23 -07- 2007

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Sud BiH / Суд БиХ
Krivično odjeljenje I Apelaciono odjeljenje/
Кривично одјељење II Апелационо одјељење
Odjel I / Одјел I Odjel II / Одјел II
Odsjek za sudsku upravu/Одсјек за судску управу
X-KRŽ/05/70

PREVOD BOS. 122 g

Number: X-KRŽ- 05/70
Sarajevo, 28 March 2007

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Panel of the Appellate Division consisting of Judge Azra Miletić as the Presiding Judge and Judges Finn Lynghjem and José Ricardo de Prada Solaesa as members of the Panel, with the participation of the Legal Officer Lejla Fadilpašić as minutes-taker, in the criminal case against the accused Radovan Stanković for the criminal offense of Crimes against Humanity in violation of Article 172 (1) c), e), f) and g) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the BiH CC), deciding upon the appeals filed respectively by the Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the Prosecutor's Office of BiH) number KT-RZ-45/05 dated 16 January 2007, the accused Radovan Stanković and his Defense Attorneys, lawyers Dragica Glušac and Nebojša Pantić, against the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/70 dated 14 November 2006, at the session held without the presence of the accused and in the presence of his Defense Attorneys and Prosecutor of the Prosecutor's Office of BiH, Vaso Marinković, on 28 March 2007, rendered the following:

## VERDICT

Refusing as ungrounded the appeals filed respectively by the Accused Radovan Stanković and his Defense Attorneys, lawyers Dragica Glušac and Nebojša Pantić, and the appeal of the Prosecutor's Office of BiH referring to the acquitting part of the first instance Verdict, and granting the appeal of the Prosecutor's Office of BiH referring to the decision on criminal sanction, therefore, the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/70 dated 14 November 2006 is hereby revised in the part referring to the decision on criminal sanction whereby the accused Radovan Stanković, for the criminal offense of Crimes against Humanity in violation of Article 172 (1) c), e), f) and g) of the BiH CC, IS SENTENCED TO 20 (twenty) YEARS OF LONG TERM IMPRISONMENT.

Based on the application of the legal provision under Article 56 of the BiH CC, the time the Accused spent in custody, commencing on 9 July 2002, shall be credited towards the sentence of imprisonment.

The other parts of the Verdict remain unchanged.

## REASONING

By the Verdict of the Court of Bosnia and Herzegovina number X-KR-05/70 dated 14 November 2006, the accused Radovan Stanković was found guilty of the criminal offense of Crimes against Humanity in violation of Article 172 paragraph 1 item c), e), f) and g) of the BiH CC committed by the acts described in sections 1 through 4 of the operative part of the Verdict.

STALNI SUDSKI TUMAČ ZA ENGLESKI JEZIK / STALNI SUDSKI INTERPRETER [redacted]

The first instance panel sentenced him to 16 (sixteen) years of imprisonment for the above mentioned criminal offense, crediting the time the accused spent in custody towards the sentence of imprisonment, while pursuant to the provision of Article 188 (4) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the BiH CPC) it relieved him of the duty to reimburse the costs of criminal proceedings.

Pursuant to Article 198 (2) of the BiH CPC, the injured parties A., B., C., D., E., G., H., I., J., K. and N. were referred to take civil action with their claims under property law.

By the same Verdict, the accused is acquitted of the charges that he committed the actions described in Section 1 of the acquitting part of the Verdict while pursuant to the provision referred to in Article 283 c) of the BiH CPC the charges for the actions described in Section 1 of the dismissing part of the Verdict are dismissed. Therefore, the costs of the criminal proceedings referring to these two sections are to be paid from within the budget appropriations.

The accused Radovan Stanković and his Defense Attorneys, lawyers Dragica Glušac and Nebojša Pantić, filed timely appeals against the convicting part of the Verdict for all the grounds for appeal, while the Prosecutor's Office of Bosnia and Herzegovina filed a timely appeal against the acquitting part of the Verdict for the state of the facts being erroneously or incompletely established, violation of the criminal code and in respect to the sentencing part of the Verdict for the decision on criminal sanction.

In addition to the above mentioned appeal, the accused filed a supplement to the appeal and then on 14 March 2007 he filed another supplement to the appeal.

Pursuant to the decision dated 5 December 2006, the Appellate Panel did not take into consideration the supplement to the appeal given that it includes offensive and inappropriate content, particularly having in mind that the basic appeal was filed for all the grounds for appeal.

The supplement to the appeal was also not taken into consideration by the Appellate Panel given that it was filed on 14 March 2007, that is, outside the legally prescribed time period for filing the appeal.

In the reasoning of his appeal the accused states that during the first instance proceedings his right to defense guaranteed by Article 6 of the European Convention on Human Rights (hereinafter: ECHR) was violated in that the first instance Panel prevented him from presenting his defense and questioning the witnesses for the prosecution and that following his falling out with the lawyer Radović it imposed other lawyers upon him thus preventing him from representing himself. Further, the accused argues that due to the fact that he did not attend any of the held hearings the duty of the first instance panel was to forward him the records of the hearings which, in his opinion, was not done pursuant to Article 151 through 156 of the BiH CPC considering that instead of the written recordings he only received audio recordings which he refused to receive stressing that the said form of the records was not practical to trace the relevant spots in the testimonies of the witnesses

compare them. Furthermore, he argues that the operative part of the Verdict is incomprehensible and contradictory because it indicates the period from April 1992 to the end of March 1993 as the time of perpetration of the criminal offense as well as because it does not contain a description of a single action which would indicate any of the elements of the criminal offense. Then, the accused states that his *ex officio* Defense Attorneys did not read the submissions filed by the accused and his former Defense Attorney to the International Criminal Tribunal for the Former Yugoslavia (hereinafter: the ICTY) which resulted in a poor quality defense as well as that from the contested Verdict it cannot be seen whether and how they cross-examined the witnesses for the prosecution. The accused alleges a further violation of the provisions of the criminal procedure in the Decision of the first instance panel to accept, as proven, facts established in certain cases conducted before the ICTY, stating that regardless of the fact that in some case there is a decision on certain issues and facts, these facts cannot be considered as adjudicated for other cases as well even if they refer to the same time period and location. In addition to the above mentioned, the accused states that the contested Verdict does not indicate concrete actions or explain the reasons based on which the Court concluded that he acted with direct intent as a required form of guilt for the existence of the crimes as charged, that is, knowledge that the acts he was taking were related to the armed conflict and that he took them within a widespread and systematic attack directed against Muslim civilians. Therefore, he is of the opinion that they should be considered separately from the other events.

Further, the Accused states that the state of the facts was erroneously or incompletely established. He argues that based on the contested Verdict it is impossible to establish how and based on which evidence the first instance panel reached the presented conclusions, in particular alleging that the testimonies of the witnesses are contradictory and consequently, in the opinion of the appellants, they are false.

The accused finds a violation of the Criminal Code in the fact that the first instance panel, instead of the Criminal Code of the SFRY applicable at the time of the alleged commission of the criminal offense, applied the Criminal Code of BiH which entered into force in 2003. Thus, in his opinion, it violated the principle of legality and the ban on retroactive application of the criminal code. Moreover, he states that since at the time of the perpetration of the criminal offence Crimes against Humanity were not defined by the applicable criminal legislation as a separate criminal offence, or at the very least, no criminal sanction was prescribed for it under the law, then the SFRY CC and the BiH CC, currently in effect, cannot be compared either by type or by length of punishment. Therefore, he concludes that in the concrete case only the provision of Article 142 of the CC of SFRY could be applied because it is the more lenient law in respect to the punishment prescribed by Article 172 and 173 of the BiH CC and the fact that the Constitution of BiH abolished the death penalty.

Explaining the arguments of the appeal contesting the decision on duration of the pronounced punishment, the accused states that he is of the opinion that the first instance panel in meting out the punishment did not take into consideration a single extenuating circumstance such as the fact that he helped the witness C to leave Miljevina and saved her life, the fact that in the wider context of the conflict he did not have a significant role, that his alleged actions were limited only to the territory of Miljevina, that it was not proved that he influenced others to violate the provisions of international humanitarian law and that

had no prior convictions. In particular, he indicates that the first instance panel attached a too great significance to his conduct before the Court, stating that his conduct during the proceedings was his defense strategy which cannot be considered as an aggravating circumstance in meting out the punishment.

In the appeal the Defense Attorney Dragica Glušac indicates that the first instance panel, by its decision to conduct the main trial outside the presence of the accused, prevented the accused from following the course of the main trial, rebutting the evidence and facts, or examining witnesses. Thus, as deemed by the defense, his right to a fair and public trial pursuant to the provisions of Article 6 (1) of ECHR was violated. In addition to the above mentioned, she states that the decision on exclusion of the public was unlawful which pursuant to Article 297 (1) e) and Article 297 (2) of the BiH CPC constitutes an essential violation of the provisions of criminal procedure. So, it follows that in the first instance Verdict the Court relied on the unlawful evidence pursuant to the provisions of Article 10 (2) of the BiH CPC and international law. The defense deems the decision on exclusion of the public unlawful because the first instance panel failed to evaluate protection measures that the Prosecutor's Office requested for each witness individually and it did not take into account the effect of such a decision on the right of the accused to a fair trial. The defense further contests the decision of the Court to abandon its previous decision on psychiatric evaluation because the accused explicitly refused to cooperate with the expert witness arguing that the Court had to find appropriate ways and methods, without use of force, to conduct the granted psychiatric evaluation in order to asses the mental condition and mental capacity of the accused at the time of the trial. The defense argues that the above mentioned indicates that the state of the facts is erroneously or incompletely established and thus the substantive law has been erroneously applied because the issue of capacity of the accused to consciously attend and follow the course of the main trial, as estimated by the defense, remains unresolved and not properly explained in the Verdict, meaning that the most important and decisive fact has not been established.

The decision of the Court to accept, as proven, the facts established by the ICTY judgments, in the opinion of the defense, constitutes a violation of the principle of equality of arms as well as the principle of immediacy of criminal proceedings, pointing out that it was rendered only to avoid hearing 11 witnesses and that the accepted facts incriminate the accused either directly or indirectly. Within that context, the defense deems that both the Defense and the accused should have been permitted to cross-examine the proposed witnesses and to comment on and review the material evidence related to these facts.

The appeal further indicates that the contested Verdict, contrary to the provision of Article 24 of the Law on Protection of Witnesses Under Threat and Vulnerable Witness (hereinafter: Law on Protection of Witnesses), is exclusively based on the testimonies of the protected witnesses which the defense considers fabricated and false stressing in particular that the description given by one of the witnesses who stated that she had been raped by the accused does not correspond to the description of Radovan Stanković at all. Therefore, the Defense Attorney is of the opinion that the person concerned is a completely different person. The defense considers the testimonies of the witnesses unreliable, motivated by personal, emotional or political reasons. The defense further considers the contribution of the accused to everything that happened negligible compared with the other persons who were the main commanders and who made decisions.

In respect to the applicable substantive law, the Defense Attorney for the accused is of the opinion that the Court, in the concrete case, had to apply the SFRY CC as the law in force at the time of alleged commission of the criminal offense, and which, as deemed by the defense, is also the law *more lenient for the perpetrator* because according to Article 141 and 142 of the CC of SFRY War Crimes against Humanity and Crimes against Civilians are punishable with not less than five years of imprisonment or a death sentence (which was abolished after the ratification of Protocol 13 of ECHR on 29 July 2003). Then, the defense considers that the Court violated the Criminal Code by application of the law that could not be applied to the criminal offense of which the accused has been found guilty, in that following the transfer of the case against the accused from the ICTY, which is in charge of prosecution of persons responsible for serious violations of international humanitarian law, and pursuant to the provisions of the Statute of the Tribunal, the Court reached the erroneous conclusion that the criminal offense the accused has been found guilty of constitutes a criminal offense according to the national law. So, the defense deems that the criminal offense of Crimes against Humanity does not fall within the competence of the Court as referred to in Article 4a) of the BiH CC, because it did not constitute a part of the national criminal laws in the SFRY in 1992. Therefore, the defense argues that the Court of BiH does not have jurisdiction in that respect nor does Article 4a) envisage a mechanism for prosecution of Crimes against Humanity according to the "general principles of international law" within the national legal system.

As regards the pronounced criminal sanction, the appeal indicates that the first instance panel did not evaluate all the circumstances under which the offense concerned was allegedly committed referring to the fact that there was a war in the territory of BiH, that people were mobilized and sent to the front against their will and that, as stated by the defense, everything was a consequence of the past, the unexplained hatred and the combination of unfortunate circumstances. Furthermore, it is stated that the accused was a young and inexperienced man in such an environment and situation when he could not do anything else as he would have put his own safety at risk. Meanwhile, he has made a family, he has three minor children and a long stay in prison would certainly cause irreparable harm. The accused has no previous convictions and is not inclined to antisocial behavior while his conduct during the proceedings and submissions he was filing, in the opinion of the defense, demonstrate his dissatisfaction with the entire proceedings, including his custody status as well as lack of confidence in the Court and the Prosecutor's Office of BiH.

In the appeal, the Defense Attorney Nebojša Pantić, presented the same objections as the accused Radovan Stanković and lawyer Dragica Glušac which refer to the decision of the Court to hold the main trial outside the presence of the public and Accused, to accept as proven the facts established by the ICTY judgments and in the concrete case to apply the BiH CC. He also contests the regularity and completeness of the established state of the facts in respect to responsibility of the accused for removal of the underage A.B. as well as the decision of the Court to abandon the psychiatric evaluation of the accused to determine his mental condition.

The Prosecutor's Office of BiH contests the acquitting part of the Verdict due to the state of the facts being erroneously established, holding that the first instance panel erroneously evaluated the testimony of the witness G as incomplete and imprecise in relation to

[redacted]

decisive facts and based on an erroneously established state of the facts it acquitted the accused of the charges under this count of the Indictment instead of finding him guilty, the consequence of which, as stated in the arguments of the appeal, is a violation of the Criminal Code of BiH.

In respect to the imposed criminal sanction, the Prosecutor's Office of BiH is of the opinion that the Court, for the actions that the accused was found guilty of, should have sentenced him to a long term imprisonment given the gravity of the perpetrated crime, its consequences and the level of social threat that it produced. In addition to the above mentioned, the appeal argues that the Court did not sufficiently evaluate other aggravating circumstances for the accused such as his status in the Karaman's house, the anger and hatred that he demonstrated towards the victims, the fact that in the same decisive manner he was responsible for the fate of the underage AB, and his conduct before the Court, which, in the opinion of the Prosecutor's Office, indicates that in order to serve the purpose of punishment in terms of general and special prevention the Accused should have been sentenced to a long-term imprisonment.

The Defense Attorneys have also filed replies to the appeal of the Prosecutor's Office of BiH proposing that it be refused as ungrounded.

At the session of the Appellate Panel, held on 28 March 2007, pursuant to Article 304 of the BiH CPC, both parties briefly presented the appeals and replies to the appeals and fully supported their respective written arguments and proposals.

Following review of the contested Verdict insofar as contested by the appeals, the Appellate Panel rendered the decision as in the operative part for the following reasons:

The arguments of the appeal indicating the existence of essential violations of the criminal procedure provisions, and relating to the decision of the first instance panel on exclusion of the public and the continuation of the trial outside the presence of the accused, are ungrounded.

Article 235 of the BiH CPC regulates that from the opening to the end of the main trial, the judge or the Panel of judges may at any time, *ex officio* or on motion of the parties and the defense attorney, but always after hearing the parties and the defense attorney, exclude the public for the entire main trial or a part of it for the reasons specified in the said Article. Article 237 (1) regulates that a decision on exclusion of the public must be explained and publicly announced.

Based on a review of the case file, the Panel found that by the Decision of the Court of BiH number X-KR-05/70 dated 23 February 2006, aimed at protection of the personal and intimate life of the injured, morality and interest of the witnesses, the public was excluded from the main trial subject to the obligation of the Court to revise and evaluate the decision concerned during the entire course of the proceedings. The said Decision was rendered upon the motion of the Prosecutor while the Defense Attorney for the accused, even after the Court set the time period for consultations with the accused, refused to comment on the Decision. Therefore, the fact that the defense did not use the given possibility to present its position on the motion of the Prosecutor's Office, contrary to the arguments of the appeal,

[redacted]

does not make the decision of the first instance panel unlawful. If, in addition to the above mentioned, one takes into account that the Decision concerned was publicly announced and explained, pursuant to Article 237 of the BiH CPC, and even forwarded to the parties to the proceedings in a form of a written decision, then the arguments of the appeal of the Defense Attorney Dragica Glušac are also proved to be ungrounded as a whole.

As regards the reasons for exclusion of the public, which guided the first instance panel when it rendered the Decision, the Appellate Panel is of the opinion that they are fully justified. That is, the reasoning of the Decision of this Court number X-KR-05/70 dated 23 February 2006, as well as the reasoning of the contested Verdict, contain important and serious reasons which indicate that the protection of personal and intimate life of the injured, morality and interest of the witnesses who testified about extremely difficult and humiliating circumstances they survived, in addition to the threat of the accused that he would make their protected identity known, could not be achieved in any other way but by the exclusion of the public. Therefore, there are no grounds for the objection given in the appeal that the Court failed to evaluate protection measures that the Prosecutor's Office requested for each witness individually given that the protection measures would not have any purpose if at the public trial the accused had carried out his threat and disclosed their identification data. The fact that the first instance panel took into account the need to strike a balance between the rights of the accused to a public trial and the protection of morality and interests of the witnesses also arises from the decision to open the trial to the public whenever possible. Thus, the standard of public nature of the trial and legal possibility to depart from it in certain situations, in the opinion of this Panel, was correctly and fully applied. Therefore, the arguments of the appeal that the evidence presented at the main trial from which the public was excluded should automatically be considered unlawful is also ungrounded.

The objections of the appeal, indicating that the decision of the first instance panel to conduct the main trial even outside the presence of the accused violated the provision of Article 247 of the BiH CPC, thus preventing him from following the course of the main trial and actively participating in it, are also ungrounded.

The said Decision of the first instance panel was rendered and explained at the main trial held on 4 July 2006, and made in writing, and as such it was submitted to the parties to the proceedings and Defense Attorneys. The first instance panel also gave a detailed explanation of the reasons for rendering the Decision in the contested Verdict. Based on the above mentioned it arises that at the hearings held on 23 February 2006 and 6 June 2006 the accused, having received multiple warnings from the Presiding Judge, had to be removed from the courtroom for the reason of improper conduct and contempt of the court. After that, as it can be seen from the official notes of the authorized officers of the Detention Unit of the Court of BiH, on 16 June 2006 and 4 July 2006, he refused to appear at the continuation of the main trial stating that he could only be brought in there with the use of force and announcing that he would continue with improper conduct by coming to the Court in his underwear. The first instance panel resolved the resulting procedural situation by rendering the decision that in case of further unjustified refusal by the accused to appear at the scheduled trial to which he was duly summoned the trial should be held even without his presence and noted that the accused should have the right to appear before the Court at all times, that his Defense Attorneys would be present at the trials held without his

[redacted]

and that he would be informed about the course of the proceedings by serving the accused with the recording of the entire trial the same day the session was held. Such actions, contrary to the arguments of the appeal, neither violated the principle of ban of trial in absentia nor prevented the accused from following and participating in the main trial.

Absence of the accused as regulated by Article 247 of the BiH CPC implies a situation in which it is not possible to provide for the presence of the accused at the main trial because he is hiding or on the run or if there are other difficulties in informing him about the proceedings. Considering that the accused was in custody during the entire course of main trial and that he consciously refused to appear at the hearings to which he was duly summoned, the Appellate Panel is of the opinion that it cannot be considered that he was absent pursuant to Article 247 of the BiH CPC.

The continuation of the trial outside the presence of the accused, considered within the context of the guarantees of Article 6 of the ECHR, is also possible. That is, the standards set by Article 6 of the ECHR applicable to the concrete procedural issue require the accused to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him, which was indisputably done during the hearing before the Preliminary Proceedings Judge and by delivery of the Indictment, holding of the guilty or not guilty plea hearing and opening of the main trial by reading the Indictment. Furthermore, he is entitled to examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. However, the said right of the accused which would also imply his presence is not an absolute right in the light of the fact that the accused can actually waive the right. Taking into consideration the fact that at all times the accused was aware of the charges against him, that he was timely informed and summoned to the scheduled hearings, that he was capable to attend them, that his Defense Attorney was always present throughout the main trial and that each time the accused would waive his right to attend the trail clearly, voluntarily and explicitly, the Appellate Panel is of the opinion that he was in no way prevented from attending, following and participating in the main trial, but that he waived the right voluntarily, thus accepting continuance of the main trial even without him. Although the BiH CPC does not explicitly regulate such a procedural situation, based on the provision of Article 242 (2) of the BiH CPC, it can be seen that it is possible to remove the accused from the courtroom if the accused persists in disruptive conduct after being warned by the Presiding Judge and that the proceedings may continue during this period if the accused is represented by counsel. Thus, the conclusion of the first instance panel that the mere fact that the accused is not physically present in the courtroom does not automatically mean that the trial cannot continue is additionally supported. And above all, it was noted that the purpose of the constant improper conduct of the accused was obviously to prevent continuation of the proceedings and delay it, as correctly concluded by the first instance panel. Considering the alternative measure which could be applied in the concrete case, that is, forceful bringing of the accused to the courtroom in spite of his will, regardless of the threats to appear in his underwear, as proposed by the Defense Attorney Pantić in his appeal, the first instance panel concluded correctly that such treatment would represent the inhumane treatment of the accused, undermining the physical integrity of the accused and authority and the dignity of the Court. Besides, except for the physical presence of the accused he could not be forced to follow the course of the proceedings and respect procedural discipline in his own interest. Taking into account the foregoing, the decision

[redacted]

the panel, following the end of each hearing, to serve the recording to the accused, in order for him to be able to be informed about the course of the proceedings, represents an adequate manner to provide for the possibility to follow the course of the main trial without undermining his physical integrity by forcefully bringing him to the courtroom.

The arguments given in the appeal, filed by both Defense Attorneys and accused himself, that the decision of the court to accept as proven the facts established by the ICTY judgments, represents a violation of the provision of criminal procedure, that is, the principle of immediacy and contradiction are also ungrounded. In other words, in the hearing held on 13 July 2006, having heard the Prosecutor and the defense attorneys, the first instance panel granted the Motion of the Prosecutor's Office of BiH number KT RZ/05 to accept, as proven, the facts established in the ICTY first instance and the Appeals Panel Judgments in the case against Kunarac et al. number IT-96-23-T and IT-96-23/1-T and to also agree and accept the Decision on Judicial Notice of the ICTY Trial Chamber dated 16 May 2003.

In rendering this decision, the first instance panel, as deemed by the Appellate Panel, fully complied with the provision of Article 4 of the Law on Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by the ICTY in Proceedings Before the Courts in BiH, which as a *lex specialis*, in such cases, provides for departure from the said principles. Therefore, the objection of the defense in that sense is not grounded. The facts accepted by the first instance panel as proven are clear and concrete, do not include legal qualifications, and at the same time constitute a part of the Verdict which was adjudicated in the appeals procedure. Furthermore, they do not establish the criminal responsibility of the accused but the concrete act of perpetration is placed in a wider context of the war events, that is, the context of the existence of a widespread and systematic attack against non-Serb civilians in the said territory and at the time relevant to the Indictment. Their acceptance, as also concluded by this Panel, in no way influenced the right of the accused to a fair trial.

Then, the Defense Attorneys in their appeals dispute the decision of the court to abandon the previously accepted motion of the defense to subject the accused to a psychiatric evaluation by Dr. Neira Zivlak Radulović, being of the opinion that in the said manner and without valid explanation the Court failed to find out whether the accused, given his mental capacity, was able to participate in the proceedings at all.

The fact that the Court ordered or allowed presentation of certain evidence and then abandoned it does not by itself represent a violation of the provision of the criminal procedure considering that the Court, in any case, is entitled not to allow presentation of some evidence or abandon the evidence whose presentation it ordered. The panel, naturally, has to give valid reasons for such decision, and in the concrete case, they are given in the reasoning of the contested Verdict, therefore, this Panel accepts them as a whole.

To wit, the defense proposed presentation of the evidence concerned because they were of the opinion that improper conduct of the accused before the Court and numerous submissions of offensive content sent to different addresses during the proceedings raised doubts that the accused developed permanent or temporary mental disorder during the trial due to which he was not capable to follow the trial. The first instance panel accepted

motion of the defense and, pursuant to the above mentioned, on 27 September 2007, the expert witness, Dr. Neira Zivlak Radulović, tried to contact the accused in the Detention Unit of the Court of BiH, however, the accused refused to see the doctor and make any contact with her. At the hearing held on 25 October 2006, the Court required from the expert witness an opinion on whether there was any alternative method to carry out the said evaluation and as the only remaining measure in that context the expert witness proposed to refer the accused, for observation, to the Psychiatric Clinic in Sokolac. She also stated that, in case of further refusal of the accused to cooperate, it would not be possible to evaluate his mental condition even at the foregoing clinic. Considering that the accused in his submission dated 27 September 2007 explicitly refused any expert evaluation, it is absolutely clear that not even his referral to the psychiatric clinic would cause a different reaction. Besides, the manner in which the accused could be transported to the clinic, given his refusal to cooperate whatsoever, would necessarily involve the use of force against him, which in the opinion of this Panel, as well as the opinion of the expert witness, would not be advisable and would cause an even stronger reaction by the accused.

On the other hand, if the conduct of the accused is analyzed as a whole, except for numerous submissions of offensive content in which he expressed his disrespect for all the state-level institutions, and his improper conduct before the court, which was the result of the same disrespect, the Court did not receive any other information from medical staff of the Detention Unit which would indicate that he is mentally ill. That is, while in custody he was frequently seeing a dentist and in that respect showed no repulsion against the doctor of his own choice. Then, the accused did not have or require any other medical intervention related to his mental condition. He demonstrated aggressive behavior only when addressing the Court or judges, that is, if he was brought to some of the hearings, while the content of his submissions to the Court results in the fact that he was aware of all actions undertaken by the Court and not only in his case but also in the other cases tried before this Court. Finally, the appeal itself that he filed personally against the first instance Verdict indicates that he is aware of the charges, the procedural provisions based on which the proceedings were conducted, as well as the substantive law applied to the concrete case. All the foregoing does not support the conclusion that he is a person who could not follow the proceedings but that he is a person who refused to respect the discipline of the proceedings regulated by the provisions of the BiH CPC, all due to his disrespect for the Court of BiH, as the state-level institution not recognized by the accused, aimed at delay and hindrance of the proceedings itself. So, based on the above mentioned reasons, the first instance panel correctly concluded that subjecting the accused to psychiatric evaluation at all costs and with the use of force, without a realistic possibility that it would have been possible to carry out the evaluation at all, and considering the foregoing, is not justified, therefore, the arguments of the appeal indicating the opposite are completely ungrounded.

Furthermore, the position of the appellants is wrong in claiming that the contested Verdict is based on the evidence on which, pursuant to the provisions of the Law on Protection of Witnesses Under Threat and Vulnerable Witness, it could not be based. The reason is that contrary to the arguments of the appeal, the witnesses who were granted the measures of protection in a form of protection of identity data and enabled to testify with the use of electronic device for distortion of voice or image of the witness were not granted the status of "protected witnesses" pursuant to the provision of Article 14 through 22 of the Law on Protection of Witnesses Under Threat and Vulnerable Witness (hereinafter:

Protection of Witnesses). In that case, the records on their hearing would only be read out at the main trial, pursuant to Article 21 of the said Law, therefore, pursuant to Article 23 of the Law on Protection of Witnesses, the sentencing verdict could not be based solely or to a decisive extent on evidence provided in that way. Contrary to the above mentioned, the witnesses under pseudonyms "A", "B", "C", "D", "E", "I", "J", "G", and "K" personally attended the main trial, as indicated by the Defense Attorney in the appeal, and gave their testimonies directly before the court panel, they were subjected to cross-examination by the defense for the accused pursuant to the provision of Article 262 of the BiH CPC thus the said restriction referred to in Article 23 of the Law on Protection of Witnesses does not apply to these witnesses. Based on the foregoing, it is clear that the objection of the Defense Attorney is ungrounded and as such refused.

Also, the Appellate Panel refused as ungrounded the arguments of the appeal of the accused Radovan Stanković, according to which he deems that the decision of the court to appoint him *ex officio* Defense Attorneys, that is, to refuse his request for self-representation, violates his right to a defense. Article 45 (1) of the BiH CPC explicitly regulates, among other things, that the accused must have a defense attorney if he is charged with a criminal offense for which a penalty of long-term imprisonment may be pronounced, which is the case here. The Article also states that the right concerned is not a right which can be waived voluntarily but that it is the duty of the court, according to the law, to provide the accused adequate professional assistance in prescribed cases, therefore, equality of arms in respect to the Prosecutor's Office as the other party to the proceedings. The essence of the mandatory defense in cases in which the court may pronounce a long-term imprisonment is the fact that these are the gravest criminal offenses which include numerous legal matters the resolution of which requires the involvement of persons with specific legal expertise. The position of the accused, in the concrete case, is even more difficult due to the fact that he is in custody, which also represents one of the reasons, aimed at adequate preparation of defense, to hire professionals who will be able to collect evidence in favor of the accused without disturbance. All the above mentioned was discussed by the first instance panel and on 19 August 2005 it was also decided by the ICTY, and in both cases it was concluded that the appointment of *ex officio* defense attorneys is absolutely in the interest of both justice and the accused as well as the economy of the proceedings which is also accepted by this Panel as a whole. Also, the Appellate Panel did not accept the statement of the accused that due to the appointment of ex officio defense attorneys the concept of his defense was wrong and that the evidence for the defense was not presented as it, in his opinion, should have been presented, being of the opinion that it is completely ungrounded and blanket. The basic reason for this is the fact that in the first instance proceedings the accused did not, pursuant to Article 49 (4) of the BiH CPC, require dismissal of the Defense Attorneys for not performing their duties properly, nor did their conduct before the Court indicate such a development, but he objected to the appointment of any *ex officio* defense attorney in general. In addition to that, the accused, due to the fact that he had two defense attorneys, in no way, either by the Court or the Defense Attorneys, was prevented from presenting the facts and evidence in his favor, asking witnesses the questions or presenting explanations about their testimonies. Instead, he opted on his own to use his right to remain silent, that is, not to present his defense, which is also guaranteed by the provisions of the BiH CPC. Since the appeal itself demonstrates the fact that the accused knowingly and deliberately did not use his right to present his defense and propose presentation of evidence, therefore

[redacted]

objection that the Defense Attorneys represented him poorly and that the Court should allow him to represent himself in person is completely ungrounded.

The objection of the accused that the operative part of the Verdict is incomprehensible because it indicates the period from April 1992 until March 1993 as the time of perpetration of the crime was refused by the Court as ungrounded given that not even the appellant himself stated what makes the operative part incomprehensible. However, based on the established state of the facts it arises that the criminal actions the accused is charged with were committed exactly in the indicated period of time and that a more precise time frame, given the character of the crime and the circumstances under which it was committed, was not possible in the concrete case.

The statements of the appeal that the operative part of the Verdict does not include all the essential elements of the criminal offense the accused was pronounced guilty of and that the Verdict does not contain the reasons on decisive facts, that is, that the presented evidence was not evaluated as regulated by the provisions of the BiH CPC, in the opinion of this Panel are presented in an absolutely generalized manner. The operative part of the Verdict includes all the essential elements of the criminal offense of Crimes against Humanity referred to in Article 172 of the BiH CC: the existence of a widespread or systematic attack directed against the non-Serb civilian population, knowledge of the accused of such an attack and nexus between the crime of the accused and the attack against the civilian population with a precise description of individual criminal actions marked in Sections 1 through 4 of the sentencing part of the Verdict. Then, contrary to the statements of the appeal, the contested Verdict gives valid reasons on all decisive facts relevant for adjudication of this legal matter with a detailed and comprehensive analysis of all the evidence individually and in correlation, which will be elaborated in the evaluation of regularity and completeness of the established state of the facts.

The accused then objected to the form of the recordings of the main trial which were regularly delivered to him by the first instance panel following the completion of each hearing, stating that the law prescribes the obligation to keep minutes in writing and that he was forwarded only audio-video recordings, which he refused to accept, and which he considered to be impractical for the quick tracing of certain sections of witnesses' testimonies.

In addition to the general provisions of the BiH CPC referred to in Article 151 through 155, pursuant to the provision of the Article 156 of the BiH CPC, special provisions of Article 253 and 254 of the said law are also applied to the minutes of the main trial.

Article 253 (1) of the BiH CPC regulates that a verbatim record of the entire course of the main trial must be kept. When the issue is the manner of keeping the records, except in writing (either in writing or using a typing machine or computer) it can be kept by means of audio-video recordings which results from Article 155 of the BiH CPC, that is, the same is regulated by Article 253 (2) of the BiH CPC which, among other things, regulates that the judge or the presiding judge may order that a certain part of the record be read (if taken in writing) or copied (if technically recorded).

In the concrete case, given the technical capacities of the Court of BiH, the minutes of the main trial are recorded using audio-video means, and, pursuant to the above mentioned provisions, they represent valid minutes of the main trial. The law also does not prescribe the obligation to take written minutes cumulatively in case of audio-video recordings of the main trial, so, given that the accused had technical capacities to review the minutes in the form in which they were delivered to him, his objection that he finds them impractical to follow testimonies of the witnesses does not make the minutes improperly made or indicate the existence of any violation of the provisions of criminal procedure in that context, therefore this objection is also refused as ungrounded.

The arguments of the appeal contesting the application of the substantive law are also ungrounded. That is, he states that the first instance panel, instead of the SFRY CC, which as deemed by the appellants was the law in force at the time of commission of the criminal offense and which was more lenient to the perpetrator both from the aspect of existence of the criminal offense concerned as such and the punishment foreseen, erroneously applied the BiH CC. Thus, the appeal alleges it violated both the principle of legality and of time constraints regarding applicability referred to in Article 3 and 4 of the Criminal Code of Bosnia and Herzegovina.

In other words, it is indisputable that at the time of commission of the acts the accused is charged with and which constitute all the elements of the criminal offense of Crimes against Humanity, the said criminal offense, as such, was not stipulated by the Criminal Code of SFRY which was the applicable substantive law at the time of commission of the criminal offense.

It is also indisputable that, pursuant to the principle of legality, no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which no punishment was prescribed by the law (Article 3 of the BiH CC), while, pursuant to the principle of time constraints regarding applicability, the law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied (Article 4 of the BiH CC). The principle of legality is also stipulated under Article 7 (2) of the ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR).

However, Articles 4a) of the BiH CC which the first instance Verdict correctly refers to regulates that Articles 3 and 4 of the 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. Thus, the provisions of Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR have practically been adopted, therefore providing for departure from the mandatory application of a more lenient law in proceedings conducted for acts which are criminal according to international law. It is stated that this is the case in the proceedings against the accused because this is exactly an incrimination which includes a violation of international law. In other words, as correctly reasoned in the contested Verdict, in the period relevant to the Indictment, Crimes against Humanity indisputably constituted a criminal offense both from the aspect of inter[illegible]

[redacted]

customary law and from the aspect of the general principles of international law. The detailed and comprehensive arguments corroborating such conclusion presented by the first instance panel are absolutely valid and correct, and therefore also accepted by this Panel as a whole.

Further, international customary law and international treaties signed by the Socialist Federative Republic of Yugoslavia automatically became binding on Bosnia and Herzegovina, either during the time when it was part of the Socialist Federative Republic of Yugoslavia or after it became a successor to the former Socialist Federative Republic of Yugoslavia. The 1978 Vienna Convention on Succession of States in respect to Treaties, ratified by the Socialist Federative Republic of Yugoslavia on 18 April 1980, in Article 34 stipulates that a treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues to be in force in respect of each successor State so formed unless the States concerned agree otherwise. In addition to the above mentioned, on 10 June 1994, Bosnia and Herzegovina declared that it recognized all the international treaties which were binding on the former Yugoslavia. Article 210 of the Constitution of the Socialist Federative Republic of Yugoslavia, indeed, stipulates that international treaties are automatically implemented and applied from the day of entry into force without the adoption of implementing regulations.

The foregoing results in the correct position of the first instance panel that Bosnia and Herzegovina, as a successor to the former Yugoslavia, ratified the ECHR and the ICCPR, therefore, these treaties are binding on it. Given that they regulate the obligation to try and punish 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, which is definitely the case with Crimes against Humanity pursuant to the above mentioned, it is indisputable that the arguments of the appeal claiming the opposite are entirely ungrounded and as such refused.

As regards the objections indicating that the SFRY CC was more lenient to the perpetrator in respect to the imposed criminal sanction, the Appellate Panel notes that at the time of commission of the crime the accused is charged with, it was possible to pronounce a death penalty, because as correctly stated by the Defense Attorney Dragica Glušac, it was abolished after the ratification of Protocol 13 of the ECHR on 29 July 2003. That is, by the said Protocol, the signatory countries committed not to prescribe the death penalty in their criminal laws. Prior to that, the death penalty was removed from the criminal laws of Bosnia and Herzegovina by adoption of the Criminal Code of the Federation of BiH (1998), Criminal Code of Republika Srpska (2000) and Criminal Code of the Brčko District (2000), and the 2003 Criminal Code of BiH. Therefore, it follows that the Law which does not envisage pronouncement of such penalty, meaning the Criminal Code of BiH, is in any case more lenient law to the perpetrator.

The arguments of the appeal contesting the jurisdiction of this Court to try the concrete case are also ungrounded considering the fact that the case against Radovan Stanković was transferred from the ICTY to the Court of BiH pursuant to Rule 11*bis* of the Rules of Procedure and Evidence of the ICTY and Article 2 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected from the ICTY in the Proceedings Before the Courts in BiH (hereinafter: the Law on Transfer) and given that the fact that Article 13 (1) of the Law on the Court of BiH stipulates that the

[redacted]

Court has jurisdiction over criminal offences defined in the Criminal Code of Bosnia and Herzegovina and other laws of Bosnia and Herzegovina and that Crimes against Humanity are defined as a criminal offense in Article 172 of the BiH CPC.

The statements of the appeal contesting the regularity and correctness of the established facts both in the sentencing and acquitting parts of the first instance Verdict are also ungrounded.

In other words, the Appellate Panel deems that the first instance panel by the correct evaluation of key evidence - testimonies of the witnesses, injured parties, and other material evidence of the Prosecutor's Office of BiH - in a proper and reliable manner found that the accused committed the criminal offenses he was found guilty of, a conclusion which is fully accepted by this Panel as well.

The presented arguments of the appeal referring to the regularity and correctness of the established facts are brought down to the arguments that the heard witnesses are not telling the truth and that their current condition, the fact that they are married and have children, does not suggest the conclusion that they were raped. The Appellate Panel deems such objections completely ungrounded particularly because they, except for blanket conclusions on the alleged fabrication of the testimonies of the witnesses, do not contain a single valid counter-argument or evidence which would in any way challenge their mutually consistent contents. On the other hand, the first instance panel in a regular and correct way gave credence to the heard witnesses given that their testimonies, which differ only to the extent confirming that they were not memorized but reflecting different perceptions of different persons in abnormal and extremely stressful circumstances they were indisputably in, clearly result in the fact that the accused Radovan Stanković undertook the acts in the manner, at the time and in the place as stated in the operative part of the sentencing part of the Verdict.

Due to the above mentioned grounds, the Appellate Panel accepts the grounds given in the reasoning of the first instance Verdict because it resulted from proper and legal proceedings, because its reasoning presents fully and definitely both the indisputable facts as well as the grounds for certain disputable facts to be considered proven and because it includes a valid evaluation of the credibility of contradictory evidence. The presented arguments of the appeal are on the other hand not sufficient to contest such correct and complete conclusions.

The arguments of the appeal of the Defense Attorney Dragica Glušac, that the witness under pseudonym C who testified about all four sections of the sentencing part of the Verdict, at the time relevant for the Indictment, was actually in a common-law marriage with the Accused, that in that sense during the hearing in the capacity as a witness she should have been warned that she was allowed to refuse to testify, given the content of the testimony of the witness concerned, are completely irrelevant. In her testimony, which this Panel also deems clear, precise and extremely moving and credible and which was fully corroborated by the testimonies of all other witnesses as explained in detail in the first instance Verdict, she clearly described how she was forcefully taken to and detained in Karaman's house. In the house, among other things, she was assigned to Radovan Stanković, he repeatedly raped her and forced her to clean, cook and do other house chores together with other girls and young girls who were brought there in the same manner. Considering all

[redacted]

mentioned, the conclusion of the defense that such relation has to be considered a common-law marriage, in terms of the voluntary union of man and woman, is not based on a single segment of the testimonies of the heard witnesses and as such it is absolutely wrong.

In respect to the objections of the appeal claiming that pursuant to the presented evidence it was not established in a reliable manner that the accused removed the underage A.B. in Foča from a bus going to Goražde and brought her to the detention center, the Appellate Panel is of the opinion that the first instance Verdict gives a detailed and comprehensive analysis of the testimonies of the witnesses who testified about the circumstances referred to in this section, therefore, it draws a valid conclusion which is fully accepted by this Panel as well. In other words, it follows from the testimonies of the witnesses A., C., J., I. and K that the girl A.B., with her mother and two sisters, was sitting in the front part of the bus when the bus was stopped by the police car on the bridge. According to the testimony of her mother, witness I, the accused warned AB, when entering the bus, that Pero Elez had told her to get off the bus, which she did not do. Indeed, the witness "I" testified that she did not personally see that the accused Radovan Stanković had removed her daughter from bus, however, the witness A who was detained in Karaman's house when AB was brought from the bus clearly confirms that she learned directly from AB that it was precisely the accused who "pulled her out of the bus". The witnesses J and K, in their testimonies, described how AB was removed from the bus and the witness K clearly stated that the accused took out of the bus AB, whereby she completely confirmed the knowledge of the witness A. Based on such established state of the facts it follows that it was precisely the accused who removed AB from the bus in Foča and took her to Karaman's house, therefore, the argument of the appeal indicating that the facts referring to this section of the Verdict are not established beyond doubt, is also ungrounded.

The Appellate Panel also shares the conclusion of the first instance panel in reference to Section 1 of the acquitting part of the Verdict, in other words, that based on the testimony of the witness G, which was also the only evidence presented in respect to this section, it is not possible to determine in a reliable way that it was exactly the accused Radovan Stanković who committed the said criminal offense he is charged with under the section concerned.

Contrary to the arguments of the appeal of the Prosecutor, the reasoning of the first instance Verdict indicates that the said testimony is imprecise when it concerns basic acts constituting elements of the criminal offense and the identification of the accused, so, based on such testimony applying the principle "in dubio pro reo" the first instance panel correctly rendered the acquitting Verdict. In other words, the witness G, in her testimony, generally testifies that with 8other women, not mentioning their names, with whom she spent some time in the Foča hospital, she was taken to "an apartment" in "some" building and that Radovan Stanković raped her there. She states that she did not know the accused since before the war, that she learned his name from "some" women from Foča, concluding that today she could not even recognize him. Based on such testimony, which was not corroborated by any other evidence either directly or indirectly, the Court could not determine in a reliable way that it was the accused Radovan Stanković who committed the said criminal offense, therefore, the acquitting Verdict had to be rendered in respect to this section, as it was correctly done.

[redacted]

On the other hand, the appeal of the Prosecutor's Office is grounded in claiming that the pronounced punishment is not appropriate to serve the purpose of punishment in terms of general and special prevention, therefore, the Appellate Panel revised the contested Verdict and sentenced the accused to 20 years of long term imprisonment for the above mentioned criminal offense. The said sentence, as deemed by this Panel, represents the adequate reflection of the gravity of the criminal offense which the accused was found guilty of, the prevention of which is of a wider importance for society and as such it is penalized even by the international legislation and it has a specific importance from psychological, religious, moral and other aspects of life of both the victims and their families. The Panel also took into account the level of criminal responsibility of the accused, his status in Karaman's house, the age of the victims, the number of criminal offenses of which he was found guilty, and particularly the fact that he is responsible for the disappearance of the underage AB, which, in the opinion of this Panel, are of such character that they inevitably require the pronouncement of a more severe punishment that the one pronounced by the first instance Verdict.

Based on the foregoing, pursuant to Article 310 (1) in conjunction with Article 314 of the BiH CPC, it has been decided as in the operative part of the Verdict.

| Minutes-taker | Presiding Judge |
|---|---|
| Lejla Fadilpašić | Judge Azra Miletić |

REMEDY: No appeal shall be allowed against this Verdict.

*I hereby confirm that the corrected version of the earlier translation dated 19 April 2007 is a true translation of the original written in Bosnian/Croatian.*

*Sarajevo, 23* [redacted]