

**PROSECUTOR V. ZELJKO LELEK**

X-KMV202

Court of Bosnia & Herzegovina

Criminal Division Verdict

May 23, 2008

**Judges:**

Vučinić Hilmo

Shireen Avis Fisher

Paul M. Brillman

**Prosecution:**

Božidarka Dodik

**Defense:**

Fahrija Karkin and Saša Ibrulj

**Gender Keyword(s):** Coercion; Credibility or Character of the Victim; Forced Nudity; Genitalia; Penis; Protective Measures; Rape; Rape, Torture; Sexual Violence

**Procedural History:** On November 16, 2006, the Prosecutor's Office of Bosnia and Herzegovina filed an indictment charging Zeljko Lelek with persecution as a crime against humanity in conjunction with several other crimes against humanity, including killing, enforced disappearance, unlawful imprisonment, torturing and beating, forcible transfer, rape, and other forms of sexual violence.<sup>1</sup> On March 31, 2008, the Prosecutor filed an amended indictment that, *inter alia*, removed two counts of alleged murder.<sup>2</sup> The only difference between the indictment and the amended indictment with regard to charges of sexual violence was that the amended indictment removed allegations that Lelek raped a victim referred to as A.J. in the same count in which Lelek was charged with raping another victim, Witness M.H.<sup>3</sup> The amended indictment maintained the allegation that Lelek with raped Witness M.H., and also alleged that he raped victims referred to as Witnesses A and D, and coerced a victim referred to as Witness C into performing an act equivalent to sexual intercourse.<sup>4</sup> Specifically, the indictment alleged that in April 1992, Lelek came to the Vilina Vlas spa where the protected Witness A was staying for treatment and raped her on several occasions together with other soldiers while also insulting, cursing, and beating her (p. 4) Lelek was also charged with other acts that took place at the Vilina Vlas spa, where women were unlawfully confined, including raping Witnesses D and M.H. on multiple occasions together with other soldiers while physically and mentally abusing and insulting them (*id.*). Lelek was also accused of going to the home of Witness C in May or June of 1992 armed with a weapon and forcing Witness C to engage in an act equivalent to sexual intercourse by making her touch his genitals as he beat and insulted her on national grounds (*id.*). Additionally, the indictment alleged that Lelek was responsible for an act of forced

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<sup>1</sup>*Prosecutor v. Zeljko Lelek*, Indictment of November 16, 2006, p. 2.

<sup>2</sup>*Prosecutor v. Zeljko Lelek*, Amended Indictment of March 31, 2008, p. 2.

<sup>3</sup> See Indictment, *supra* note 1, p. 4. Compare to Amended Indictment, *supra* note 2, pp. 3-4.

<sup>4</sup> See Amended Indictment, *supra* note 2, pp. 3-4.

nudity and other mistreatment committed against a woman named Zejneba Osmanbegović and her mother.<sup>5</sup> Based on these and other allegations, Lelek was charged with committing the crime against humanity of persecution under Article 172(h) of the Criminal Code of Bosnia and Herzegovina<sup>6</sup> (Code of BiH) through several acts including rape and sexual violence; depriving another person of life (murder); forcible transfer of a population; imprisonment; torture; enforced disappearance of persons; and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to physical or mental health (*id*). On May 28, 2008, the First Instance Panel in the War Crimes Section of the State Court of Bosnia and Herzegovina delivered its verdict in the case, digested here.

**Disposition:** The Trial Panel finds Lelek committed two of the four counts supported by allegations of rape and sexual violence, convicting Lelek of persecution as a crime against humanity through several acts including rape and torture for the rape and treatment of Witness M.H. and a second count for the rape or “other form of sexual violence of comparable gravity” for coercing Witness C into engaging in acts described above (p. 2). The Panel acquits Lelek of raping Witness A and Witness D (p. 4). In addition to these acts of rape and sexual violence, Lelek’s conviction for persecution as a crime against humanity is also based on other acts in including severe deprivation of physical liberty in violation of fundamental rules of international law, torture, and forcible transfer of a population (p. 2). The Panel sentences Lelek to 13 years of imprisonment (p. 3).

### **Key Gender-Based Holdings:**

#### **COERCION:**

- The Prosecutor charged Lelek with several counts of crimes against humanity under Article 172(1)(g) of the CC of BiH, which prohibits “[c]oercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity.”<sup>7</sup> As detailed under “Rape” below, the Panel finds that Lelek coerced Witness M.H. into sexual intercourse and coerced Witness C into an act of severe sexual violence, convicting Lelek of persecution as a crime against humanity in part through these acts (p. 2).

#### **CORROBORATION:**

- The Panel considers evidence given by witnesses A and D in support of the charges against Lelek of rape as a crime against humanity, detailed under “Rape” below. The Panel finds that witnesses A and D were victims of the acts alleged and acknowledges that such acts represent grave violations of the rights of these victims and caused suffering, but finds that the evidence presented was insufficient to establish beyond a reasonable doubt that Lelek was responsible for the rapes (p. 39). The Panel notes that both witnesses’ testimony was “to a large extent reliable so that no other witnesses are

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<sup>5</sup> See *id.* p. 2.

<sup>6</sup> Criminal Code of Bosnia and Herzegovina, “Official Gazette of Bosnia and Herzegovina” No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07.

<sup>7</sup> *Id.* Art. 172(1)(g).

required to establish the facts on which they testified” (*id.*). However, for reasons detailed under “Rape” below, the Panel concludes that the witnesses’ identification of Lelek as the perpetrator of these crimes is insufficient to establish Lelek’s guilt beyond a reasonable doubt (*id.*). The Panel states that these victims cannot be blamed for this insufficiency but nonetheless acquits Lelek of charges that he raped witnesses A and D (*id.*).

#### CREDIBILITY OR CHARACTER OF THE VICTIM:

- The Prosecutor charged Lelek with several counts of rape and torture as crimes against humanity for several alleged acts of rape, sexual violence, and forced nudity, which are detailed under sections addressing these crimes below.<sup>8</sup> The Defense questioned the credibility of two witnesses who testified that they were victimized by Lelek.
  - *Witness M.H.*: The Defense contested the credibility of Witness M.H., who testified that Lelek raped her at Vilina Vlas spa, submitting that there were inconsistencies between her testimony at the trial and statements she gave during the investigation (p. 35). The Defense argued that one of these inconsistencies concerned how many times Witness M.H. saw Lelek during the relevant events (*id.*). The Defense also presented a Defense witness who testified that he had seen Witness M.H. at the relevant time and had seen no signs that she had experienced violence at the spa (*id.*). This witness also testified that he had asked Witness M.H. whether she had experienced any “bullying” and she had responded only once but gave no further details (*id.*). The Panel finds that Witness M.H.’s testimony did not reflect any significant inconsistencies that would affect her credibility (*id.*). The Panel attributes any inconsistencies by victims of such offenses to the passage of time and the traumatic experiences that prevent witnesses like M.H. from observing details (pp. 35-36). The Panel concludes that Witness M.H.’s evidence is sufficient and reliable regarding the key factors of the identification of Lelek and the overall account of the events that took place (p. 36).
  - *Zejneba Osmanbegović*: The Defense also called into question the credibility of witness Zejneba Osmanbegović, who testified about Lelek’s role in events detailed under “Forced Nudity” below (p. 28). The Panel gives credence to Osmanbegović’s testimony because she had known Lelek for a long time and she recognized Lelek when he came to her house on the night in question with two others (*id.*). Osmanbegović also knew the others who came with Lelek, Oliver Krsmanović and Gordana Andrić, well (*id.*). The Defense introduced testimony from witnesses who stated that they had never seen Lelek with Oliver Krsmanović and Gordana Andrić, but the Panel notes that the alleged events occurred after midnight and in the early morning hours, therefore it is highly unlikely other witnesses would have seen them (*id.*). The Panel concludes that Osmanbegović’s testimony is clear and unambiguous and finds her credible (*id.*).

#### FORCED NUDITY:

- In support of the charge of persecution as a crime against humanity committed through acts of torture, the Trial Panel heard evidence from witness Zejneba Osmanbegović that Lelek and others forced her and her 80-year-old mother to undress (p. 27). Osmanbegović testified that Lelek and two other people, Oliver Krsmanović and Gordana Andrić, came

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<sup>8</sup> Amended Indictment, *supra* note 2, pp. 2-4.

to her house on the night of June 1, 1992, armed with guns, bringing with them a man they knew who had been stabbed named Hasan Ahmetspahić (p. 24). Lelek and the others took Osmanbegović's husband Nail outside and when they brought him back in, he was beaten and bloodied (*id.*). During this incident, Lelek ordered Zejneba Osmanbegović and her mother to undress, using a derogatory term for Muslim women (p. 28). Lelek left before Osmanbegović and her mother undressed, but the Panel finds that Lelek was responsible because he ordered them to be undressed (*id.*). The Panel also finds that Lelek was responsible for the other mistreatment his co-perpetrators inflicted upon Osmanbegović and her mother, since he ordered them to undress and his orders led to continued mistreatment by his co-perpetrators (p. 27). For example, after Osmanbegović's mother was forced to undress, she was ordered to sit on top of Hasan Ahmetspahić, which caused blood to spurt out of his stab wounds (pp. 27, 52). Later Lelek and the others left with Hasan and Nail, neither of whom was seen alive again<sup>9</sup> (p. 24). The Panel finds that there is no doubt that Lelek acted with the intent to subject Osmanbegović and her mother to such treatment, as evidenced by the fact that he went to their house with the purpose of abusing them and there he ordered them to get undressed and cursed and insulted them (p. 28). The Panel recalls the elements of torture as a crime against humanity under Article 172(1)(e) of the CC of BiH, including the infliction of severe pain and suffering, and finds that there is no doubt that Osmanbegović and her mother were subjected to severe suffering and mental pain, "especially due to the fact that they were forced by [Lelek] and others to undress, which itself is a humiliating and degrading act, not only to the witness but also to her mother" (p. 27). The Panel notes further that the International Criminal Tribunal for the former Yugoslavia (ICTY)<sup>10</sup> and the International Criminal Tribunal for Rwanda (ICTR)<sup>11</sup> have held that under customary international law, an additional element to torture is that the infliction of such suffering must be "for the purpose of obtaining information or a confession; punishing, intimidating or coercing the victim or a third person, or for the purpose of discriminating, on any ground, against the victim or a third person" (p. 28). The Panel finds that the acts in question were committed against the victims because they were Bosniaks and Muslims and that they were targeted for sadistic abuse for the purpose of discriminating against them due to their ethnicity (*id.*). The Panel therefore finds that although Article 172(1)(e) of the CC of BiH does not require that an act of torture be committed for a prohibited purpose such as discrimination, this discriminatory intent is satisfied in the present case (*id.*). The Panel finds Lelek guilty of persecution as a crime against humanity based in part on acts of torture committed against Osmanbegović and her mother (pp. 2, 28).

#### FORCED PENETRATION:

- The Panel discusses the issue of penetration in distinguishing between "rape or an equivalent act" and sexual violence in assessing Witness C's evidence that Lelek forced her to touch his penis (pp. 38-39). As discussed further under "Rape" and "Sexual Violence" below, the Prosecutor charged Lelek with persecution as a crime against

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<sup>9</sup> Lelek was charged and convicted of "severe deprivation of physical liberty" as a crime against humanity in this case for the removal and disappearance of Nail Osmanbegović and Hasan Ahmetspahić (p. 2).

<sup>10</sup> *Prosecutor v. Akayesu*, Trial Chamber Judgment, September 2, 1998, ¶ 594.

<sup>11</sup> *Prosecutor v. Kunarac, et. al.*, Trial Chamber Judgment, February 22, 2001, ¶¶ 485, 497.

humanity through several acts including an act “equivalent” to sexual intercourse under (pp. 2-3, 38-39). The Panel finds that a “sexual act equivalent to sexual intercourse implies penetration of a sex organ, an object or some other body part in any part of the victim’s body” and concludes that in this case, Lelek did not penetrate Witness C (p. 39). Thus, the Panel finds that Lelek’s act should be characterized instead as “severe sexual violence,” which it finds is also prohibited under Article 172(1)(g) (*id.*).

#### HUMILIATING AND DEGRADING TREATMENT:

- As discussed under “Forced Nudity” above, the Panel characterizes the acts Lelek and others took forcing a woman named Zejneba Osmanbegović and her 80-year-old mother to undress as “humiliating and degrading” (p. 27). The Panel also uses this language to describe the acts of sexual violence Lelek committed against Witness C, discussed under “Sexual Violence” below, stating that Witness C was an elderly woman coerced into an act (touching Lelek’s “sexual organ”) that caused her humiliation and degradation of her human dignity as well as fear and shame (*id.*).

#### PENIS:

- As detailed under “Rape” and “Sexual Violence” below, the Panel heard evidence from Witness C that Lelek came to her house and forced her to touch his penis (pp. 2, 52). The Panel finds Lelek perpetrated “severe sexual violence” under Article 172(1)(g) of the CC of BiH,<sup>12</sup> convicting him of persecution as a crime against humanity through several acts, including this one (pp. 2-3, 38-39).

#### PROTECTIVE MEASURES:

- During the proceedings, the Panel granted several protective measures for witnesses, including Witnesses A, C, D, and M.H., who all testified that they were victims of rape and sexual violence (pp. 5, 34-41). The Panel notes that it granted protective measures to Witness M.H. upon her request pursuant to Articles 12 and 13 of Bosnia’s Law on Protection of Witnesses under Threat and Vulnerable Witnesses<sup>13</sup> (*id.*). Witness M.H. submitted that she was to testify about the rape that had traumatized her and she did not want her identity disclosed (*id.*). The Panel partly excluded the public during hearings to determine the protective measures to order and the manner in which it would hear evidence from Witnesses A, C, D, and M.H. (*id.*). The Panel also excluded the public during Witness A’s testimony at the trial, noting that it “may exclude the public for a part of the main trial if it is necessary to protect the personal and intimate life of the injured party” (*id.*). The Panel concluded that, because Witness A testified about “events which are an insult to human dignity” and was psychologically traumatized by the crime and the circumstances surrounding its commission, it was justified in deciding to exclude the public during Witness A’s testimony, citing the additional fact that both parties agreed

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<sup>12</sup> See Criminal Code of Bosnia and Herzegovina, *supra* note 6, Art. 172(1)(g) (=prohibiting “[c]oercing another by force or by threat of immediate attack upon his life or limb, or the life or limb of a person close to him, to sexual intercourse or an equivalent sexual act (rape), sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation or any other form of sexual violence of comparable gravity”).

<sup>13</sup> Law on Protection of Witnesses Under Threat and Vulnerable Witnesses, “Official Gazette” of Bosnia and Herzegovina, 3/03, 21/03, 61/04, 55/05.

with this approach (p. 5). By contrast, the public was not excluded during the testimony of Witnesses C, D, and M.H. at the trial (*id.*)<sup>14</sup>.

#### RAPE:

- *Rape of Witness M.H.:* Lelek was charged with persecution as a crime against humanity based on several acts including raping Witness M.H. at the Vilina Vlas spa in June of 1992.<sup>15</sup> M.H. testified that Milan Lukić ordered her, under threat and by force, to come to the spa on a daily basis for several days in a row and that on those visits, she was raped by Lukić, as well as other soldiers, including Lelek (p. 35). She stated that she was first raped on multiple occasions at the spa and mistreated by Milan Lukić and another man, and later other soldiers dressed in camouflage, and stated that the spa was under the control of armed Serb soldiers and paramilitary forces (*id.*). Witness M.H. also testified that she was taken to a room where she found Witness D and that she saw several other Muslim women that were held in the spa, where various forms of mistreatment and rapes occurred each day and where she heard screams and crying from other rooms (*id.*). Witness M.H. testified that on one of the days she was brought to the spa, Lelek came to the room she was in with other women, took her to another room, and coerced her to have sexual intercourse with him (*id.*). When Lelek took her out of the room, he slapped her several times, insulted her, and called her “Baliya mother” (*id.*). Witness M.H. testified that she knew Lelek from before and that, in addition to that one time at the spa, she saw him again when she was leaving the spa later as part of a convoy, as he was escorting her bus, wearing a uniform with ammunition belts and carrying an automatic rifle (*id.*). The Defense objected to M.H.’s testimony, pointing to inconsistencies in her evidence, which is discussed under “Credibility or Character of the Victim” above (p. 36). The Panel finds that M.H. provided credible testimony and finds that the description of events Witness M.H. provided meet the elements of rape as a crime against humanity under Article 172(1)(g) of the CC of BiH, citing the fact that the rape occurred on the premises of the Vilina Vlas spa, which was completely under the control of Serb forces, foreclosing any possibility of Witness M.H.’s escape (*id.*). The Panel notes further that Witness M.H. experienced abuse before and during the rape, was beaten and insulted during the rape, and also heard screams and cries from others, all factors that would cause her to have fear and anxiety (*id.*). The Panel also states that these factors support a finding that the rape also constitutes an act of torture as a crime against humanity due to the severe pain and suffering M.H. experienced, a finding which is discussed further under “Rape, Torture” below. The Panel finds Lelek guilty of persecution as a crime against humanity based in part on his culpability for the rape of Witness M.H. (*id.*).
- *Rape of Witness A:* The charge of persecution as a crime against humanity against Lelek was also based in part on the allegation that Lelek raped Witness A.<sup>16</sup> The Panel heard evidence that in April 1992, Witness A was receiving medical treatment at Vilina Vlas spa after a car accident that occurred in 1991 (p. 39). Witness A testified that while she was at the spa, she was raped and mistreated by Milan Lukić and several other soldiers (*id.*). The Panel finds that Witness A’s evidence regarding the identity of the other soldiers who raped her was inconsistent (*id.*). Specifically, she told investigators from the

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<sup>14</sup> The verdict does not explain why this measure was not implemented for these additional witnesses.

<sup>15</sup> Amended Indictment, *supra* note 2, p. 3.

<sup>16</sup> *Id.* pp. 2-3.

Prosecutor's Office that she heard Milan Lukić refer to one of the other rapists by the last name "Lelek," but during the trial, she testified that Lukić had referred to Lelek by the first name Zeljko and that Lukić was referring to a different man named Zeljko (pp. 39-40). Witness A described Lelek physically by referring to his "protruding teeth," but admitted that she could not bear to look at her attackers during the rapes and she failed to identify Lelek in the courtroom until his Defense Counsel introduced himself and it became apparent that Lelek was standing beside his counsel (pp. 39-40). The Panel observes that it is understandable that Witness A could not bear to look at her attackers, but finds that this identification fails to establish beyond a reasonable doubt that Lelek was one of the people that raped her (p. 40). The Panel also notes inconsistencies in Witness A's evidence with regard to when Lelek allegedly raped her, pointing to various timeframes offered by Witness A during the investigation and at the trial (p. 40). The Panel concludes that the only evidence linking Lelek to the alleged rape of Witness A was Lukić or another soldier calling one of the rapists "Lelek" or "Zeljko" and Witness A's description of his teeth, evidence that the Panel concludes is insufficient to meet the standard of beyond a reasonable doubt (*id.*). Noting that "it is indisputable that Witness A is trying to tell the truth and that she survived the rape and torture she described" and that "[i]t is understandable that she cannot identify with certainty and consistency the perpetrators of the crimes she suffered," the Panel nonetheless finds that Witness A's evidence is not sufficient to establish that Lelek committed the crimes of torture and rape against Witness A and acquits him of these charges (*id.*).

- *Rape of Witness C:* Lelek's charge of persecution as a crime against humanity was also based in part on allegations that he committed acts equivalent to sexual intercourse against Witness C.<sup>17</sup> Witness C testified she had resided in Višegrad prior to the war and that, around June 13, 1992, Lelek came to her house with another person she did not know and asked for gold and money (p. 37). Witness C stated that she had known Lelek since before the war and knew him to be a nice young man who she saw often in the town of Višegrad and she was able to identify Lelek in the courtroom (*id.*). When he came to her house, Lelek said he was looking for Witness C's daughter, son, and husband, and she told Lelek they had been taken away (*id.*). When he did not find what he wanted, Witness C said that Lelek "continued to sadistically abuse" her, beating her and forcing her to "fondle his sex organ" (*id.*). Witness C testified that while this was happening, Lelek cursed her "Turkish mother" and asked her if she was disgusted because he was a Serb (*id.*). Then someone named Ljubisa came and told Lelek to leave Witness C alone, so he left and Witness C did not see him again (*id.*). The Panel finds Witness C's evidence and her identification of Lelek to be reliable, especially because she knew Lelek prior to this incident (p. 38). As discussed in more detail under "Sexual Violence" below, the Panel determines that while the Prosecution alleged that Lelek had committed an act "equivalent" to sexual intercourse it finds that "severe sexual violence" more accurately describes the evidence (*id.*). The Panel finds that the evidence establishes beyond a reasonable doubt that Lelek committed this act and that this act, in addition to several other acts, amounted to persecution as a crime against humanity (pp. 38-39).
- *Rape of Witness D:* The Prosecutor also alleged that Lelek committed the charge of persecution as a crime against humanity for raping Witness D at Vilina Vlas spa in June

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<sup>17</sup> *Id.* p. 3.

of 1992.<sup>18</sup> The Panel heard testimony from Witness D that she had been brought to the spa by Milan Lukić, where Lukić and other soldiers, including Lelek, raped and physically and mentally abused her (p. 40). Witness D stated that, at that time, she did not know Lelek (*id.*). Witness D testified that she thought Lelek was one of the people that had raped her because another person told her one of the assailants must have been Lelek (*id.*). Witness D later escaped the spa and left Višegrad (*id.*). After the war, Witness D visited Višegrad, where she met Lelek and said that she recognized him as one of her assailants (*id.*). The Panel notes several inconsistencies in Witness D's evidence, including the fact that in her statement to the Prosecutor's Office, she had stated that she knew Lelek, whereas at trial, she initially testified that she knew Lelek but later admitted that she had not known who he was when the alleged events occurred and had been told by another woman at the spa that Lelek must have been one of the men who had raped her (*id.*). Witness D could not explain at trial how that woman at the spa knew Lelek was responsible and could not identify who the woman was (*id.*). The Panel concludes that Witness D's confusion can be explained by the torture she survived, but finds that the evidence is insufficient to conclude beyond any doubt Lelek is the person who committed this offense (p. 41). The Panel acknowledges, however, that Witness D suffered grave violations of her rights that have caused her great suffering and remarks that its findings are not meant to in any way diminish the significance of the acts that occurred or the suffering of the victim (p. 39). The Panel acquits Lelek of the allegation that he raped Witness D (p. 41).

#### RAPE, TORTURE:

- In the indictment, the Prosecutor charged Lelek with persecution as a crime against humanity based on allegations of torture for both the events described under "Forced Nudity" above and for acts committed against Witness M.H.<sup>19</sup> As discussed under "Forced Nudity," the Panel agrees that the acts described in that section amounted to torture. The Panel also determines that the rape of M.H., described under "Rape" above, amounted to not only rape as a crime against humanity but also torture (p. 36). Recalling jurisprudence from the ICTY,<sup>20</sup> the Panel observes that the act of rape "necessarily gives rise to severe pain and suffering" and thus it can also constitute an act of torture (*id.*). The Panel explains that under Article 172 (2)(e) of the CC of BIH, the elements of torture are:
  - 1) Intentional infliction;
  - 2) Of severe pain or suffering, whether physical or mental;
  - 3) Upon a person in the custody of the Accused (*id.*).

The Panel notes that the ICTR and the ICTY have concluded that, according to customary international law, for rape to amount to an act of torture, it is necessary that the infliction of severe pain or suffering be for the purpose of "obtaining information or a confession, punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person"<sup>21</sup> (*id.*). The Panel finds that "some actions *per se* imply suffering on the part of those subjected to them"

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* p. 2.

<sup>20</sup> *Kunarac* Trial Chamber Judgment, *supra* note 11, ¶¶ 149-150.

<sup>21</sup> *Id.* ¶¶ 485, 497. *See also Akayesu* Trial Chamber Judgment, *supra* note 10, ¶ 594.

and that rape is such an act, concluding that sexual violence inevitably leads to severe pain or suffering, thus justifying the characterization of such acts as torture (*id.*). More specifically, the Panel finds that the incident Witness M.H. experienced surely caused her “severe suffering, mental pain and disgust” (*id.*). The Panel observes that the victim must have felt helpless in this situation in which armed men forcibly brought non-Serb women and girls to the Vilina Vlas for the purpose of sexually and physically abusing them (pp. 36-37). The Panel recalls Witness M.H.’s testimony that she was brought to the Vilina Vlas spa and was raped “for the exclusive purpose of the perpetrators’ sadistic abuse because of her ethnic affiliation and for purposes of discrimination” (p. 37). The Panel recounts Witness M.H.’s testimony describing multiple episodes of sexual abuse that caused internal and external injuries and bleeding and cites the fact that Lelek found M.H. when she was already injured and then he raped and beat her, increasing her suffering (*id.*) The Panel observes also the fact that Witness M.H. had suffered so intensely that she eventually escaped from her home and hid, despite Lukić’s threats against her and her family if she did not continue to come to the spa (*id.*). The Panel concludes that Lelek was aware of and pursued “all prohibited goals” served by raping Witness M.H. and finds that Lelek had the requisite intent and thus finds his acts amounted to torture and that this act, together with several other acts, constitute persecutin as a crime against humanity (*id.*).

#### SEXUAL VIOLENCE:

- As discussed above under “Rape,” the Panel considers the evidence given by Witness C in support of allegations that Lelek committed an act equivalent to sexual intercourse, one of several alleged acts in support of the charge of persecution as a crime against humanity (pp. 2-3, 37-38). The Panel recalls the language of this provision, stating that it prohibits the crime against humanity of “[c]oercing another by force or by threat of immediate attack upon his life or limb to any other form of severe sexual violence” (p. 38).<sup>22</sup> The Panel looks to international law to define “severe sexual violence” as “any severe abuse of a sexual nature inflicted upon the integrity of the person by means of coercion, threat of force, or intimidation in a way that is humiliating and degrading to the victim’s dignity”<sup>23</sup> (*id.*). The Panel explains that, unlike the act of coercing another into sexual intercourse or an equivalent act, sexual violence has been defined by the ICTY as “broader than rape and including such crimes as molestation” (*id.*). The Panel finds that this characterization matches the facts of Witness C’s testimony perfectly, recalling that Witness C was “coerced by force and threats against her life and physical security” when Lelek came to her house with another person, armed and demanding money, and cites the fact that Witness C was alone in her house, facing uncertainty, and afraid for her life (*id.*). In this context, Lelek cursed at her, physically assaulted her, and acted in a violent manner (*id.*). Thus, the Panel concludes that Lelek coerced her into an act of a sexual nature under circumstances in which civilians were under attack and Lelek was a part of that attack (*id.*). The Panel observes the fact that Witness C was an elderly woman

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<sup>22</sup> Note that this citation of Article 172(1)(g) differs somewhat from the text of that provision cited elsewhere in this digest, which uses the phrase “or any other form of sexual violence of comparable gravity” rather than “any other form of severe sexual violence,” suggesting a different translation of these terms in different versions of the Criminal Code of BiH.

<sup>23</sup> *Prosecutor v. Stakic*, IT-97-24/T, Trial Chamber Judgment, July 31, 2003, ¶ 757.

coerced into touching Lelek's "sexual organ," an act that caused her humiliation and degradation of her human dignity, as well as fear and shame (*id.*). Based on these factors, the Panel finds that Lelek's acts constitute a severe form of sexual violence (*id.*). The Panel notes that in the indictment, the Prosecutor characterized these allegations as "an equivalent sexual act (rape)," but finds that "severe sexual violence" more accurately describes the evidence (*id.*). This is because, in the Panel's view, a sexual act equivalent to sexual intercourse implies penetration of a sex organ, an object, or some other body part in any part of the victim's body, and in this case, Lelek did not penetrate Witness C (p. 39). Nonetheless, the Panel finds that the evidence establishes Lelek's culpability for this act which, together with other acts evidenced at trial, constitute persecution as a crime against humanity (pp. 2-3, 38-39).

### **Other Issues:**

#### **SENTENCING:**

- In determining Lelek's sentence, the Panel assesses several factors under the relevant sentencing provisions of the CC of BiH<sup>24</sup> and considers Lelek's acts of sexual violence relevant to several of these factors (pp. 51-57).
  - *Suffering of victims*: First, with regard to the requirement that the sentence must be "necessary and proportionate to the danger and threat to the protected persons and values,"<sup>25</sup> the Panel explains that the purpose of this provision is to take into account "the suffering of the direct and indirect victims" (p. 51). The Panel recounts the effects of Lelek's crimes on his victims, including the effects of the incident described under "Forced Nudity" above in which Lelek ordered Zejneba Osmanbegović and her 80-year-old mother to undress (p. 52). Recalling how Osmanbegović and her mother were "terrorized and threatened and caused emotional injury" due to several actions taken by Lelek and others, including being forced to undress and remain that way for nearly an hour, the Panel notes that Osmanbegović still suffers emotional injuries as a result of these events (*id.*). The Panel also cites the ongoing suffering Witness M.H. is experiencing, and while the Panel acknowledges M.H.'s testimony that the other men who raped her were more brutal than Lelek, the Panel nonetheless concludes that Lelek contributed greatly to her suffering, recounting the fact that M.H. was already in a "mutilated physical condition" from previous rapes when Lelek raped her (*id.*). Furthermore, the Panel observes that Lelek had known M.H. since his childhood, making his actions a violation of M.H.'s trust (*id.*). The Panel notes also the suffering Witness C experienced when Lelek terrorized her at gunpoint, beat and robbed her, and then forced her to touch his penis until he was ordered to stop by another soldier (*id.*).
  - *Degree of liability*: The Panel also considers Lelek's degree of liability in determining his sentence (p. 54). The Panel notes in this regard that Lelek was acting as a leader when he committed the offenses against Osmanbegović and her family, giving orders to two co-perpetrators (*id.*). Furthermore, the Panel finds, as

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<sup>24</sup> See Criminal Code of Bosnia and Herzegovina, *supra* note 6, Art. 2.

<sup>25</sup> *Id.*

a reserve police officer, Lelek had a duty to protect the citizens of Višegrad regardless of their ethnicity and he violated this duty by committing several crimes, in particular violent crimes including sexual violence (p. 55). The Panel finds this fact constitutes an aggravating factor in its sentencing determination (*id.*).

- *Deterrence and rehabilitation:* The Panel also notes that its sentence must take into consideration the goal of rehabilitation and how Lelek’s rehabilitative needs will be met (p. 56). In this regard, the Panel emphasizes the fact that the nature of Lelek’s crimes against the Osmanbegović women, the rape and torture Lelek committed against M.H., and the sexual violence he perpetrated against Witness C “all raise issues for individual assessment” (*id.*).
- Taking all of the above factors and several others into account, the Panel sentences Lelek to 13 years of imprisonment (p. 56).