25-12-2007

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

X-KRŽ/05/51

PREVOD DOK. 467

Number: X-KRŽ-05/51
Sarajevo, 13 June 2007

IN THE NAME OF BOSNIA AND HERZEGOVINA

The Court of Bosnia and Herzegovina, sitting as the Appellate Panel of Section I for War Crimes comprising Judge Azra Miletić, as the President of the Panel, and judges Finn Lynghjem and Jose Ricardo de Prada Solaesa as the Panel members, including the legal officer Melika Bušatlić as the minute-taker, in the criminal case against the accused Damjanović Dragan accused of the criminal offence of *Crimes against Humanity* under Article 172 (1) (a), (f), (g), (h) and (i) of the Criminal Code of Bosnia and Herzegovina (BiH CC), deciding upon the appeal Ref. number KT-RZ-39/05 dated 15 February 2007 filed by the Prosecutor's Office of Bosnia and Herzegovina (Prosecutor's Office of BiH) and the appeal filed by attorney Dragoslav Perić, Defense Counsel for the accused, against the Court of Bosnia and Herzegovina Verdict Ref. number X-KR-05/51 dated 15 December 2006, at the session held on 13 June 2007 in the presence of the accused, his Defense Counsel, attorney Dragoslav Perić, and the Prosecutor of the Prosecutor's Office of BiH, Munib Halilović, rendered the following

VERDICT

Denying as unfounded the appeal filed by attorney Perić Dragoslav and the appeal filed by the Prosecutor's Office of Bosnia and Herzegovina in their parts referring to the acquittal section of the first-instance Verdict, at the same time granting the appeal filed by the Prosecutor's Office of BiH in its part referring to the convicting section of the first-instance Verdict - the ruling on the criminal sanction, therefore reversing the Court of Bosnia and Herzegovina first-instance Verdict Ref. number X-KR-05/51 dated 15 December 2006 in the part referring to the criminal sanction by sentencing the accused Dragan Damjanović for the criminal offense of Crimes against Humanity under Article 172 (1) (a), (f), (g), (h) and (i) of the BiH Criminal Code, of which he has been found guilty, to a **LONG-TERM IMPRISONMENT OF 20 (TWENTY) YEARS.**

Pursuant to Article 56 of the BiH CC, the time the accused spent in pre-trial custody starting from 6 December 2005 until he is committed to prison shall be credited towards the sentence of imprisonment.

The remaining sections of the first-instance Verdict shall remain unchanged.

REASONING

The Court of Bosnia and Herzegovina Verdict Ref. number X-KR-05/51 dated 15 December 2006 found the accused Dragan Damjanović guilty of the criminal offence of

Crimes against Humanity under Article 172 (1) (a), (f), (g), (h), (i) and (k) of the Criminal Code of Bosnia and Herzegovina committed by acts described under Sections 1, 2 and 4 through 7 of the operative provision of the Verdict.

For the aforementioned criminal offense, the first-instance panel sentenced him to 20 (twenty) years of imprisonment, crediting the time he spent in pre-trial custody towards this sentence, while relieving him of the duty to reimburse the costs of the criminal proceedings pursuant to the provision of Article 188 (4) of the BiH CPC.

The injured party, Nafila Kodžaka, has been advised to pursue her property claim in a civil action pursuant to the provision of Article 198 (2) of the BiH CPC.

The cited Verdict acquitted the accused of the charges described in Section 3 of the operative provision of the acquittal section of the Verdict.

The cited Verdict has been duly appealed by the Defense Counsel for the accused, attorney Dragoslav Perić, and the Prosecutor of the Prosecutor's Office of BiH. The Defense Counsel for the accused filed the appeal on the grounds of essential violations of the criminal procedure, erroneously and incompletely established state of the facts and the erroneous application of substantive law, moving the Appellate Panel of the Court of BiH to grant the arguments of the appeal and reverse the Verdict in favor of the accused.

The Reasoning of the appeal states that the Verdict is vague given that there is an inconsistency between the Indictment and the Verdict with respect to the acquittal of charges of the deprivation of life of 5 persons, as argued in the appeal. The appeal also points to the inconsistency in the time of perpetration of the criminal offence since, according to the Verdict, the time is the month of July 1992, although, based on the testimonies of the witnesses heard, it is clear that the time is the month of June of the same year. In support of the averment in the appeal concerning the first section of the Verdict, the appeal also quotes the very reasoning of the appeal which reads that "the Panel was unable to establish with certainty that the accused was responsible for the death of these persons". Elaborating on the elements of the criminal offense, more precisely the actions listed under Article 172 (1) of the BiH CC, the appeal stressed that the accused Damjanović lacked the *mens rea* for the perpetration, referring at that to evidence given by witnesses Šabanović Zijad and Muharemović Zejnil, as well as Sikirać Ognjen. The facts they testified about are directly contrary to the elaborated mens rea of the accused for the crimes he is charged with. His actions do not include the intent to inflict great suffering, because even prior to being taken by the accused, these persons had been deprived of liberty by third parties and the accused took them to the place of their work detail and did not aggravate their status by doing that, and he handed them over to the commander. These actions lack the elements of the criminal offence.

As regards Section 2, the appeal notes that the evidence given by witness Kolar Ramiza is contrary to the material evidence given the serious deviation in time between the taking of two persons which was the subject of this witness's testimony, which is why the appeal expresses doubts about such testimony and compares it with the testimony of witness Kuburić Jovo. It is obvious, the appeal notes, that the first-instance panel is selective in accepting certain facts and evidence without providing reasons for accepti[redacted]d not

accepting other evidence, because that is the primary requirement for the validity of any Verdict. The contested Verdict does not make a single reference to the Federation Commission on Missing Persons Report dated 14 March 2006 and applies the same technique of reasoning for each convicting section.

As regards Section 4 of the Verdict, the Defense Counsel submits that this section of the Verdict is based merely on the testimony of the injured party and the existence of consequences qualified by the expert witness as a light bodily injury, while the injured party himself testified that he did not experience physical pain. Given that the elements of the crime of torture include severe pain and suffering, one question that the Panel failed to link with this was – to what extent does a light bodily injury inflict severe pain. Also, other witnesses who were supposed to be heard were not heard although they are available to the Prosecution, and this especially applies to the instances where the Panel gave credence to the injured party.

As regards Section 5, the appeal notes that the rape has not been reasoned in a way so as to establish significant elements. By rounding off all significant elements contained in the acts of rape, the Defense makes a comparison with the statement given by the injured party according to which the accused did not disrobe, that she did not tell anyone what had happened, that she never saw a doctor and sustained no injuries during the rape.

As regards Section 6, the appeal notes that the first-instance Verdict uses two terms to denote the acts the accused is charged with, specifically those are "abused" and "beat", but fails to explain what elements the abuse as a crime against humanity includes. Besides, Article 172 of the BiH CC does not list abuse as a crime against humanity, and yet criminal liability is significantly stressed through the abuse of Baručija Zahid and Muračević Eset. The inference made by the Panel that Baručija Zahid was exposed to torture and was beaten, and that the accused Damjanović stood out in that, is entirely contrary to the statement of the witness Eset Muračević who says he did not see Dragan beat professor Baručija, and this testimony was accepted by the Panel as objective and accurate. Furthermore, the statements by witnesses who testified about the incident described in Section 6 of the Verdict are entirely opposite to what the Verdict says. According to the Verdict, the accused is responsible for taking the prisoners to be used as "human shields". Almost all witnesses are mutually consistent in their statements with regard to the actions of the accused and to the explanation of the notion of "human shields". Actually, in terms of hierarchy, the accused was just a private who took the prisoners from the camp to the point where they were handed over to Serb soldiers who proceeded to the front line in a manner as described. Therefore, most witnesses state that they were not taken by the accused to be used as human shields.

As regards Section 7 of the convicting part of the Verdict, the appeal points out the testimony of the witness Selimović Bego who stated he was able to identify the accused Dragan Damjanović, but that he was not present in the courtroom. With respect to the killing of professor Baručija, the first-instance panel elaborates on and states what the witnesses have stated, but they do not link those statements with each other nor do they compare them with the testimonies of other witnesses or facts. Thus the appeal mentions two contrary testimonies by witness Selimović Bego who assumes that professor Baručija was killed in the night between 25 and 26 January 1993, whereas witness [redacted] Omer

says in his statement that, on 8 February 1993, Zahid (Baručija) shaved himself and that he was supposed to go for an exchange. Referring to the testimonies of some of the witnesses heard, which are related to the fact of the finding and burying of the body of the killed professor Baručija, the appeal notes that the first-instance Verdict was selective in evaluating evidence supporting all facts that have been accepted by the Court as grounds for establishing criminal liability. Thus, the Panel accepted the statement of witness Selimović Bego, who states that the accused beat professor Baručija, although Section 6 of the Verdict acquits the accused of the criminal liability in the very part related to the beating of professor Baručija and witness Eset. Witness testimonies are contradictory with respect to the fact that the accused engraved a cross on the face of the late professor using a bayonet.

As regards the application of substantive law, the appeal notes that there is a discontinuity in the time of the perpetration of the crimes with which the accused is charged, and that period is 1992 -1993, when the SFRY CC was in effect, whereas in this entire case the BiH CC is being applied, which has been in effect since its publication, which beyond doubt was in 2003. The appeal goes on to quote Article 4 of the BiH CC and indicates that the criminal offence of Crimes against Civilians was prescribed by the SFRY CC too under Article 142, meaning that the crime with which the accused is charged was prescribed as a criminal offence and sanctioned by that law as well. In addition to that, the entity courts in such criminal matters apply the law which was in effect at the time of the perpetration of the offence, that law being the SFRY CC. The appeal finally concludes that the SFRY CC should be applied to the case of the accused Dragan Damjanović, because the act with which the accused is charged did occur at the time when this law was in effect, which did define this act as a criminal offence, while with respect to the criminal sanction, this law does represent a more lenient law, it also stipulated the application of the principles of international law, even enriched with the case law and experience from the previous cases heard before the International Tribunal.

The Prosecutor's Office of BiH filed the appeal on the grounds of violations of the criminal code, the erroneously and incompletely established facts of the case and the ruling on the criminal sanction, and moved the Appellate Panel to grant the appeal in its entirety and reverse Section 1 of the convicting part of the contested Verdict by qualifying the described acts in a way as have been described in Count 1 of the Indictment, and reverse the acquittal section of the Verdict and find the accused guilty of the crimes listed under Count 3 of the Indictment and therefore sentence the accused to a long term imprisonment.

The reasoning of the appeal states that the Trial Panel erroneously established the facts of the case with regard to Section 1 of the convicting part of the Verdict and made an erroneous inference when they convicted the accused of inhumane acts, failing to accept the qualification made by the Prosecution and thus failing to convict the accused of the killing of five men. According to the averments in the appeal, the Trial Panel, when evaluating the testimonies of some of the witnesses heard, found that the presented evidence did not provide sufficient grounds to infer that the accused had deprived the five men of their lives as argued in the Indictment, whereas they failed to evaluate other evidence as well, primarily the testimonies of some witnesses (Hido Ahmed) which actually confirmed that they had knowledge that the accused had deprived these persons of their lives. The testimonies of these witnesses and circumstantial knowledge, when linked with the previously established facts of the case, represent a credible and reliable [redacted] the

inference that the accused did deprive these persons of their lives. This knowledge does not come from one or two witnesses only, on the contrary, almost all witnesses stated that they had learned from the Serb guards that it was the accused himself who had deprived these persons of their lives. This is supported by material evidence as well, which the trial panel fails to mention at all. Everything mentioned above indicates that the trial panel was superficial in analyzing some of the pieces of evidence and it failed to link all aforementioned evidence, which resulted in facts of the case being erroneously established, and also in the erroneous application of substantive law.

As regards the acquittal section of the Verdict, the Prosecution submits that here too there is a case of the erroneously established facts of the case, which resulted in the violation of the provisions of the BiH Criminal Code. Commenting on the analysis of the reasoning of that section of the Verdict, the appeal points out that the arguments of the Trial Panel obviously represent grounds for appeal referred to in Article 299 (1) and Article 298 (d) of the BiH CPC, given that, at the main hearing, a witness deposition was read out (the witness had passed away in the meantime), the Panel found that it could not be inferred that it was a case of the killing committed by the accused, and presented their position according to which the Findings and the Opinion by the expert witness Ilijas Dobraća itself gave rise to certain dilemmas and questions about the statement of the witness, which could have been resolved only by the witness, who was supposed to be heard in the course of the trial. Given that the witness had passed away, the position was taken that a deposition which was not subjected to authentication at the main hearing could not be used to the extent so as to base the verdict fully or in its decisive part on it. Contrary to such position taken in the contested Verdict, the appeal submits that such inference gives rise to a series of dilemmas resulting from the insufficient and incomplete analysis of the witness testimonies and other evidence. Namely, when all witness testimonies are analyzed and linked, especially testimonies of Eset Muraćević and Hido Ahmed, which indirectly support the testimony of Šišić Hamid, it can be inferred that the accused deprived Mr. and Mrs. Hodžić of their lives. In addition to that, the appeal submits that the Verdict erroneously interprets the jurisprudence of the European Court relative to the use of depositions which have not been subjected to authentication at the main hearing, because an exception from the direct examination of a witness at the main hearing, under certain circumstances, is in accordance with the European Convention, and does not represent a violation of the right to a defense. The Defense had a possibility to present evidence that would challenge the statement of the witness who had passed away *and whose deposition* was read out at the main hearing, and this statement is not the only piece of evidence on which Count 3 of the Indictment is based. Given the fact that the defense failed to proffer a single piece of evidence to challenge this witness statement, and also given the fact that the key portion of his deposition is supported by testimonies of witnesses who support his allegations, this case differs from the jurisprudence the first-instance panel refers to and it justifies the application of the exception from direct testimony. Furthermore, the appeal states that the Trial Panel failed to give any reasons whatsoever as to why they acquitted the accused of the charges of abuse of Šišić Hamid, which in return resulted in the violation of the provisions of the criminal procedure.

As regards the ruling on the sanction, the Prosecution submits that the sanction is too lenient given the numerous aggravating circumstances mentioned in the reasoning of the Verdict, therefore, the purpose of punishment has not been met, primarily given the discriminatory intent of the accused, as well as the continuous suffering he inflicted upon th[redacted]s of

the Bosniak population, which will remain lasting both in physical and psychological aspect in those people. Bearing in mind everything mentioned above, especially the fact that the accused, according to the Prosecution, is also responsible for Count 3 of the Indictment, as well as for the deprivation of lives of those 5 persons mentioned under Count 1 of the Indictment, this represents sufficient grounds to impose upon the accused a more severe sanction than the one that has been imposed by the first-instance Verdict, that being the sanction of a long term imprisonment.

In his response to the appeal filed by the Prosecution, the Defense Counsel for the accused Dragan Damjanović moves the Court to deny the appeal as unfounded.

At the Appellate Panel session held on 13 June 2007 in accordance with Article 304 of the BiH CPC, both parties made short presentations of their appeals and maintained their presented allegations and motions in their entirety.

Having reviewed the contested Verdict within the scope of the averments made in the appeals, the Appellate Panel *ruled* as set forth in the operative provision herein for the following reasons:

In reference to the convicting section of the first-instance Verdict, the Appellate Panel is satisfied that, based on the results of the evidence presented at the main hearing and the facts established on that basis, referred to in the Reasoning of the Verdict, the first-instance court established beyond reasonable doubt that the accused Dragan Damjanović has committed the crimes described under Sections 1, 2 and 4 through 7 of the operative provision of the Verdict, that they were correct in finding that the described acts include all legal elements of the criminal offense of Crimes against Humanity under Article 172 (1) (a), (f), (g), (h), (i) and (k) of the BiH CC, of which he was correctly found guilty.

Therefore, the Appellate Panel finds that the averments made in the appeal filed by the accused through his Defense Counsel according to which the first-instance court erroneously established the facts of this case are unfounded.

Following the averments of the appeal organized according to the sections of the operative provision of the Verdict, with respect to Section 1 of the operative provision of the Verdict, this Panel is satisfied that, having correctly evaluated key evidence – testimonies of witnesses (eyewitnesses), the first-instance court established in a correct and reliable manner that the accused had committed the acts described in more details in the operative provision of the Verdict, and this Panel supports such inference in its entirety. The testimonies of the said witnesses fully correspond to one another with respect to the acts of the accused and his involvement in the perpetration of the criminal offense, therefore, this Panel too finds that such testimonies are clear, credible and authentic and that they fully support the facts established in this section of the Verdict. The examined witnesses – eyewitnesses Mensur Pandžić, Fikret Ščerić, Zejnil Muharemović, Muhamed Ruhotina and Zijad Šabanović all testified that the accused had singled out five persons from a group of prisoners and put them back on the truck and had driven away with them in the direction of Golo brdo in order to have these five persons burry a horse. In addition to the things mentioned above, witness Ruhotina Muhamed testified that they had been told by the accused Damjanović that they were being taken to burry "a horse killed by [redacted]" and if,

at the same time, we take into consideration the testimonies of the Defense witnesses Kutlača Branislav and Sikiraš Ognjen, who both stated that, on one occasion, while they had been on the frontline, a horse had been killed by an anti-personnel mine when it had strayed into a mine field separating the two enemy frontlines, and also that witness Sikiraš stated that he had seen the Commander send the accused Damjanović to bring several prisoners to bury the horse, all of the things mentioned above clearly indicate that the first-instance Panel was correct when they inferred that it was the accused himself who took the five prisoners in the direction of the minefield where they were expected to bury the killed horse (committed the criminal offence in the exact manner as stated in the first-instance Verdict).

In reference to the circumstances surrounding the establishing of the intent on the part of the accused, which are objected by the Defense Counsel for the accused in his appeal, the first-instance court bases the fact they established on the presented evidence, primarily testimonies of the witnesses mentioned above, which have been found to be true and authentic by this Court as well. The criminal offence under Article 172 (1) (k) is committed if the perpetrator acted with the intention to inflict great suffering or serious injury to body or to physical or mental health. Given the fact that the accused forced them to go into a minefield on the frontline, thus putting them in a life-threatening situation and causing in them significant anxiety and fear due to the great probability that the accomplishment of that task could result in their death, this certainly indicates the intent of the accused to inflict upon the five prisoners great suffering as is correctly inferred by the first-instance court, therefore the averment made in the appeal and directed towards the establishment of non-existence of the intent on the part of the accused is entirely unfounded. The facts that the first-instance court established beyond reasonable doubt with respect to Section 1 of the Verdict, do not create any confusion about the portion of this Count as it was described in the Indictment, and of which the accused has been acquitted, because the court was unable to establish beyond reasonable doubt that the accused also deprived these five persons of their lives, which is why this charge against the accused has been adjusted to the presented evidence. The reason for this being the fact that the acts of the accused as established by the first-instance court in themselves represent elements of the criminal offence of Crimes against Humanity under Article 172 (1) (k) of the BiH CC. The objection pertaining to the exact time of perpetration, which in the operative part of the first-instance Verdict was identified as July 1992, whereas according to the specified Indictment, the evidentiary results and the Reasoning of the Verdict it transpires that the time is 23 June 1992, is well-founded; however, this obvious omission by the first-instance court is not of such a nature (we are talking about a small temporal difference here) so as to make the Verdict incomprehensible, nor contradictory to the extent that it would constitute an essential violation of such an intensity so as to bring about its revocation. It should be noted here that the crime in question is not subject to the statute of limitations, so that this fact does not affect the possibility of prosecuting the accused either.

The averments of the appeal directed against Section 2 of the convicting part of the operative provision of the Verdict are unfounded. Namely, the testimonies of witnesses Ramiza Kolar and Salko Kolar are in essence identical and consistent when they speak about the manner in which Salihović Bekir and Bajramović Muharem were taken, and about the role that the accused Damjanović played in their taking. Contrary to the positions presented in the appeal, this Panel finds that the first-instance court provided a perfectly

clear, logical and convincing reasoning as to why they accepted the testimonies of the said witnesses in their entirety, which this court finds acceptable as well.

References to material evidence made in the appeal, that evidence being the Commission Report dated 14 March 2006, are groundless, given the fact that this Report represents a document compiled on the basis of information collected from various and unchecked sources and therefore it cannot represent reliable evidence, whereas, contrary to that, the testimony of witness Kolar Ramiza, who is the eyewitness to the taking itself, and the testimony of witness Kolar Salko, which in all essential facts is identical to the testimony of Kolar Ramiza, both of which have been carefully evaluated by the court, in their entirety constitute a logical unity and lead to the inference that the accused Damjanović, at the time and in the place specified in the operative provision of the contested Verdict, together with a person who went by the nickname *Mićo četnik*, took Salihović Bekir and Bajramović Muharem in an unknown direction, and they remain unaccounted for ever since. Furthermore, the first-instance court correctly evaluated the testimony of Jovo Kuburić, not basing their ruling on his circumstantial knowledge of the incident itself and yet attributing it the significance of test evidence supporting the testimonies of direct witnesses according to which the taking did take place and that it was done by the accused himself.

With reference to Section 4 of the operative provision of the Verdict, the averments made in the appeal according to which the injury sustained by the injured party Abaz Mujo qualifies as a light bodily injury are unfounded, given that the gravity of a bodily injury in this particular case cannot represent a criterion for the existence of this criminal offence. As the first-instance court correctly inferred, the fact that the victim did not feel physical pain at the time when the injury was inflicted represents a clear indication of the severity of emotional pain and fear caused by the threat made against the victim's wife and children. The averments of the appeal according to which other eyewitnesses have not been heard cannot be accepted given that the first-instance panel did not have a single reason not to give credence to the witness-victim Abaz Mujo, whose testimony is clear, consistent and has in no way been challenged, and has therefore been accepted as authentic with respect to the fact that he, while a detainee at Planjina kuća */Planjo's House/*, was cut on the face by the accused who used a knife to engrave a cross in the form of a cut running down his nose and above his eyebrows, while the blood from the wounds ran down his face and into a food plate, whereupon the accused forced him to eat all that food soaked with blood. This testimony has been supported by evidence given by a medical expert witness about the existence of the injury, which the Panel could see for themselves, because the victim still has the scar on his face. All of the above undoubtedly indicates that the first-instance panel correctly inferred that the accused committed the crimes inflicting thus upon the victim not only physical pain, but also long-term mental suffering, given that this injury and humiliation brandished him for life because of the scar which will inevitably stand as a reminder of the trauma he suffered, therefore the accused undoubtedly did commit the criminal offence with which he is charged under this count.

With regard to the factual finding under Section 5 of the operative part of the Verdict, the Appellate Panel is satisfied that the first-instance Verdict provides an overall and exhaustive analysis of testimonies of witnesses who testified to the circumstances under this Section, and therefore drew a valid conclusion which this Panel finds fully acceptable. To wit, from the consistent testimonies to the criminal activities of the Accused by witnesses Taib

Kodžaga and Nafila Kodžaga it transpires that this very Accused came together with Žiko Crnogorac and Zoran Berović to the house of Taib and Nafila Kodžaga, requesting them to hand over money and gold and beating them with rifles and pistols, after which the Accused took the witness Nafila Kodžaga to another room where he raped her. The aforementioned witnesses provided a detail and clear description of the incident, and the first-instance Panel legitimately evaluated them as objective and consistent and found their testimonies reliable, all the more because both witnesses identified the Accused in the courtroom. This Panel is satisfied that in her testimony, the witness gave a precise, very convincing and credible description of the manner in which she was taken to the room, ordered by the Accused to take her clothes off and thereupon raped by the Accused, during which time she was afraid for her own and her husband's life; this testimony is fully corroborated by the testimony of Taib Kodžaga and extensively reasoned in the challenged Verdict. The appeal arguments refer to the statement of the injured party that the Accused had not taken his clothes off, are not worth an extensive consideration because the very fact that the Accused did not take his clothes off does not necessarily mean that the rape did not happen. Furthermore, the fact that the injured party did not talk to anyone about the rape other than her husband is easily understandable if we bear in mind the circumstances at that time and that a very stressful and traumatic incident is at issue here, with a strong impact regardless of the time flow. Besides, in the patriarchal community, in which the injured party has lived, the rape is regarded as a disgrace for the victim herself; furthermore, bearing in mind that everything took place in the presence of her husband it is completely understandable as to why the injured party did not talk about it before.

With regard to Section 6 of the operative part of the Verdict, this Panel is satisfied that the first-instance Panel extensively evaluated the evidence regarding the intolerable conduct of the Accused toward persons who were imprisoned in the camp (to which the following persons testified: Eset Muračević, Isenaj Ismet, Bego Selimović, Izet (son of Huso) Šehić, Izet (son of Hasan) Šehić, Safet Borčak, Omer Čerimagić, Refik Bešlija, Fikret Sirćo, Suad Masnopita, Safet Čelik, Mustafa Handžić, Zahid Šehić, Safet Mulavdić, Bego Mulavdić) and correctly concluded that the actions of the Accused constituted the criminal offence of Crimes against Humanity under Article 172 (1) (h) of the CC of BiH as charged. This Panel is satisfied that the first-instance Panel correctly evaluated the key evidence – testimonies of the eye-witnesses (injured parties) and correctly and reliably found that the Accused committed the actions described under this section of the operative part of the Verdict. The testimonies of the said witnesses are not identical but they are consistent in the part of the Accused's conduct and his participation in the criminal offence at issue and, therefore, this Panel fully accepts the position of the first-instance Panel with regard to the credibility and the authenticity of the said testimonies based on which it was correctly found that there existed a basic element of this criminal offence, that is, the existence of the discriminatory approach of the Accused towards the prisoners in Planjo's house. The first-instance Panel correctly evaluated the fact that the prisoners were Bosniaks, who were the only ones taken to perform forced labour, exposed to inhumane and degrading treatment, beaten up, insulted, humiliated, in which the Accused stood out and which was confirmed by all examined witnesses – victims who were imprisoned at that time in Planjo's house.

Bearing in mind the indisputably determined actions of the Accused, it is cl
second requirement for the existence of the charged criminal offence has bee
that is, the discriminatory action or failure to act, which deprived or violat

fundamental rights defined in international customary or contract law, which was correctly found by the first-instance Panel. The actions of Accused Dragan Damjanović towards prisoners constituted the violation of the fundamental and generally accepted human rights: the right to life, the right of a person not to be arbitrarily detained, that a person must not be kept in slavery and exposed to torture, which are the rights guaranteed by all international human rights agreements, starting with the Universal Declaration of Human Rights and also recognised by international customary law; thus, this Panel accepts the conclusion of the first-instance Panel in its entirety.

The insistence by the appeal on the difference between the terms "mistreated" and "beat" is not of substantial importance for the existence of this criminal offence, all the more because the challenged Verdict clearly and extensively explains the way the Accused treated prisoners, beat them, insulted them, forced them to sing Serb nationalistic songs simply because they belonged to another ethnicity or religion, all of which contains elements of the criminal offence under Article 172 (1) (h) of the CC of BiH, that is, represents an act of persecution on national, ethnic and religious grounds, which is impermissible not only under the criminal legislation of Bosnia and Herzegovina but also under international law.

With regard to Section 7 of the operative part of the Verdict, this Panel is satisfied that, based on the presented evidence, the first-instance Panel found beyond reasonable doubt that Accused Dragan Damjanović indeed committed the criminal offence as charged, which is why the appeal that pertains to this part cannot be granted. By evaluating the testimonies of examined witnesses Bego Selimović, Taib Đogo, Zahid Šehić, Hašim Džanko and Hurem Murtić, the first-instance Panel indisputably found that the Accused continuously tortured the imprisoned professor Zahid Baručija due to which the latter was completely physically exhausted and eventually deprived of life. This account is corroborated by numerous, consistent and credible testimonies which do not leave room for the least suspicion in the actions of the Accused towards this prisoner, whereas the defence appeal in this part does not depreciate the arguments put forward in the conclusion of the first-instance Panel.

The first-instance Panel provided sufficient reasons for such factual finding and, therefore, the challenged Verdict does not have any flaw in this aspect. To wit, all examined witnesses contend that the Accused treated the imprisoned professor Zahid Baručija in an inhumane manner. Witness Bego Selimović is particularly clear and convincing when describing the way in which the Accused incised a cross on Baručija's forehead using a bayonet, while Baručija lied exhausted on the ground, all muddy and wet (the existence of the cross of professor Baručija's forehead was also confirmed by witness Taib Đogo), and in such condition left him lying in the snow for quite a long time, which was also confirmed by witnesses Hašim Džanko and Hurem Murtić. Witness Bego Selimović and witness Taib Đogo consistently state that it was exactly Accused Damjanović who took professor Baručija out of the house of Rajko Bunjevac, following which Baručija never returned to the house, and not long thereafter was his body found in the vicinity of the house, which was also confirmed by witness Hurem Murtić and witness Hašim Džanko. The testimonies of these witnesses were also confirmed by the Report on exchange by the State Commission for Exchange of Prisoners of War, which reads that the body of Baručija was exchanged, the record was made of a violent death and the left temple trauma. By reaching conclusions, finding an interrelation between the testimonies of the said witnesses, evaluating the factual circumstances in their entirety, the Panel is satisfied that

instance Panel reached a proper conclusion that Accused Damjanović committed, as charged, the criminal offence of Crimes against Humanity under Article 172 (1) (a) and (f) of the CC of BiH. The attempts by the appeal to stress the contradictory parts in the witness testimonies and to underline that the Court took a selective approach in the evaluation of evidence by evaluating only the inculpating pieces of evidence cannot be accepted. To wit, due to the primary task of the Court to examine the veracity of the Indictment in light of the presented evidence in relation to the Accused, this Panel finds that it is a wrong perception of the appeal when claiming that the Court unilaterally evaluated evidence in such way to evaluate only the inculpating evidence. The appeal in fact seems to be inconsequent as it claims that the Court evaluated evidence selectively, at the same time ignoring the exculpating evidence, although the appeal itself does exactly what it blames the Court of having done; therefore, valid arguments for such position cannot be made on such basis. To wit, the appeal quotes parts of some witness testimonies, which is in most cases incorrectly done, trying to link those parts in order to discredit the validity of testimonies of the witnesses examined and the regularity of the evaluation thereof done by the first-instance Panel. For example, the appeal underlines the testimony of witness Bego Selimović who says that "prisoners brought another body which was decapitated, that is, the head was severed", and correlates that with the testimony of Muhamed Ruhotina who stated that he "attended the funeral and that he saw with his own eyes the body of Baručija without the head." However, witness Bego Selimović actually stated that he was digging a grave in which three bodies were buried, that is, the body of certain Mehmed from Podlugovi, the body of Baručija and a decapitated body (Hurem Murtić and Taib Đogo also confirm that three bodies were buried at the same time), whereas witness Muhamed Ruhotina stated that he heard that Baručija's body was decapitated when exchanged and that he attended the funeral, but he had never stated that he saw it with his own eyes as claimed by the appeal. Therefore, the finding of the Court with regard to the criminal liability of the Accused cannot be brought into doubt, as the appeal is intending to do, nor can there be any doubt about the authenticity of the testimonies of the said witnesses, which are overall clear, logical and consistent.

The appeal insists on different dates of the incident when Baručija was killed provided in the accounts of various witnesses, that is, witness Bego Selimović and witness Omer Čerimagić, but it cannot raise doubts about the factual finding because the discrepancy regarding the date at issue is an expected and normal discrepancy given the fact that the witnesses were imprisoned at that time, which was a stressful and traumatic period for them, and it is not reasonable to expect identical witness testimonies with regard to the date, as insisted upon by the Defence. Besides, the short time period is at issue here (late January – early February) which exactly matches the period when the criminal offence was committed. It was impossible to give a closer timeframe if one bears in mind the nature of the criminal offence and the circumstances under which it was committed in this specific case.

Furthermore, a careful analysis of the challenged Verdict in order to examine any flaws of the Verdict which would constitute an essential violation of the criminal procedure provisions under Article 297 of the CPC of BiH clearly reveals that the Verdict does not contain such flaws and, therefore, there was no violation of the criminal procedure provisions, which means the appeal is arbitrarily composed in this part. This Panel ca[redacted] analysed the challenged Verdict and found that it was beyond any reproach in [redacted]

violation of the criminal procedure provisions. The elaborative methods of the Verdict are fully consistent with the procedural law that regulates this matter. To wit, the Verdict first sets down the presented evidence, then elaborates on the contents thereof, without any difference in relation to their actual contents – according to the records which contain them, and evaluates them from both possible aspects, that is, evaluates them both by their contents and by their validity, which is why the claim by the appeal that the exculpating evidence was not evaluated is not well-founded. The challenged Verdict did not violate the methodological approach to the establishment and evaluation of the decisive facts as foreseen under Article 14 of the CPC of BiH which provides for the equality of arms principle, since the Verdict found the facts that are both inculpatory and exculpatory. Having taken this methodological-procedural approach, the Verdict contains probative grounds for every fact considered as reliably established, regardless of the category of such fact (decisive, circumstantial or controlling) and it did not leave out a single fact that was important for the determination of the matter. Therefore, the violation of the criminal procedure provisions, as mentioned in general terms by the appeal, does not exist.

The appeal argument challenging the application of substantive law is unfounded, when it claims that the first-instance Panel erroneously applied the CC of BiH instead of the CC of SFRY, which the appeal finds more lenient for the perpetrator in terms of the existence of the said criminal offence as such, as well as the possible sanction, and when it claims that by this the principle of legality and the principle of time constraints regarding applicability under Articles 3 and 4 of the Criminal Code of Bosnia and Herzegovina were violated.

The principle of legality is imperative under Article 7 (1) of the European Convention on Human Rights and Fundamental Freedoms, and the Convention prevails over all other legislation of Bosnia and Herzegovina (Article 2 (2) of the Constitution of Bosnia and Herzegovina). The said Article of the European Convention prescribed the general principle which prohibits the imposing of a heavier penalty than the one that was applicable at the time the criminal offence was committed.

However, Paragraph 2 of the said Article of the European Convention sets an important exception in relation to Paragraph 1 of the said Article which reads that "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations."

Article 15 Paragraphs 1 and 2 of the International Covenant on Civil and Political Rights of the UN prescribe similar international provisions that should be regarded as *Lex Superioris* in relation to "...general legal principles recognized by the international community."

The common status of liability and sanctioning the crimes against humanity and individual criminal liability for the commission thereof in 1992 was confirmed by the UN Secretary General on 3 May 1993 in his Report to the Security Council with reference to the Resolution 808, International Legal Commission (1996), as well as jurisprudence of the ICTY and ICTR.

Crimes against Humanity thus constitute an imperative principle of international law and it is indisputable that in 1992 crimes against humanity was an integral part of international customary law.

To wit, the application of the 2003 CC of BiH to the specific criminal offence is grounded on the provision of Article 4 (a) of the CC of BiH, which again refers to the "general principles of *international* law" as properly stated in the challenged Decision, and it prescribes that Articles 3 and 4 of the said Code do not prevent trial or sanctioning of any person for an act or omission to act, which at the time of the act constituted a criminal offence per general principles of international law. This certainly makes an exception from the general principles of international law prescribed by Articles 3 and 4 of the CC of BiH in the sense that these Articles do not question trial and the sanctioning of a person for every act or omission to act which include the criminal offence of crimes against humanity which was not prescribed as such by the Criminal Code in force during the time of the commission of the criminal offence. This Panel is satisfied that the first-instance Panel correctly and completely determined the state of facts according to the CC BiH and provided valid reasoning in the challenged Verdict which undoubtedly confirms that Crimes against Humanity constituted a criminal offence per general principles of international law; therefore, this part of the appeal is refused as unfounded.

Jurisprudence of the European Court for Human Rights focuses on the application of Article 7 (2) in conjunction with Article 7 (1) in similar cases, while the first-instance Verdict refers to the Decision on the European Court in the case of Naletilić vs. Croatia. Besides, in its ruling upon the appeal of Maktouf Abduladhim, the Constitutional Court of BiH concluded on 30 March 2007 that in that specific case the application of the CC of BiH before the Court of BiH did not constitute a violation of Article 7 (1) of the European Convention.

Contrary to the appeal arguments of the Prosecutor's Office of BiH, the Appellate Panel deems that the first-instance Panel correctly decided on the acquittal of the Accused from the liability for the murder of five persons who were beyond any doubt singled out by the Accused and driven towards the frontline on the Žuč hill. To wit, not a single of the examined witnesses was an eye-witness, that is, nobody saw Accused Dragan Damjanović killing these persons. The accounts of witnesses who only heard that from third parties or the account of witness Muhamed Ruhotina who heard two short bursts of fire from the direction to which the Accused took those five persons does not constitute sufficient ground to conclude that Accused Damjanović deprived these persons of life. Even if these pieces of direct evidence are correlated with other presented evidence, it is impossible to conclude beyond reasonable doubt that the Accused is responsible for that, namely, in this way a possibility of reaching a conclusion other than the one made in the factual description of the Indictment is not fully excluded. Bearing this in mind, the Panel is satisfied that the first-instance Panel correctly adapted the factual description of this part of the Indictment to the presented evidence and, therefore found the Accused guilty only of the actions of perpetration under item k) of the criminal offense of Crimes against Humanity, providing full and valid reasons, which this Panel too accepts in their entirety.

With regard to Section 3 of the operative part of the Verdict, the first-instance Panel correctly decided to acquit the Accused of murder charges of Muharem Hodžić and [redacted] Mejra and the torture of Hamid Šišić. To wit, the Prosecution is wrong in re[redacted]

jurisprudence of the European Court, in concluding that the exception from the direct examination of a witness in the main trial under certain circumstances is in accordance with the European Convention and does not violate the right to a defence, and in claiming that the right to a defence was respected throughout the proceedings. The first-instance Panel correctly interpreted the European Court jurisprudence (cases *Unterpertinger vs. Austria*, Decision dated 24 November 1986, *Asch vs. Austria*, Decision dated 26 April 1991, *Kostovski vs. Netherlands*, Decision dated 20 November 1989) which provides a clear position that the statement that was not the subject of "examination" in the main trial in the presence of the Accused and/or was not examined by the Accused himself/herself cannot be used solely or to a decisive extent for the purposes of the verdict, which is the case at issue here. The Prosecutor himself avers that in accordance with the European Court jurisprudence, the Accused should be given the possibility to adequately challenge a testimony or examine the witness who testifies against him, and this possibility was not given to the Accused in this specific case. The testimonies of witnesses Eset Muračević and Ahmet Hido in an indirect way corroborate the statement of Hamid Šišić as mentioned by the Prosecutor, but if it is to be reached in accordance with the fair trial requirement, the decision cannot be based on a statement of the witness who had not been examined in the main trial due to which there was no adequate possibility of examination, and it cannot indirectly increase the probative value of this evidence, that is, indirect knowledge of other examined witnesses who did not eyewitness the incident. The fact mentioned in the prosecution appeal that it transpires from the finding by expert witness Ilijas Dobraća that the death of the said persons was violent and caused by the mechanical action of the round fired from firearms, when correlated with the statement of witness Hamid Šišić, cannot be and does not constitute reliable grounds to believe that it was exactly the Accused who deprived those persons of life. As a matter of fact, the pieces of evidence that the Prosecutor presented and believed to be confirming the factual ground under Count 3 of the Indictment are only a collection of evidence which cannot either separately or collectively confirm beyond reasonable doubt that the Accused committed this criminal offence as charged by the Indictment; thus, the appeal of the Prosecutor's Office in this part is completely unfounded.

Contrary to the foregoing, the Prosecutor's Office legitimately claims that the pronounced sanction does not serve the purpose of the punishment from the point of view of general but also special prevention, which is why the Appellate Panel revised the challenged Verdict in that respect and sentenced the Accused for the said criminal offence to a long-term imprisonment in the duration of 20 years. The Panel finds that this type of imprisonment sentence represents an adequate punishment in view of the gravity of the criminal offence of which the Accused was found guilty, and where the protected value is of a larger social significance and, as such, it has also been sanctioned pursuant to international legislation, as it carries a specific weight from the psychological, moral, religious, customary and other aspects on the lives of the victims themselves but also of their family members. The Panel also considered the degree of criminal liability, the number of criminal actions of which the Accused was found guilty and their continuous character, and particularly the manner in which the criminal offence is committed, by actions that were particularly sadistic and cruel, and his cold-blooded, deliberate and calculated conduct. The nature of these circumstances requires the pronouncement of a long-term imprisonment, which is particularly adequate from the point of view of general prevention and a warning to others not to commit the same or similar criminal offences.

Given the aforementioned and pursuant to Article 310 (1) as read with Article 314 of the CPC of BiH, the decision was reached as stated in the operative part of the Verdict.

Record-taker	Presiding Judge
Melika Bušatlić	Azra Miletić

LEGAL REMEDY: This Verdict cannot be appealed.

We hereby confirm that this document is a true translation of the original written in Bosnian/Serbian/Croatian language.

Sarajevo, 10 December 2007

[redacted]
Certified Court Interpreter for English Language

[redacted]

[redacted]
Certified Court Interpreter for English Language