BiH in these proceedings before the Court of BiH does not constitute a violation of Article 7(1) of the ECHR.

5. In relation to the decision on criminal sanction

146. In examining the decision on sanction against the complaints made in the appeals by both the Prosecution and the Defence, the Panel bore in mind the fact that the First Instance Court took into account the circumstances having a bearing on the magnitude of punishment, as required by Article 48 of the CC BiH (general rules on meting out a sentence). In particular, the first instance Verdict took into account the statutory framework for the pronouncement of the sentence for the criminal offence in question as well as the general rules on the selection of the type of sentence, more specifically the purpose of punishment and in particular the degree of the criminal liability of the Accused, the circumstances surrounding the commission of the offense, the degree of danger or injury to the protected object, the previous life of the perpetrator, his personal circumstances, his conduct after the perpetration of the criminal offence and the motive for the perpetration thereof.

147. In considering this ground of appeal, the Appellate Panel bore in mind that the First Instance Court imposed on the Accused a criminal sanction within the statutory limits, but it did not, as it corresponds to the present case, correctly exercise its discretion under the law with regard to the selection of the magnitude of the criminal sanction. In other words, regarding the appeal from the sentence, this Panel examines whether the lower court found the appropriate measure in levying the sanction within the statutory range. Having analyzed the reasons provided in both appeals, the Appellate Panel holds that the imposed 13 (thirteen) years' imprisonment sentence is too lenient to the Accused hence it was necessary to grant the Prosecutor's appeal and refuse the Defence appeal in this part of the Verdict.

148. In reviewing the aggravating circumstances on the part of the Accused, the First Instance Court did bear in mind the degree of his criminal responsibility. However, instead of elaborating on it, the first instance Verdict merely cited this circumstance from the law, ascribing to it an aggravating significance, hence its true range which would have a bearing on the sanction imposed cannot be seen. Primarily, the first instance Verdict does not sufficiently recognize that the Accused, when it comes to the subjective

character of the committed criminal acts which he was found guilty of, acted with a direct intent, that is, the most severe form of culpability under our national criminal law in the capacity of a perpetrator or co-perpetrator, which certainly necessitates a harsher sanctioning.

149. Having analysed individual incriminations underlying the crime, it is evident that the Accused acted with apparent ruthlessness, showing, from the emotional aspect, a particular insensitivity while inflicting severe physical and mental sufferings on his victims. By using his domination and power, on the one hand, and helplessness of the victims on the other, the Accused committed the offence the protected object of which are universal human values which, as such, enjoy absolute protection. These are the values which are not only the requirement and the foundation but also a positive obligation demanding a human treatment.

150. From among the aggravating circumstances, the Appellate Panel further had in mind the persistence displayed by the Accused during the commission of the criminal offence, which is reflected in the numerosity of the undertaken criminal acts, in particular in the repetition of the criminal offences of sexual abuse and torture, without showing even the slightest consideration for human dignity. In evaluating these circumstances, the Court manifested a particular sensibility in light of the fact that the injured parties were also women, including one elderly woman, who, together with children, represent the most vulnerable civilian population.

151. The intensity of danger and injury to the protected object also constitute the factors which are to be included within the scope of aggravating circumstances in this case. It is certain that, due to the sufferings they experienced, the injured parties will feel permanent and profound consequences throughout their lifetime, in sense of their traumatisation, the feeling of psychological pain, humiliation and emptiness. Moreover, besides these traumas, they felt betrayed and deceived because they expected of the Accused, whom they perceived as a guardian of the order and law and their fellow citizen, to protect them, however, not only did he fail to do so but he himself caused their sufferings. This fact that the Accused, as a police officer, had the capacity of an official person, hence the full awareness of the unlawfulness of the committed acts, certainly constitutes a factor which shows a higher degree of danger by the Accused as the perpetrator of the prohibited acts which he effectively undertook.

152. As to the personality of the Accused, the First Instance Court, opposite to this, ascribed an excessive importance to the circumstances pertaining to the conduct of the Accused prior to and after the commission of the criminal offence and his personal situation, qualifying them as mitigating circumstances. Indeed, when the Verdict alleges that the Accused comes from a respectable family and that he is married to a woman who also comes from such a family, and that in the post-war period he properly performed his duty of a police officer and contributed to the support of his wife and two children, it is difficult to correlate these allegations with the contextual basis from which one could infer the value and importance of this fact for imposing a harsher or lesser sentence.

153. All the more so, because the Accused, as the Prosecutor plausibly observes, did not in any way show regret for the sufferings of the victims which, if viewed from a psychological aspect, provides an important insight into the structure of his personality to the extent necessary for the purpose of the Verdict.

154. Thus, although the First Instance Panel evaluated both the mitigating and the aggravating circumstances, the Panel concludes that the latter ones – aggravating circumstances – were not given the appropriate significance in the present case.

155. Pursuant to the foregoing, the Appellate Panel partly granted the Prosecution appeal and modified the first instance Verdict in part of the decision on sanction by sentencing the Accused to 16 (sixteen) years' imprisonment for the committed criminal offence. Pursuant to Article 56(1) of the CC BiH, the time spent in custody from 5 May 2006 until committal to serve the sentence shall be credited towards the imposed sentence, with the confidence that such sanction is commensurate with all the circumstances underlying the present case which have a bearing on the severity of the imposed sentence and that it will achieve the purpose of punishment as envisaged in Article 39 of the CC BiH.

156. Bearing in mind the reasons spelled out in relation to the decision on sentence, the allegations made in the defence appeal on the sentence imposed on the Accused are rendered irrelevant.

157. In accordance with the foregoing and pursuant to Article 310(1), in conjunction with Article 314 of the CPC BiH, it was decided as articulated in the operative part of the Verdict.

158. Since the grounds for which the first instance verdict was challenged by appeals are unfounded for the above reasons, expect for the reasons pertaining to the sentence imposed, the first instance Verdict is hereby upheld in the remaining part, pursuant to Article 310(1), in conjunction with Article 313 of the CPC BiH.

MINUTES-TAKER:	**PRESIDENT OF THE PANEL:** **JUDGE**
Medina Hababeh	***Mirza Jusufović***

INSTRUCTION ON REMEDY: No appeal from this Verdict shall be permissible.