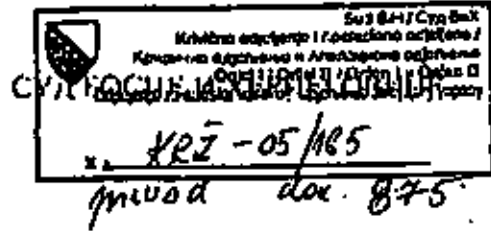


SUD BOSNE I HERCEGOVINE



Number: No X-KRŽ/06/165
Sarajevo, 26 March 2008



IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting in the Panel of the Appellate Division consisting of Judge Dragomir Vukoje as the Presiding Judge and Judges Almiro Rodrigues and Robert Carolan as members of the Panel, with the participation of the Legal Officer Željka Marenčić as minutes-taker, in the criminal case against the accused Nenad Tanasković for the criminal offence of Crimes against Humanity in violation of Article 172 (1) h) in conjunction with subparagraphs d), e), f), g) and h) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC BiH), in conjunction with Article 180 (1) of the CC BiH, deciding upon the appeals filed by Defence Counsel, lawyer Dragan Borovčanin, and Co-Counsel, lawyer Radmila Radosavljević, against the Verdict of the Court of Bosnia and Herzegovina number X-KR/06/165 dated 24 August 2007, at the session held with the presence of the accused and in the presence of his Defence Counsel, lawyer Radmila Radosavljević, and Prosecutor of the Prosecutor's Office of BiH, David Schwendiman, on 26 March 2008, rendered the Verdict that follows.

VERDICT

The appeals filed by the Defence Counsel on behalf of the accused Nenad Tanasković, are hereby partially granted and the Verdict of the Court of Bosnia and Herzegovina number X-KR/06/165 dated 24 August 2007 revised in the part referring to the decision on criminal sanction whereby the accused Nenad Tanasković, for the criminal offence of Crimes against Humanity in violation of Article 172 (1) h) in conjunction with subparagraphs d), e), f), g) and h) of the CC BiH, in conjunction with Articles 29 and 31, and all in conjunction with Article 180 (1) of the CC BiH, of which the first instance Verdict found him guilty, is sentenced to 8 (eight) years of imprisonment.

Pursuant to Article 56 of the CC BiH, the time the Accused spent in custody, commencing on 11 July 2006 until his committal to serving the sentence, shall be credited towards the sentence of imprisonment.

The other parts of the Verdict remain unchanged.

REASONING

Under the Verdict of the Court of Bosnia and Herzegovina No. X-KR/06/165 dated 24 August 2007, the accused Nenad Tanasković was found guilty of having committed the criminal offence of Crimes against Humanity under Article 172 (1) (h) of the Criminal Code of Bosnia and Herzegovina by the acts described in the operative part of the Verdict as follows: per sub-clauses c), g) and f) in respect of Count 1 of the Indictment; per sub-clauses e) and f) in respect of Counts 2 and 3 of the Indictment; per sub-clauses c), f) and h) in respect of Count 4 of the Indictment; per sub-clauses d) and e) in respect of Count 5 of the Indictment; and per sub-clause e) in respect of Count 7 of the Indictment, in conjunction with Article 29 in respect of Count 1 (e), 2, 3, 4, 5, and 7 of the Indictment, and Article 31 in respect of Count 1 of the Indictment (f and g), all as read with Article 180 (1) of the CC BiH.

Therefore, pursuant to Article 285 of the CPC BiH, with the application of Articles 39, 42, 48 of the CC BiH, the first-instance panel sentenced the Accused to the penalty of twelve (12) years imprisonment, while pursuant to Article 56 of the CC BiH the time he spent in custody, commencing on 11 July 2006 until his committal to serving the sentence, shall be credited towards the sentence of imprisonment. Pursuant to Article 188 (4) of the CPC BiH, the Accused shall be relieved of the duty to reimburse the costs of the criminal procedure.

Under the same Verdict, pursuant to Article 284 (1) (3) of the CPC BiH, the Accused was acquitted of the charges of having committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) f), h) and k) of the CC BiH, in respect to Count 6 of the Indictment.

Defence Counsel, lawyer Dragan Borovčanin, and Co-Counsel, lawyer Radmila Radosavljević, appealed the Verdict in timely manner. Defence Counsel Dragan Borovčanin filed the appeal on the ground of essential violation of provisions of the criminal procedure, erroneously and incompletely established state of facts, violation of the Criminal Code and the decision on criminal sanction, and moved that the contested Verdict be revised and the Accused acquitted, or that the Verdict be reversed, main trial re-opened, and acquittal rendered. Co-Counsel filed the appeal on the ground of violation of

the European Convention on Human Rights and Fundamental Freedoms, essential violation of provisions of the criminal procedure, erroneously and incompletely established state of facts, and violation of the Criminal Code, and moved that the appeal be upheld, the contested Verdict revised and the accused acquitted, or that the Verdict be reversed and main trial re-opened.

In its responses to the appeals, the Prosecutor's Office of BiH moved that the appeals be dismissed as unfounded and the first-instance Verdict confirmed.

The Appellate Panel, pursuant to Article 304 of the CPC BiH, held a session on 26 March 2008. The Defence presented the appeals and the Prosecutor of the Prosecutor's Office of BiH replied to the appeals, and they fully supported their respective written arguments and proposals.

Having reviewed the Verdict insofar as contested by the Defence appeals, the Appellate Panel rendered the decision as in the pronouncement part for the reasons that follow.

I. Grounds for contesting a verdict as referred to in Article 296 of the CPC BiH

When referring to Article 296 of the CPC BiH, a verdict may be appealed on the grounds of an essential violation of the provisions of criminal procedure, a violation of the criminal code, or erroneously or incompletely established state of facts, the decision as to the sanctions, the forfeiture of property gain, costs of criminal proceedings, claims under property law and announcement of the verdict through the media.

The mentioned grounds mostly refer to legal (error of law) and factual (erroneously or incompletely established state of facts) aspects.

I. Legal Errors

Any Appellant alleging an error of law must, as said, identify, at least, the alleged error, present arguments in support of its claim and explain how the error affects the decision resulting in its unlawfulness.



Where the Appellate Panel finds that there is an error of law in the Verdict arising from the application of the wrong legal standard by the Trial Panel, it is open to the Appellate Panel to articulate the correct legal standard and review the relevant factual findings of the Trial Panel accordingly. In doing so, the Appellate Panel not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.

2. Factual Errors

The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. When considering alleged errors of fact, as raised by the Appellant, the Appellate Panel will determine whether any reasonable trier of fact could have reached the verdict of guilt beyond reasonable doubt. The Appellate Panel will only substitute its own finding for that of the Trial Panel when no reasonable trier of fact could have reached the original Verdict. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict by a Trial Panel, but only one which has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

The Appellate Panel shall bear in mind that in determining whether or not a Trial Panel's conclusion was reasonable, it will not lightly disturb findings of fact by a Trial Panel. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel. Only where the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appellate Panel substitute its own finding for that of the Trial Panel.



With regard to direct or indirect circumstantial evidence, the Constitutional Court of BiH¹ emphasizes that the proving of facts through circumstantial evidence is not by itself contrary to the principle of fair trial, as laid down in Article 6(1) of the ECHR. However, the evaluation of circumstantial evidence has to comply with the value-added requirement of being established beyond any reasonable doubt and tightly and logically interrelated in order to lead to the only possible conclusion that a fact is proven. Reasonable doubt is the criterion. It is very rare that a fact can be proven beyond any doubt. Indeed; sometimes circumstantial evidence, like the separate pieces of a puzzle when all put together, can be more compelling than direct eye witness testimony which can be subject to normal human error.

The Appellate Panel considers that there are no reasons to depart from the standard set out above. That standard will be applied where appropriate in the present appeal against the Verdict.

II. The Case Grounds of Appeal

The Defence of Nenad Tanasković filed an Appeal from the Court of BiH Verdict Ref. number X-KR-06/165, dated 24 August 2007, requesting that the Appellate Panel uphold the Appeal, revise the challenged Verdict and acquit the accused of the charges, or else revoke the Verdict and order a retrial on the following grounds:

1. violation of the European Convention on Human Rights and Fundamental Freedoms;
2. an essential violation of the criminal procedure;
3. the erroneously or incompletely established state of the facts;
4. a violation of the criminal code, and
5. the decision as to the sanction.

1. Violation of the European Convention on Human Rights and Fundamental Freedoms

The Defence mentioned, in relation to the grounds of essential violations of the criminal procedure and violation of the criminal code, that "such a position represents a violation of the ECHR, Article 6 (1), and an essential violation of the provisions of the criminal procedure under Article 297 (1) (k) of the BiH

¹ In its reasoning in the case AP 661/04



CPC in different forms" and "the principle banning retroactivity is included in Article 7 (1) of the ECHR (...).

That ground was alleged by the Defence without a specific and autonomous argument in relation to the grounds of an essential violation of the provisions of the criminal procedure and violation of the criminal code. These two grounds will be considered below.

Therefore, Appellate Panel decides, without detailed reasoning, not to consider the allegation as it is not directly pleaded as ground of appeal.

2. Essential Violations of the Criminal Procedure

2.1 General allegations

The Defence alleges in its appeal that: the Verdict is incomprehensible, contrary to itself and its grounds and lacks grounds. Namely, the Verdict is based exclusively on subjective evidence, particularly on witness statements. No matter how thorough, the witness statements cannot be unreservedly accepted if they are not supported by substantive evidence as well.

Furthermore, the preamble of the Verdict says that the accused participated in a widespread and systematic attack by the Army of the Serb Republic of BiH, Police and paramilitary formations. These are very numerous and diverse military formations and even more numerous members of those units, which leaves undefined the concept of "participation" in terms of the accused.

In addition to lacking the description of the actual action, it also lacks in entirety the factual substratum which would show the subjective position of the accused towards the act and the consequence of the act.

Finally, the Trial Panel failed to resolve the essential issue of the credibility of certain Prosecution witnesses, and therefore whether statements of Prosecution witnesses can be accepted as evidence supporting beyond reasonable doubt the factual allegations regardless of the statements of the accused and other witnesses, if it relies on the "presumption of innocence" bearing in mind the fact that they failed to evaluate any of the evidence given by the Defence witnesses including material evidence filed by the Defence as evidentiary material and accepted by the Panel.

The Prosecutor in his response states: that "the Verdict of the First Instance Panel resolved each and every one of the charges laid by the Prosecutor in the

Indictment. All of the evidence considered by the First Instance Panel in arriving at the Verdict was evidence that could be used as the basis of the Verdict. The Verdict does not exceed the charges in the Indictment". Furthermore, he concludes that "the Verdict is comprehensible, internally consistent, does not contradict itself, is grounded in properly considered facts, and properly and adequately cites its reasoning on the decisive facts.

The Appellate Panel finds that the Defendant's claims regarding the Verdict are mere conclusions without substance. The Verdict is comprehensible because it contains nothing inconsistent about the conclusions or the reasoning used by the First Instance Panel to find the defendant guilty and to acquit him of allegations that were not well founded in the evidence. Further, the Verdict carefully lays out the facts it relies upon, why it relies upon them, the law which it applies to them, and the conclusions it reaches as a result.

According to Article 297 (1) k) of the CPC BiH, there is an essential violation of the provisions of criminal procedure "if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts".

Having reviewed the Verdict, the Appellate Panel notes that the Trial Panel adduced evidence by examining both Prosecution and Defence witnesses and reviewing the proposed material evidence and evaluated the evidence individually and in combination², including inconsistencies of testimonies and credibility of witnesses.

Furthermore, the Trial Panel also concluded that from April to June 1992, there was a widespread and systematic attack conducted by the Army of the Serb Republic of Bosnia and Herzegovina ('VRS'), police and paramilitary formations, in particular, by the 'Beli Orlovi' (*White Eagles*), against the Muslim population of the Višegrad municipality.³

In terms of establishing the "participation" of the Accused in the widespread and systematic attack, his actions are clearly described, on one side, when the Trial Panel considered the nexus between the acts of the Accused and this attack and, on the other side, the prohibited acts which were committed by the Accused as part of this attack and his knowledge of this attack⁴. The prohibited acts are described in detail in the Counts of the Indictment of which he is found

² At pg 17.

³ At pg. 18

⁴ At pgs 19 and 21

guilty and consist in depriving the lives of persons, aiding in rape, acting as a co-perpetrator in torture, forcible transfer and destruction of Muslim property, that were taking place during the period immediately after the widespread and systematic attack against the civilian population of Visegrad Municipality; his actions were part of that attack and were designed to further the progress of this larger attack. It has been established that the Accused was involved in taking the civilians for interrogations which would result in inhumane and degrading treatment either by the Accused himself or other individuals⁵.

In general, the Appellate Panel observes that the Trial Panel, when dealing with the personal responsibility of the Accused, clearly stated the facts which constituted his criminal liability. The personal participation of the Accused in the acts that led the Trial Panel to find him guilty on some of the charges is amply supported by a factual basis carefully described in the Verdict. In addition, in relation to the personal responsibility of the Accused for the crimes of conviction, the Trial Panel requalified the mode of liability in some Counts, while in other Counts, the Trial Panel decisively and in great detail refused to convict. Finally, the Trial Panel carefully treated the evidence when it was not consistent with the charge and fully considered the objections then made by the Defence.

As regards the act of the perpetration itself, the Prosecution witnesses, who testified about the circumstances surrounding the charges of the perpetration, are mainly direct eyewitnesses to the incidents; however some of them are also direct victims.⁶

The Appellate Panel observes that the Trial Panel concluded beyond a reasonable doubt that "the relevant actions occurred at the time of a widespread and systematic attack by the Army of Republika Srpska, police and paramilitary formations against the civilian population of Višegrad Municipality, and that the Accused, acting as part of such an attack, was aware that his actions represented part of such an attack".⁷

The Appellate Panel cannot find anything, at least in relation to these general allegations of the Defence, which makes the Verdict internally inconsistent about the conclusions or the reasoning used by the Trial Panel in finding the Accused guilty that were not well founded in the evidence. Further, the Verdict carefully lays out the facts it relies upon, why it relies upon them, the law which it applies to them, and the conclusions it reaches as a result.

⁵ Pg 19

⁶ Pg 21

⁷ Pg 21

Furthermore, the claims of the Defence do not identify precise and specific grounds for finding fault with the Trial Panel's Verdict.

Therefore, in relation to these claims, the Appellate Panel concludes that the Verdict is comprehensible, internally consistent and does not contradict itself. Furthermore, it is grounded in well noted facts. The facts are adequately taken in the reasoning and the reasoning compelled the conclusions of the Verdict.

2.2. The preamble text of the Verdict and the factual description contradiction

The Defence claims that the preamble text of the Verdict and the factual description are obviously contradictory and there is a contradiction with the reasoning of the Verdict, which constitutes an essential violation of the criminal procedure under Article 297 (1) (k) of the CPC BiH. The Defence states that "the preamble of the challenged Verdict mentions the period from April through late June of 1992 (...), while "the factual description under counts 1, 2, 3, 4, 5 and 7 charges the accused for the time period between mid May 1992 and late June that same year". It concludes that "it is obvious that the Court kept the charged period between April and late June 1992 to the detriment of the accused, although according to the allegations the acts took place between mid May and late June".

The Appellate Panel considers that the argument is clearly without foundation and is obviously ill-founded. In fact, it is not clear that "the preamble text of the Verdict and the factual description are obviously contradictory and there is a contradiction with the reasoning of the Verdict". Even though, "the preamble text of the Verdict" is nowhere identified in the Verdict, it is quite obvious in that Verdict that "the period from April through late June of 1992" has to do with the armed conflict in Bosnia and Herzegovina and the existence of a widespread or systematic attack (the general elements of the legal definition of crimes against humanity) and "the factual description under counts 1, 2, 3, 4, 5 and 7", charging the accused for the time period between mid May 1992 and late June that same year", is in relation to the criminal offences committed by the accused as part of this attack (the underlying criminal offenses of crime against humanity). In sum, the dates the Accused committed the criminal offences he is charged with arise from the established state of the facts related with each Count and clearly fall in "the period from April through late June of 1992".

Therefore, the Court appropriately kept the charged period between April and late June 1992 which was not to the detriment of the Accused in the meaning

pointed out by the Defence. The findings by the Trial Panel are not inconsistent. Mid-May 1992 to June 1992 is within the period of April 1992 to June 1992. Both findings are consistent. The mere fact that the Accused did not commit the alleged crimes every single day or every single hour between April 1992 and June 1992 does not make the Trial Panel's findings inconsistent, although the acts allegedly occurred between mid-May through late June.

2.3. Violation of Article 14 of the CPC BiH

The Defence further asserts that the Court failed to evaluate the presented evidence as prescribed by Article 281 (2) of the CPC BiH, which creates realistic grounds for the conclusion that this Court did not review and establish with equal attention both the facts charging the accused and those in his favour, which constitutes the violation of Article 14 of the cited law.

This is a general allegation without a specific argument. The Defence does not identify where the Court blatantly failed to correctly review and reasonably establish with equal attention both the facts charging the accused and those in his favour. There is no argument in support of its contention. In any case, "equal attention paid to both the facts charging the accused and those in his favour" will be considered when Defence arguments, if any, concerning the Verdict are taken into account in relation to different Counts of the Indictment.

2.4. Credibility of certain Prosecution witnesses

The Defence claims that the Trial Panel failed to resolve the essential issue of the credibility of certain Prosecution witnesses, and therefore whether statements of Prosecution witnesses can be accepted as evidence supporting beyond reasonable doubt the factual allegations regardless of the statements of the Accused and other witnesses.

The Defence further alleges that "following a detailed analysis of the statements of certain witnesses from 1994 up until the handing down of the verdict, the Women-Victims of War Association headed by Bakira Hascić had the most decisive influence on the witnesses. It is the Association's legitimate right to keep track of the victims, but not to instruct them to give statements, even threatening them that they would lose some right they have as victims. It is alleged in the case of Mula Kustura, who fears that she could be denied her pension. It is further alleged that a criminal report against the President of the

Association, Bakira Hasečić, has been filed with the Prosecutor's Office of BiH under number KTA-302/07 for influencing witnesses and giving false testimony".

In his response, the Prosecutor stated that "as to those Counts of the Indictment which the First Instance Panel was convinced beyond a reasonable doubt of the defendant's guilt based on the evidence adduced at the Main Trial (Counts 1, 2, 3, 4, 5 and 7), the defendant merely disagrees with the First Instance Panel regarding the interpretation of evidence (which is explained thoroughly by the First Instance Panel in the Verdict) and the merit of the testimony of the witnesses who appeared in the Main Trial. Likewise, he disagrees with the First Instance Panel about the weight such testimony should have been given. None of what the defendant offers, however, raises significant or reasonable questions regarding whether the evidence was legally qualified; that is, given by witnesses who either personally experienced what they testified about or were possessed of information that was reliable and independently corroborated by other witnesses or documentary evidence that was legally admissible and accepted by the First Instance Panel".

The Appellate Panel accepts the principle that "it is the Association's legitimate right to keep track of the victims, but not to instruct them to give statements, even threatening them that they would lose some right they have as victims". However it also considers that again, the Defence is making a general allegation without a specific argument. There is no evidence that witnesses were coerced by the Victims of War Association to give false testimony under the threat of losing some rights or benefits they have as victims. Furthermore, there is no concrete evidence that witnesses gave false testimony in these or other conditions. Would evidence be produced that a witness lied, the Appellate Panel should go back, check the verdict, see if the Trial Panel took the testimony into account and, if yes, review the decision on that Section of the Verdict. If it is proved in criminal proceedings that a witness lied concerning material evidence under the abovementioned conditions, extraordinary review proceedings of this Verdict would then be appropriate.

This is a general consideration on the general allegation. However, the Appellate Panel will check the credibility of witnesses when analysing the evidence supporting the factual basis of each Count of the Indictment by evaluating the arguments presented by the Defence. Nevertheless, the Appellate Panel notes that the Trial Panel was mindful of the issues raised by the Defence regarding the credibility of the witnesses and took them into account. Anyway, contradictions and inconsistencies are to be expected from witnesses, who



experienced great trauma from the events about which they are asked to testify, particularly when those events occurred many years before they actually appear in court. Even though, they do not generally disqualify the evidence as to the substance of the testimony.

3. The erroneously or incompletely established state of the facts

The Defence repeated the general claims that witnesses were somehow influenced by victims' associations or political interests or by ethnic or personal "hatred".

The Prosecutor responded in general that the Accused merely disagrees with the Trial Panel regarding the interpretation of evidence (which is explained thoroughly by the Trial Panel in the Verdict) and the merit of the testimony of the witnesses who appeared in the Main Trial. None of what the Accused offers, however, constitutes new facts or evidence to refute the factual description of the first-instance panel established at the main trial.

The Appellate Panel observes that the Defence does not offer a single substantial reason grounded in fact for concluding that the Trial Panel's findings were "erroneous or incompletely established." Furthermore, the Defence offers no new evidence or facts that would give rise to a conclusion that the facts were not completely established in the Verdict. As noted above, it submits that the Verdict touches upon significant and grounded aspects with regard to the evaluation and legal definition of evidence presented at trial. The Trial Panel dealt in detail in the Verdict with the state of the facts in the case, always taking the standard approach of noting the evidence it relied on, analysing the evidence individually and holistically and concluding on the state of facts. Additionally, objections presented by the Defence in closing arguments were carefully taken for consideration under the mentioned standard of approach.

In accordance with Article 299 (1) of the CC BiH, "a verdict may be contested because the state of the facts has been incorrectly or incompletely established when the Court has erroneously established some decisive fact or has failed to establish it". Considering this legal criterion, the Panel concludes in general that the Trial Panel correctly and completely established the state of the facts, including the decisive facts upon which it based the Verdict. It further concludes that the Defence does not offer new facts or evidence on appeal that



would challenge the Trial Panel's description of the facts as done in the Verdict.

3.1. Section I of the Verdict

A) The Appeal

The Defence claims that the Verdict found the accused Nenad Tanasković guilty solely on the basis of the testimony of one witness, whose contradictory statements given during the investigation most seriously throw into doubt the truthfulness of her testimony given at the trial. Even more, these contradictions were pointed out by the Defence during the cross-examination, but the Court ignored them and did not mention that at all in the Verdict.

The Defence alleges that it is not proven that Nenad Tanasković, even acting as a co-perpetrator, arbitrarily deprived Witness A and Junuz Tufekčić of their liberty. Their being brought in, by itself, even if it was done, does not represent a criminal offense and is not unlawful if carried out on the orders of a superior officer.

The Defence also points out some observations in relation to the alleged identification circumstances of the accused Nenad Tanasković, namely that the easiest thing for all the witnesses, including Witness A, was to claim that he was a bus conductor. After having indicated some circumstances, the Defence concludes that all these are dilemmas which indicate a directed preparation of the witness prior to her testimony and her targeted testimony.

The Defence contests the Verdict's conclusion that Nenad Tanasković was an accessory in the rape of Witness A, arguing the Witness A was handed over to a Višegrad Ministry of Internal Affairs Official, Drago Samardžić, the Accused neither knew nor was in a position to know what was going to happen with the Witness after the interrogation.

Furthermore, the Defence also claims that the threat "You will see now how Radovan fucks" allegedly made against Witness A have not been adequately and clearly proven as the words were used as a jargon on both ethnic sides.

B) The Verdict

The Appellate Panel notes that the Defence made the same objection, in its closing argument⁸. The Trial Panel took into consideration the objection "that this Count of the Indictment was based on the testimony of only one witness, that is, the protected witness, and that a conviction cannot be established on such testimony"⁹.

In response to these assertions, the Trial Panel¹⁰ explained that "it is free to evaluate the evidence. Pursuant to Article 15 of the BiH CPC, the Court has the right to evaluate the existence or non-existence of facts and that right is not related to special formal evidentiary rules. In the opinion of the Panel, if certain evidence is lawful and valid, and if it is authentic and credible, such evidence can be sufficient to establish that a criminal offense has been committed, even if that evidence comes from only one witness. The crime of rape is rarely committed before witnesses. The Panel noted that Witness A gave a highly emotional and, for her, painful testimony. The Trial Panel found that there were no inconsistencies in her testimony with regard to what happened to her or with regard to the actions of the Accused. Furthermore, part of her testimony is supported by Defence witness Dragiša Trifković. It is also important to note that the rape occurred in Višegrad, which is indicated by the established fact that is adopted by this panel as number 21: 'Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes or beatings'¹¹.

The Appellate Panel also observes that the Trial Panel¹¹ described the criteria it relied on to evaluate the evidence given by the witness A. In its explanation of the criteria it placed special emphasis on how it evaluated the evidence from a single eye-witness. The criteria used by the Trial Panel are consistent with the legal provisions of the CPC of BiH and the international practice¹². The Trial Panel, in addition, looked to other reliable evidence, including testimony of other witnesses and its direct observation of the demeanour of the witness during her trial testimony. After the Trial Panel discussed the evidence that corroborated Witness A's account, including testimony from one of the

⁸ Pg 16 of the Verdict: When Count 1 of the Indictment is in question, the Accused did not have any control over the events in the Police Station, and the evidence does not show that he committed the offense of rape. This Count of the Indictment is based on the statement of only one witness, namely the protected witness, and a sentence cannot be established on such statement.

⁹ Pgs 29 and 30

¹⁰ Pg 30 of the Verdict

¹¹ Page 30 of the Verdict

¹² The ICTY, as the CPC of BiH, recognizes a preference for oral testimony. Further, the ICTY has elaborated a number of ways of evaluating the evidence of victim witness, which each of the witnesses in this case was, none of which require that such evidence be corroborated before it can be considered (*Habitovic* Trial Chamber November 16, 2005, para. 15).

Defence witnesses, as well as the Trial Panel's first hand observation of the witness, it explained why it gave the testimony of that single victim-witness decisive weight in convicting the Accused. In addition, contrary to the Defence allegation, the Trial Panel was aware of inconsistencies in the evidence. However, "there were no inconsistencies in her testimony with regard to what happened to her subsequently and the actions of the Accused himself". Therefore, the Trial Panel addressed the seeming contradictions in Witness A's evidence and explained the significance it attached to them in reaching its Verdict.

Regarding the allegation that it is not proven that Nenad Tanasković arbitrarily deprived Witness A of her liberty and as for the circumstances of the alleged deprivation of liberty of Junuz Tufekčić, the Appellate Panel notes that evidence was adduced from at least two witnesses who corroborated the events and the participation of the Accused, including his level of participation. In fact, the Trial Panel clearly and thoroughly analysed the evidence¹³ which allowed it to conclude that "in that same manner and resulting in the same consequence for the victim (apprehension and taking to the police station), the Accused also arbitrarily and intentionally deprived Junuz Tufekčić of his liberty without giving him any explanation or information as to why he was apprehending him or where he was taking him".

The Trial Panel also explained why and how it reached the conclusion that Nenad Tanasković acted as an accomplice when depriving Witness A and Junuz Tufekčić of their liberty. The Verdict¹⁴ reads that "the fact that the accused was an accomplice is reflected not only in the fact that he, by acting with Nenad Mirković, deprived these two persons of their liberty, but also in the fact that the Accused made a decisive contribution to the subsequent detention of those persons during the time they spent in the police station where other persons took control over them; to which the Accused made a decisive contribution as described above".

The Trial Panel did the same in relation to that Nenad Tanasković was an accessory in the rape of Witness A. Again, the Verdict reads that "the Accused was neither the perpetrator nor the accomplice* in the action of rape and torture

* *Interpreter's note: In referring to the term 'accomplice' the English translation of the first instance verdict relied on the English translation of the relevant BiH Criminal Code provisions in use at the BiH Court, while the present English translation will distinguish between 'co-perpetrator' and 'accomplice' in order to reflect more accurately the two different terms used in the BCS original: 'soizvršilac/saizvršilac' and 'samoćesnik', respectively.*

¹³ Pg 23-26

¹⁴ Pg 25-26

of this Witness. As already explained, the actions of the Accused are limited only to the fact that he helped in the commission of the offence by using the available means, without which the commission of the offense would not be possible, knowing that his actions in arbitrarily apprehending and transporting her to the police station would result in the rape of the victim".

The Defence may disagree with the Trial Panel's findings, but it cannot reasonably argue that there was no evidence upon which the Trial Panel could rely in rendering its factual and legal conclusion.

As to the allegation that the threats made against Witness A by the Accused have not been adequately and clearly proven, it is necessary to take into account the global dynamic and the emotional climate of the concerned day, namely the apprehension of Witness A carried out in such circumstances causing reasonable individuals to feel fear and uncertainty and to fear for their lives and safety in general, the aggressive conduct of the Accused including firing his gun in the presence of Witness A, lacking explanation as to why she was being apprehended and where she was going to be taken. All these circumstances seen in a wider ethnic armed conflict confer to the said expressions "You will see now how Karadžić and his army fuck. Alija and his army could not fuck you well, so you will see it now" and also "read the prayer of Our Father and make the sign of the cross" a very serious character of threat and installs a deep fear on any normal woman, regardless belonging to one or another side.

The Appellate Panel further notes that the Verdict reasonably explains how the Accused is an accessory in the criminal offence of rape. The Verdict reads that "the causative-consequential connection between the actions of the Accused and the consequence that resulted is clear, and, considering the event in the entirety, it is obvious that the Accused is indirectly responsible for the criminal offense of rape, as an accessory and not as an accomplice* See page 15"¹⁵. In sum, the jargon words in itself do not mean that he is going to commit a crime. However, under the circumstances the Accused acted it was reasonable to conclude that he meant to be an accessory to the rape. The Trial Panel took into account "the causative-consequential connection" of the acts and "the entirety" of the event as the basis of its conclusion. It means that the mentioned words cannot be isolated but seen in interaction with other factors.

In relation to the personal responsibility of the Accused, the Trial Panel requalified¹⁶ the mode of responsibility of the Accused. After carefully and in

¹⁵ Pg 27

¹⁶ Pg 28

great detail treated the evidence produced in evidentiary proceedings, the Trial Panel considered that the evidence was not consistent with the charges and concluded that "the Accused acted as an accessory in the commission of this criminal offense of torture which is the result of the rape"

Therefore, the Appellate Panel considers that the Trial Panel analysis is reasonable and its conclusion correct. Therefore, the appeal is dismissed for failure to identify any justified legal error on the part of the Trial Panel.

As for the alleged identification of the accused Nenad Tanasković, the Defence argues that there are a lot of unclear matters which indicate a directed preparation of the witness prior to her testimony and her targeted testimony. There is no valid basis for this argument. The witnesses testified in the courtroom and the Defence had the opportunity not only to cross-examine them and clarify the testimonies of these witnesses, but also to elicit any circumstance or factor which could put in cause the credibility of the witnesses or the reliability of the testimony.

C) Conclusion

Therefore, that Panel considers that the Defence's claims do not identify grounds for finding fault with the Trial Panel's Verdict and the reasoning of the Trial Panel is justified, which is the reason to dismiss the arguments of the Defence as ungrounded.

3.2. Section 2 of the Verdict

A) The Appeal

The Defence claims that the Prosecution failed to prove that Nenad Tanasković was involved in the "apprehension" of the Dolovac brothers or their beating. It accepts that the Accused, following the orders of the Commander Vlatko Trifković, took the Dolovac brothers in a passenger motor vehicle Passat from the Local Community premises in the village of Donja Lijeska to the Višegrad SUP. These actions, says the Defence, do not include elements of the charged criminal offence.

The Defence also claims that Suad Dolovac was the only witness testifying about the alleged beating of his brother Kemal. For that reason this testimony is subjective and biased and as such cannot be considered credible.

Furthermore, the Defence alleges that it is not proven that the Accused acted with a direct intent when inflicting as much severe pain as possible upon Kemal Dolovac.

B) The Verdict

The Appellate Panel notes that the argument was already presented in the Defence closing argument¹⁷. The Trial Panel took it under due consideration¹⁸ and explained as follows: "With regard to Count 2 of the Indictment, the Defence objected that the evidence concerning the beating up of the brothers was not reliable. The Accused stated that he had taken away the Dolovac brothers for interrogation, but only upon the order of Vlatko Trifković. With regard to this, the Panel points out that the conviction on the basis of this Count is based on the testimony of witness Suvad Dolovac, who is himself the victim of this action of the Accused. The testimony of this Witness is substantiated in its key part with the testimony of witness Islam Cero who is the direct eye-witness of the Dolovac brothers' apprehension. There are minor inconsistencies between the accounts of these two witnesses: Islam Cero recalled the vehicle in which the Dolovac brothers were taken away to be a Red Passat, whereas Suvad Dolovac identified it as a Renault 21, a shade between blue and green. Further, Islam Cero recalled two soldiers in the trunk of this vehicle. However, the Panel finds that these discrepancies are irrelevant to the substance of the Count and that it is inevitable that accounts will differ between witnesses in minor respects, particularly given the passage of time. As such, these inconsistencies do not undermine the credibility of witness Suvad Dolovac who gave a detailed, consistent and credible testimony".

The Appellate Panel considers the explanation completely reasonable and the claim of the Defence unfounded.

Nevertheless, the Defence brings one new aspect, in relation to the Verdict, that is: "despite the fact that during his testimony Suvad Dolovac minimized the gravity of his injuries, the Panel concludes that it is inconceivable that Suvad Dolovac did not experience great pain or suffering from being beaten twice, over a period of up to an hour..." In the opinion of the Defence, the court evaluates the "pain" and "suffering" the way they say it, regardless of the fact that the witness's testimony is completely different.

¹⁷ Pg 16 of the Verdict: "With regard to Count 2 of the Indictment, the Defence points out that (...) the evidence concerning the beating of the brothers is also not reliable. The Accused stated that he did in fact take away the brothers Dolovac for interrogation, but upon the order by Vlatko Trifković. Also, the charges against the Accused for keeping them detained in inhumane conditions are not founded because he did not have any possibility to control or to impose the conditions in the Uzamnica barracks nor is there any reliable evidence supporting that".

¹⁸ Pg 33

When reviewing the Verdict, the Appellate Panel observes that the mentioned averment has to be placed in the context it was made. The Verdict reads that "with regard to Suad Dolovac, it is clear that watching his brother being maltreated by the Accused and being beaten and treated aggressively himself by both Novo Rajak and the Accused caused him great mental trauma, to the point that he was extremely concerned for his own fate. Despite the fact that during his testimony Suad Dolovac minimized the gravity of his injuries, the Panel concludes that it is inconceivable that Suad Dolovac did not suffer severe pain or suffering from being beaten twice, over a period of up to an hour. As stated above, the Accused was participating in a common plan to intentionally abuse these brothers, and thus his beatings, combined with his presence and his encouraging while Novo Rajak repeatedly hit Suad Dolovac, constitute a significant contribution to the physical torture of Suad Dolovac".

This Panel considers that, as it can be seen, the context of "watching his brother being maltreated" and "extremely concerned for his own fate" changes completely the meaning and multiplies the "minimal gravity of his injuries", which are not restrictive to physical suffering and pain. Even more, on these circumstances, the human experience clearly says that nobody is able to say the "pain" and "suffering" the way it effectively was felt.

Therefore, this Panel does not find that the Trial Panel evaluation is unreasonable or illegitimate and the allegation is refused as ungrounded.

The Defence claim that the Prosecution failed to prove that Nenad Tanasković was involved in the "apprehension" of the Dolovac brothers or their beating is thoroughly and reasonably explained by the Trial Panel in the Verdict. It reads that "with regard to Count 2 of the Indictment, (...) the Panel points out that the conviction on the basis of this Count is based on the testimony of witness Suad Dolovac, who is himself the victim of this action of the Accused. The testimony of this Witness is substantiated in its key part with the testimony of witness Islam Cero who is the direct eye-witness of the Dolovac brothers' apprehension. There are minor inconsistencies between the accounts of these two witnesses: Islam Cero recalled the vehicle in which the Dolovac brothers were taken away to be a Red Passat, whereas Suad Dolovac identified it as a Renault 21, a shade between blue and green. Further, Islam Cero recalled two soldiers in the trunk of this vehicle. However, the Panel finds that these discrepancies are irrelevant to the substance of the Count and that it is inevitable that accounts will differ between witnesses in minor respects, particularly given the passage of time. As such, these inconsistencies do not

undermine the credibility of witness Suad Dolovac who gave a detailed, consistent and credible testimony".

That Panel noted the factual basis established by the Trial Panel on the testimonies of Suad Dolovac and Islam Cero and considers that the explanation given is complete and reasonable and the conclusion on the facts relative to the deprivation of liberty of Kemal and Suad Dolovac is correct and legitimate. Therefore, the claim of the Defence is refused as ungrounded.

In relation to the allegation that it is not proven that the Accused intentionally wanted to inflict upon Kemal Dolovac as much severe pain as possible, or, in other words, that he acted with a direct intent, because this act can only be committed with an intent, the Trial Panel¹⁹ concluded that the actions of the Accused are included in his direct intent, "considering that, pursuant to the testimony of the witness Dolovac, who was consistent and credible in his description of the events, the Accused knew what he was doing, that is, he was fully aware of the commission of both acts that he committed (the action of deprivation of liberty and torture of the brothers Dolovac) and he wanted the commission of those acts to occur."

As already has been said, the Trial Panel carefully and in great detail discussed the charge of murder of Kemal Dolovac, and other inhumane acts - inhumane treatment of Kemal and Suad Dolovac, or beating and confining them in inhumane conditions, as alleged in the Indictment. It also correctly concluded that, based on presented evidence, it cannot establish beyond reasonable doubt that the Accused is responsible for the referenced criminal acts, which is why it refused to convict him on that Count. It always did the same where the evidence was not consistent with the charge.

C) Conclusion

The Defence only disagrees with the conclusion of the Trial Panel, but does not present grounds for invalidating the Trial Panel conclusion. Therefore, the allegation is unfounded.

¹⁹ Pg 36

3.3. Section 3 of the Verdict,

A) The Appeal

The Defence claims that it is not proven that Nenad Tanasković deprived M.M. and H.M. of liberty and tortured them. In fact, Defence alleges that the testimonies of Witness B and Fazila Cero, which are the basis of the Verdict, are rather contradictory.

The Appellate Panel notes that the Verdict reads that the Defence, in the Closing Arguments, holds that "there is no responsibility on the part of the Accused with regard to this Count of Indictment either. There are certain contradictions in the statements of Witness B and Fazila Cero regarding the apprehension of M.M., and the testimony of Suad Dolovac with regard to the apprehension of H.M. Also, the Prosecutor's Office failed to prove any involvement of the Accused in the killings of M.M. and H.M."²⁰ On the other side, the Trial Panel took into consideration the objection of the Defence. In fact, the Verdict reads that "when Count 3 of the Indictment is in question, the Defence objects that there is no evidence of the responsibility on the part of the Accused with regard to this Count either, and that there are certain contradictions in the testimonies of Witness B and Fazila Cero with regard to the apprehension of M.M. and the testimony of Suad Dolovac with regard to the apprehension of H.M."²¹ The Trial Panel, after having discussed in great detail the objection of the Defence, concluded that "these irrelevant contradictions did not influence the credibility and reliability of these witnesses and they surely are not relevant for the observation of the actions itself of the Accused".²²

C) Conclusion

The Appellate Panel considers the analysis and the conclusion reasonable and legitimate and the arguments developed by the Defence unfounded and without any support in fact or law.

Therefore, the argument of the Defence does not succeed, as the Defence claims fall short of identifying reasonable grounds for finding fault with the Trial Panel's Verdict.

²⁰ Pg 17

²¹ Pg 45

²² Pg 45

3.4. Section 4 of the Verdict

A) The Appeal

The Defence alleges that it was not proven beyond any reasonable doubt that, except being physically present, the Accused committed any forbidden action. In fact, says the Defence, the accused Nenad Tanasković, as a TAM truck driver, had the obligation to be in the places where some goods had to be taken to the members of the Army of Republika Srpska. The mere presence on the school premises cannot represent any form of perpetration, not even accessory.

The Defence also contests the Verdict finding that Nenad Tanasković acted as a co-perpetrator in the beating of Salko Šabanović and another person (Esad Džanović). The Defence argues that there is no co-perpetration unless the Defendant made a decisive contribution to the perpetration of the crime, and, in this particular case, the "decisive contribution" to the perpetration of the criminal offence is missing.

B) The Verdict

In its closing argument²³, the Defence stated that the circumstances referred to in Count 4 regarding the accused Tanasković had not been proven either.

The Trial Panel considered the objection and concluded that the evidence showed that the apprehended persons, who were civilians, unarmed and wearing civilian clothes, were escorted by Tanasković and others to the school in Orahovec where they were beaten up by soldiers.

²³ "The circumstances referred to in Count 4 have also not been proven with regard to the accused Tanasković. First, the offence concerning the deportation and the forced removal cannot be clear from the presented evidence because the Prosecutor's Office did not prove the intention of the Accused to really forcefully remove the people. Also, it is clear that the people who moved in a group toward the school in Orahovec, returned to their homes after a certain period of time. When the participation of the Accused is in question, the Defence points out that the escort of the group to the school was ordered by the superiors and that it was justified from the military point of view. With regard to the allegations on setting the houses on fire, it was not clearly established from the witnesses for the Prosecution who and in which manner set on fire the houses concerned, no one saw the Accused doing that. Also, the Defence does not accept the qualification of the act as "a human shield". In relation to Count 4 of the Indictment, the Defence points out that primarily, within the context of the act with which the Accused is charged, there is no attack on undefended villages, nor can the act as described under the Indictment be considered deportation or forced removal. The fact that military service were regularly escorted by the soldiers, among whom the Accused was also present, which reflects his participation, in the school in Orahovec and the military Uzdarnica barracks, after which they were released to go to their homes, which is confirmed by the statements of the witnesses for the Prosecution. The reason for the civilians' detention was quite legitimate, while the military escort was provided pursuant to the orders of the superior structures, and the escort itself was carried out pursuant to the provisions of the IV Geneva Convention. Furthermore, there cannot be any discussion about the destruction of private ownership, since it was an isolated case that was conditioned by military needs, while in the case of the alleged setting fire to the houses, it arises from the witnesses' testimonies that the Accused did not carry out the stated action. Finally, with regard to the offence concerning the existence of human shield, the fact itself that the civilians were kept in front of the soldiers, does not mean anything". Pg 17

The Trial Panel considered that "having acted together with other soldiers, the Accused participated in the gathering of civilians while passing through villages in order to finally escort them to the elementary school in Orahovci, whereby he personally forced at least one civilian to join the line (Šaban Ajanović). Undoubtedly, he was part of the group which took the civilians; witnesses recognized him and at the time they saw him he was armed. While doing this the Accused failed to offer any of the captives any explanation as to why they were being apprehended and where they were going to be taken. This is corroborated by the testimonies of the above mentioned witnesses who were direct eye-witnesses and who themselves were in the line, which was taken to the school"²⁴. Further on the Trial Panel concluded that "by performing these actions, he acted in the capacity of an accomplice"²⁵ *see page 13/* as defined under Article 29 of the BiH CC because he contributed in the decisive manner to the commission of the offence, having acted in concert with the other accomplices"²⁶ *see page 15/*²⁵.

The Trial Panel analysed carefully and in detail the testimonies on forcible taking of civilians and indisputably concluded that "it is a proven fact that the Accused was one of the soldiers, among other soldiers, who accompanied this forced march to the school in Orahovci"²⁶.

The Defence also objected, in its closing argument, to the allegations concerning the setting of the houses on fire by the Accused, since it considers that it has not been clearly established from the Prosecution witnesses who had set the houses in question on fire nor how they were set on fire, since no one saw the Accused doing that.

With regard to that objection, the Trial Panel noted that two witnesses testified about the setting of the two houses on fire by the Accused. It firstly happened in the village of Počivala, and thereafter in Vlasin. When it is taken into account that two different witnesses stated that they had seen the Accused in both instances personally setting the houses on fire, and their testimony already points to the already established modus operandi of the Accused (he first found out who were the owners of the houses, then went to the houses and set them on fire), the Trial Panel did not find any reason whatsoever to doubt their credibility. Witness D indeed did not state that he had personally seen the Accused setting a house on fire, but he heard the Accused inquire about the owner of the house; he then saw him entering the house; and, thereafter he saw smoke coming from the house.

²⁴ Under section 3.1., 4/

²⁵ Pg 50

²⁶ Pg 46



The Trial Panel also found that the allegations of the Accused himself who stated that he had taken food to the soldiers at the school in Orahovci and that he stayed there a short time, do not represent sufficient grounds for rejecting reliable statements by Witness D, Salko Šabanović and Islam Cero, especially bearing in mind that the route along which the Accused was travelling confirms his presence at locations where he was seen that day when the civilians were marched to Orahovci. Furthermore, the statement of the Accused according to which he arrived at the school at 7:30 a.m. only confirms the fact that Witness D, Salko Šabanović and Islam Cero saw him that morning".²⁷

The Appellate Panel considers that the Trial Panel assessed correctly the facts, reasonably analysed them and logically concluded. Therefore, the Defence allegation also is unfounded.

In relation to the claim that Nenad Tanasković acted as a co-perpetrator in the beating of Salko Šabanović and another person (Esad Džanović), the Trial Panel thoroughly explained how and why the conclusion was reached. In fact, the Verdict²⁸ reads: "It is also important to note that Witness Šabanović himself did not state that he had been beaten by the accused Tanasković, but rather Miloš Pantelić. However, if one takes into consideration the continuity of all acts of the Accused perpetrated during that day – that he was one of many soldiers who passed through the villages and arbitrarily deprived male civilians of their liberty; that he acted willingly; that he set Muslim houses on fire as he went along and; finally, that he was seen in the school where the captured male civilians were placed after their capture, coupled with the fact that witness Šabanović confirmed that the accused was present on two occasions when the former was beaten, the Panel unequivocally concludes that the Accused is responsible as a co-perpetrator in the torture of Šabanović. One should not disregard the fact what the presence of the Accused meant for the persons who were beating Šabanović and the other man. His presence must be interpreted as his approval of such an act, and as for the other persons who carried out the beating, his presence was encouraging to them as the direct perpetrators. In any event, the accused Tanasković had a choice, at least one choice, to refuse to be present during the mistreatment, but he did not do that. What is more, according to witness Šabanović, not only was he present on one occasion but he did the same when Šabanović was beaten on the morning after".

²⁷ Pg 55

²⁸ Pg 52



The Appellate Panel considers that the Trial Panel took the presence of the Accused, seen as an element of the dynamic of all day events, as an active approval of the beatings and encouraging to the direct perpetrators, as the Accused could have chosen not to be present. The Accused, with the act of being present in that circumstantial frame made a decisive contribution to the perpetration of the criminal offence.

C) Conclusion

The Appellate Panel also concludes that the personal participation of the Accused in the acts that led to the Trial Panel finding him guilty of the charges under Count 4 are decisively supported by reliable evidence as carefully explained by the Trial Panel in the Verdict. The explanation of the Trial Panel is complete and reasonable and thus the arguments of the Defence are unfounded.

3.5. Section 5 of the Verdict

A) The Appeal

The Defence draws attention to the inconsistency and unreliability of the testimony of witness Rahima Zukić and the testimony of witness Feud Spahić about the alleged movement of the accused Nenad Tanasković as an escort to a convoy transporting civilians from Višegrad to the area of Išević Brdo. A thorough analysis of the evidence given by these two witnesses, alleges the Defence, reveals that there is an utter contradiction between the two testimonies as regards to the place and the time that they claim to have seen the Accused.

B) The Verdict

In the closing argument²⁹, the Defence held that “the criminal responsibility of the Accused is excluded in its entirety. Primarily, it is obvious that the Accused is not mentioned as the organizer of the alleged deportation, nor was his activity related to the disputable actions proved. It is not clear whether the Accused was on the site of the event, and if he was, until which moment, and also whether he had any contact with the present persons”.

²⁹ Pg 18



When comparing the substance of the closing argument with the Appeal, the Appellate Panel considers that it is compelling to conclude that *it is the same* and the allegation was already thoroughly taken into account by the Trial Panel. The Verdict³⁰ analysed the alleged inconsistency and reliability of the evidence given on the movement of the accused Nenad Tanasković as an escort to a convoy transporting civilians from Višegrad to the area of Išević Brdo. In fact, the Verdict reads that “the Defence challenged his alleged participation in the events related to this Count of the Indictment on the basis that the Accused was engaged in other activities at the relevant times”.

The Appellate Panel notes that the Trial Panel, after having analysed in detail the testimony of the Accused and the witnesses he presented in relation to the alibi, found that the accounts of the Accused and witnesses were differing in fundamental respects, which caused the Panel to doubt the accuracy and truth of the respective accounts.

In addition, “the Accused stated that he was in Serbia from the early hours of 15 June, collecting a convoy of humanitarian aid and returning on 18 June 1992. In this regard, the Defence tendered Defence Exhibit II-16. This is a Certificate of the Ministry of Internal Affairs of the Republic of Serbia (...), certifying that the accused Nenad Tanasković was registered as a temporary resident in Mladenovac between 15 June 1992 and 17 June 1992”. Regardless of the certificate being a copy or an original and obtained or not through the procedure laid down in Article 408 of the BiH CPC, “its accuracy was refuted by the testimonies of witnesses Rahima Zukić and Ferid Spahić” and, therefore, the Trial Panel found that “the alibi of the Accused is not credible”. Furthermore, the Trial Panel considered “the Accused’s account of this trip was illogical and inconsistent”. After having reasonably explained why it is illogical and inconsistent, it did not hesitate “in doubting the veracity of these assertions”.

The Verdict also took into account that the Accused’s cousin, Rade Tanasković, “was involved in the convoy on 14 June 1992”. The Trial Panel, however, found “this claim to be unfounded” for the reasons laid down in the Verdict.

The Trial Panel³¹ also paid attention to the Defence objection that “the criminal responsibility of the Accused was not established with regard to Count 5 of the Indictment, because the Accused is not mentioned as an organizer of the alleged deportation, nor was his activity with regard to the disputed actions

³⁰ Pg 58-60

³¹ At Pg 63 of the Verdict



proven by any evidentiary means". With regard to this objection, the Panel did not even find that the Accused was the organizer of the deportation. However, he was undoubtedly present during the entire movement of the convoy. If it is taken into account that he was armed and, as previously established, a member of military formations, as an accomplice* *see page 131* he was undoubtedly a part of the organization and implementation of the relocation plan, with whose participation the action was carried out. Even more so, he verbally expressed his agreement with the taking away of the men when they were separated from women and children. (...). What is important is that the Accused was undoubtedly present in the convoy and that he participated in the forced transfer in the manner described above".

C) The Conclusion

The Appellate Panel, taking into account the foregoing, considers that the allegation which is made in the Appeal was already thoroughly analysed by the Trial Panel Verdict, its conclusions are reasonable and nothing new was brought by the Defence in relation to the Verdict as subject of the Appeal. Therefore, the Appeal concerning this Section of the Verdict is dismissed as unfounded.

3.6. Section 7 of the Verdict

A) The Appeal

The Defence alleges that a thorough analysis of the testimonies of the witnesses Sabaheta Ramić and Mula Kustura cannot, under any circumstance, result in a judgment because the evidence given by them is illogical, completely unclear and mutually contradictory. In fact, the Defence also questions the manner in which the Court identified Ćamil Kapić, considering that it is unusual and without legal foundation to carry out identification based on unreliable recollection of the witness. The Defence concludes that "with such contradiction it is not possible to conclude that Nenad Tanasković committed any of the crimes he is charged with under this Count of the Indictment".



B) The Verdict

The Closing argument of the Defence³² made, in substance, the same allegation. The Trial Panel³³, considering the objection, recognized that "there are minor inconsistencies between the accounts of these two witnesses. Witness Mula Kustura stated that neither the Accused nor the soldier left the vehicle during this incident, whereas Witness Sabaheta Ramić recalled that Nešo did exit the car, although he did not approach the group, but simply called over to Enver and Čamil".

However, the Trial Panel concluded that "this discrepancy is an irrelevant error of memory, in which regard Sabaheta Ramić testified that she was in poor physical health and exhausted at the time. Secondly, Witness Sabaheta Ramić stated that the Accused addressed Enver by his surname, 'Kulovac'. To the extent that this sounds similar to his nickname 'Kula', (...) this corroborates Mula Kusutra's account of how the Accused addressed her son: when hearing the Accused's comments, Sabaheta Ramić simply assumed the Accused was using Enver's full surname.

Thus, in the crucial aspects, the testimony of these witnesses is consistent and serves to corroborate the facts which the Panel finds to establish the criminal liability of the Accused".

C) Conclusion

The Appellate Panel finds the explanation given by the Trial Panel well based on the evidence, reasonably analysed, and that its conclusion is logical and correct. Therefore, the Defence allegation is unfounded.

³² Pg 48 of the Verdict reads: "Finally, the Defence notes that, in the period between 15-17 June 1992 the Accused was in Atladenovac, Serbia, which is several hundred kilometres away from Višegrad, to pick up humanitarian aid, and therefore it is clear that he cannot be criminally liable for the actions referred to in the stated Count of the Indictment. Furthermore, there are certain differences among the statements of the witnesses for the Prosecution, both with regard to the appearance of the Accused at the time of the alleged commission of the offense, and the actions of the Accused, therefore the identification of the Accused by those witnesses is questionable. Accordingly, it is quite clear that it cannot be established beyond any reasonable doubt that the Accused is the person responsible for the apprehension of Enver Kulovac and Čamil Kopić. Above all, the Defence points out that there is no connection between the alleged apprehension of the stated persons by the Accused and the fact that they were subsequently killed, therefore the Defence holds that the Accused cannot be held criminally liable either for the apprehension or for the killings of the stated persons"

³³ Pg 66-68 of the Verdict.

3.7. Section 5 and Section 7 of the Verdict

A) The Appeal

The Defence alleges that, with the evidence adduced on the *alibi*, it is proved beyond doubt that the accused Nenad Tanasković had not taken part in any of the incriminating actions under these Counts. In fact, says the Defence, the witnesses Boško Arsić and Dragiša Trifković confirmed beyond any doubt that, on 14 June 1992, the accused Tanasković had attended the funeral of his company commander Vlatko Trifković, who was killed on 13 June 1992. The Accused testified that he had personally participated in pulling out Vlatko Trifković's body and that, on 13 June 1992, he had driven the body to the Health Centre in Višegrad and the next day he had attended the funeral. The Defence concludes that these testimonies are logical, they complement one another and imply that their credibility is the only logical conclusion.

The Defence further alleges that the certificate (Defence Exhibit II-16) confirms beyond any doubt that the accused Nenad Tanasković was registered as a temporary resident in the house of Dragan Pavlović at Kosmajskog odreda Street no. 17, Mladenovac, between 15 June 1992 and 17 June 1992. This Certificate is an original document submitted as material evidence of the Defence and as such was admitted into the case file.

The Defence further argues that it is not clear why the Panel challenges the validity, credibility and probative value of this Certificate in its Verdict.

Furthermore, the Defence argues that the aforementioned Certificate inevitably revokes and overturns Count 7 of the Indictment as well, since Nenad Tanasković was undoubtedly several hundred kilometres away from Višegrad at the time when the alleged deprivation of liberty of Enver Kulovuc and Čamil Kapić occurred.

The Prosecutor in his response concluded that "the First Instance Panel carefully dissected the problems related to Defence Exhibit II-16 and concluded, properly, that it was defective in several important respects, not the least of which was that there was no proof that it in fact was an "original." There can be no argument that it was not obtained as required under the laws that would make it admissible in the Court of Bosnia and Herzegovina, again, as the First Instance Panel painstakingly explained. Further, the First Instance Panel was correct in dismissing the document as proof in the face of competent and corroborated evidence from eye-witnesses who knew the defendant and

gave independent evidence that they saw him in various places engaged in the conduct for which he was convicted at the time he said he was in Serbia".

The alibi presented by the Defence consists of the fact that the Accused was in Serbia from the early hours of 15 June, collecting a convoy of humanitarian aid and returned on 18 June 1992. Thus, it is argued that he could not have taken part in any of the incriminating actions alleged under these Counts. The alibi is based on the evidence given by the witnesses Boško Arsić, Dragiša Trifković and Witness M (even though the latter is not mentioned in that allegation) and on the Defence Exhibit II-16.

B) The Verdict

In relation to the testimonies of Boško Arsić and Dragiša Trifković, the allegation was already taken by the Trial Panel. In fact, the Verdict³⁴ reads that "the Defence challenged his alleged participation in the events related to this Count of the Indictment on the basis that the Accused was engaged in other activities at the relevant times. First, the Accused testified that on 14 June 1992, he attended the funeral of his former commander, Vlatko Trifković, who had been killed on 13 June 1992, as confirmed by his death certificate (Defence Exhibit II-2). He stated that the funeral took place at 2 p.m. in the Crnča town cemetery, lasting 1.5 hours, and that he and Boško Arsić were there to assist the deceased's family.

In relation to this alibi, the Accused called Defence witnesses Dragiša Trifković, Boško Arsić and Witness M, none of whom could corroborate these specific details. Boško Arsić and Witness M both stated that the funeral was two days later, although they could not be certain as to a specific date. Although Dragiša Trifković states the funeral was on 14 June, he did not attend himself. Witness M did not attend the funeral either. Although Boško Arsić confirms that he saw the Accused at the funeral, his and the Accused's account differ in fundamental respects, which causes the Panel to doubt the accuracy and truth of the respective accounts. Boško Arsić stated that two other men were buried at the same time as Vlatko Trifković. Further, he did not mention any details about helping at the funeral, but rather indicated that he knew the Accused only as a very distant acquaintance. He saw him occasionally after their mobilisation but did not have any conversations with him".

³⁴ 19g 55



This is what is written in the Verdict in relation to the evidence given by the witnesses.

On the other side, to prove the alibi, "the Defence tendered Defence Exhibit 11-16. This is a Certificate of the Ministry of Internal Affairs of the Republic of Serbia - Police Directorate Mladenovac Police Station No. 015.1-02/07 dated 12 February 2007, certifying that the accused Nenad Tanasković was registered as a temporary resident in Mladenovac between 15 June 1992 and 17 June 1992 and that his stay was registered in the Mladenovac Police Station".

Then, the Trial Panel considered the authority and admission of the submitted document. Finally, when assessing its probative value, the Trial Panel concluded in the Verdict that "such certificate is a document, and the assumption is that it is accurate unless determined otherwise. In the particular case, the document is not valid from the formal and legal point of view and its accuracy was refuted by the testimonies of witnesses Rahima Zukić and Ferid Spahić, who stated that they saw the Accused at relevant locations during the time period covered by the Certificate in question. These witnesses have known the accused very well since before the war and there is no reason for the Panel not to give credence to their respective testimonies, especially because of the fact that their testimonies are additionally corroborated by the respective testimonies of witnesses Sabahera Ramić and Mula Kustura who, also, have known the Accused very well since before the war and who confirmed that the Accused was present in Višegrad in the period 14-16 June 1992. Based on the foregoing, the Panel finds that the alibi of the Accused is not credible".

The Trial Panel reached that conclusion not only on the evidence presented by the Defence specifically on the alibi, but also confronted that evidence with other evidence produced in the trial. In addition, the Trial Panel also assessed all that evidence together with the testimony of the Accused on the alibi.

On that point, the Verdict reads that "the Accused's account of this trip is illogical and inconsistent. The Accused testified that he reported to the Mladenovac Police Station in Serbia upon the orders of his superior (...). The Accused registered with the police while wearing civilian clothes, despite testifying that one of the reasons for reporting to the police was because there were cases of desertion from the army. It took him three days to collect this aid, even though it only comprised cigarettes and other parcels. Further, he made this journey to collect aid in a passenger vehicle which would not have had capacity to carry great amounts. The Accused stated that he reported to the Police Station when he was leaving for Višegrad, yet he did not return till 18

June, further undermining the validity of the purported registration certificate. Finally, he never registered his presence on any of the subsequent numerous occasions when he later visited Belgrade for operations, on average 2-3 times a year, instead relying on military referral papers. Thus, the Panel has no hesitation in doubting the veracity of these assertions, when set against the credible identifications of the Accused offered by witnesses Ferid Spahić and Rahima Zukić”.

C) Conclusion

The Appellate Panel considers that, regardless of the certificate being original or not, correctly admitted into the file or not and legally obtained or not, the Trial Panel found reasonable doubts on the veracity of the Accused’s account (it is illogical and inconsistent) and the accuracy of the contents of the certificate was refuted by the testimonies of the witnesses. For all these reasons, the Trial Panel found that “the alibi of the Accused is not credible”.

In any case, the Appellate Panel finds that the Trial Panel carefully analysed the alibi evidence and concluded logically and legitimately. Furthermore, the Trial Panel thoroughly explained that competent and corroborated evidence from eye-witnesses, including Defence witnesses and the Accused himself, and determined that the certificate did not wear, as a document, the assumption of accuracy. The Verdict fully described the factual basis of the alibi, reasonably analysed the facts pertaining to the alibi and reached a logical and compelling conclusion. On the other side, it also considers that the Defence only argues with an alibi defence a different interpretation of the facts present at main trial, supporting its claim on the wrong dismissal of the alibi he offered in defence to the charges in these Counts. However, the Defence offers nothing more than what it argued at the trial. In fact, it appears obvious that the Defence starts from the theory according to which mere reference to the certificate, as objective evidence, is sufficient in itself to prove the alibi of the Accused, automatically giving more evidentiary weight to this evidence than to testimonies. This cannot be accepted because the CPC does not set a grading system among individual pieces of evidence but prescribes that evidence is to be evaluated freely and without any limitation set by formal evidentiary rules.

The claim that the Trial Panel gave the Defence no warning that the certificate had to be obtained in a certain legal manner is irrelevant since the Trial Panel cannot replace the Defence in doing its work and the Defence Counsel must know and understand the requirements of the CPC BiH.

Therefore, the grounds are unfounded.

4. Violation of the Criminal Code

A) The Appeal

The Defence points to the application of substantive criminal law in this particular case and alleges that the Verdict arbitrarily applied the law to the detriment of the Accused, by “convicting the accused Nenad Tanasković in 2007 (...) based on a law passed in 2003 for his conduct in 1992, when those crimes were not even prescribed by the applicable BiH laws and when customary international law and general principles were not directly applicable (...) which represents an obvious violation of the principle of legality”.

The Defence goes further on stating that it is commonly known that all courts in the Federation of BiH, Republika Srpska, Brčko District and in other ex-Yugoslav countries apply the then SFRY Criminal Code and there is no need to point to the fact that, in terms of sentencing, the former CC SFRY provides lower specific minimum and maximum than the ones provided by the CC BiH.

It concludes that it is pretty clear that, in this specific situation, the Criminal Code of the former SFRY is more favourable than the Criminal Code of Bosnia and Herzegovina. Thus, it is apparent that the Court, acting in the manner as demonstrated in the Verdict, violated the provisions of Article 298 (1) (a) and (d) of the CPC BiH.

The Prosecutor, responding to the Appeal, stated that the “acts for which Nenad Tanasković was prosecuted, as fully explained in the Verdict by the First Instance Panel, constituted criminal offenses under the CC BiH”.

The Appellate Panel reminds that “throughout the proceedings, the Defence was pointing to the incorrect application of substantive law in this particular case”, including in its closing argument³⁵.

³⁵ At pg 16: In the Closing Arguments presented by the Defence, the application of the BiH CC is contested first, as the Code which is less lenient for the Accused and the Defence holds that it is necessary to apply, pursuant to the principle of legality and the principle of prohibited retroactive application of laws, the law which is more lenient to the perpetrator, which is certainly the criminal code which was applicable at the time of the alleged commission of the offense by the Accused. The Defence also points out the obligation to apply this principle pursuant to Article 7(1) of the ECHR. Also, the Defence states that it is aware of the Decision of the Constitutional Court of BiH in the case number 1783/06, but it holds that one decision in a single case does not represent a general and binding position.

B) The Verdict

The Trial Panel "in terms of application of the substantive law to be applied in the case of this criminal offense, in the context of the time of the perpetration of the criminal offense, had in mind all the objections by the Defence to that effect.

The Verdict³⁶ started reminding the principle of legality which prohibits the "retroactive application of the criminal code to the detriment of the perpetrator".

The Trial Panel considered that it was important to pay attention to the principle of legality and the principle of time constraints regarding applicability of the substantive criminal law, given the time of the alleged perpetration of the criminal offences (May - June 1992) and the Criminal Code in force at that time.

The Trial Panel stated the rule of the principle of legality on the basis of Articles 3 and 4 of the CC BiH, Article 7 (1) of the ECHR and Article 15 (1) of the International Covenant on Civil and Political Rights (ICCPR). However, it also considered the exception of the same principle on the basis of Articles 3, 4 and 4a of the CC BiH, Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR.

In sum, Article 4a) of the CC BiH adopted, in fact the provisions of Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR thus explicitly enabling exceptional departure from the principle referred to in Article 4 of the CC BiH, as well as departure from obligatory application of a more lenient law in the proceedings concerning criminal offences according to international law, concerning the charges including violation of the rules of international law. Such a position was taken in the hitherto jurisprudence of the Court of BiH, following international jurisprudence³⁷.

Bosnia and Herzegovina, as a successor state of the former Yugoslavia, ratified the ECHR and the ICCPR and they cover the incriminating time of the criminal offenses. Therefore, these treaties are binding on the State of Bosnia and Herzegovina and governmental bodies of Bosnia and Herzegovina must apply them. Hence, Article 4a) of the CC BiH constitutes a mere national legal

³⁶ Pg 73

³⁷ See the *Abdulkullim Mujkanović* Decision on Admissibility and Merits of the Constitutional Court of Bosnia and Herzegovina, 30 March 2007, No. AP1733/06 as already referred to in the Court of BiH case law; See for example the verdict against *Radoslav Panković*, No. X- KR/06/217, from 16 April 2007, the ECHR Judgement in the case *Karadzija v. Bulgaria*, decision on admissibility, 9 February 2006.

reminder because it would not be necessary for the application of the treaties. That is why these treaties are binding on all courts in BiH, and Article 4a) of the CC BiH is not necessary condition for their application. Similar provisions as Articles 3 and 4 of the CC BiH can be found in the CCs of Brčko District, Federation of BiH and Republika Srpska.

There is a rule and an exception in the principle of legality, both equally relevant and important. The European Court took the rule and the exception of the principle of legality as equally well recognized and making part of the same principle. The European Court considered this issue in, at least, two cases.³⁸

Throughout the reasoning in the Verdict³⁹, it is clear that the Trial Panel based its decision on the exception of the principle of legality and customary international humanitarian law. These are the two main foundations of the Verdict in that part.

The Appellate Panel, while looking at the Defence appeals considers that the Defence develops some legal and theoretical considerations on the principle of legality without building an argument showing what kind of arbitrary application of law in the Verdict is in question. The appeal is represented as an obvious violation of the principle of legality, because the Verdict arbitrarily applied the substantive criminal law, when those crimes were not prescribed by the applicable BiH laws and when customary international law and general principles were not directly applicable.

The Verdict fully explains why and how the acts for which Nenad Tanasković was convicted constituted criminal offenses under the CC BiH. The Defence relies on Article 4 of the CC BiH and Article 7 (1) of the ECHR to support its conclusion that the Trial Panel applied the wrong substantive criminal law in the case.

However, the Defence completely forgets and puts aside Article 4a of the same CC BiH, Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR, which, as said, is the basis of the basis of the Verdict. As the Trial Panel explains in detail in the Verdict, Article 4a is a provision that has been upheld by the Constitutional Court of BiH.⁴⁰ It is consistent with the ECHR, the European Court jurisprudence and ICCPR. Most important, the crimes encompassed by

³⁸ *Karova v. Bulgaria*, Decision on Admissibility of 9 February 2006. Also, see *Ivanov v. Bulgaria*, Decision on Admissibility of 3 January 2006.

³⁹ Pgs 73-77

⁴⁰ *A. Maktouf* (AP 1785/06), 30 March 2007.

Article 172 of the CC BiH that are at issue in this case were well defined in international customary law at the time he engaged in the acts for which he has been found guilty. By virtue of Article 4a and customary international law, the conduct of the Accused was a criminal offence in 1992. The Trial Panel did not need to find comparative provisions in the Criminal Code SFRY that was in force in 1992 to justify its Verdict. Indeed, the Trial Panel merely noted that such provisions existed. It is enough that customary international law covered the conduct forbidden under Article 172 for it to be the basis for the Verdict in this case.

In sum, Article 4a) of the CC BiH 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 readopted. The core basis of the Verdict was completely omitted in the argument of the Defence.

The Defence also argues that "customary international law and general principles were not directly applicable". There is no reasoning to demonstrate that averment. There is no argument. Therefore, again the ground of appeal is inexistent.

C) Conclusion

As explained, the Verdict is based on the exception of the principle of legality. The appeal does not attack that basis of the Verdict reasoning. It means that the Defence did not build an argument against the Verdict on its foundation and thus missed the ground of appeal. On the other side, there is no argument on "customary international law and general principles' applicability".

Therefore, there is no argument to answer and the ground is rejected as inexistent.

5 The decision as to the sanction

A) The Appeal

The Defence claims that the sentence is too severe, because of the incorrect application of substantive law and the Court did not take into consideration some mitigating circumstances.

In fact, the Defence states that had the Court applied the ex-SFRY CC, pursuant to which a sentence of minimum five (5) years of imprisonment is prescribed, then a significantly more lenient sentence than the one pronounced by the Verdict would have been imposed on the accused Nenad Tanasković, if convicted. On the other side, says the Defence, the Court did not take into consideration the fact that the accused Nenad Tanasković is a seriously disabled person, he is an indigent person, behaved well in the course of the proceedings and treated the Court with respect and correctness. It concludes that the purpose of both general and specific prevention from Article 6 and Article 39 of the CC BiH could be achieved by a more lenient sentence which would be within the limits of the special minimum of the former CC SFRY.

The Prosecutor in his response concluded that "the sentence was appropriate given the level of his (the Accused) involvement and participation in the crimes of conviction and the aggravating circumstances that attached to his conduct".

In accordance with Article 30(k(a) of the CPC BiH a Verdict can be contested "because of the decision on the sentence (...) if the sentence did not exceed legal authority, but the Court did not correctly fashioned [sic] the punishment in view of the circumstances that had a bearing on greater or lesser punishment, and also may be contested because the Court applied or failed to apply provisions concerning mitigation of punishment, release from punishment or suspension of sentence though the legal conditions for that existed."

This argument on incorrect application of substantive law was already addressed by this Panel under the section of this opinion entitled, "violation of the Criminal Code."

B) The Verdict

When reviewing the contested Verdict in relation to the mentioned "mitigating factors", the Appellate Panel notes that the Trial Panel did take into account all of these factors as well as all of the other statutory considerations relevant to sentencing⁴¹. The Trial Panel considered in the sentencing the disability he suffered in the war and the effect it has had on him since then⁴², his behaviour

⁴¹ Under section 11. Sentencing. pg 78-84.

⁴² Under Section (3). Circumstances since that time. pg 82

before the Court⁴³. Further, the Panel discussed the economic circumstances of the Accused, noting that "it is unlikely that he will ever be able to maintain any employment in the future"⁴⁴ and concluding that he would not be charged for the cost of the proceedings as a consequence. The Trial Panel, balancing aggravating and extenuating circumstances, concluded that the extenuating circumstances should be reflected in the sentence and that they do, to some extent, require a reduction of the sentence in relation to the one calculated solely on the basis of gravity of the crime itself".⁴⁵

However, the Trial Panel⁴⁶, noting that "the accused behaved with decorum during the course of the trial, (...) it considered that he did not display any remorse for his actions and was persistent in denying his involvement". The Trial Panel, while balancing aggravating and extenuating circumstances, took the fact of not displaying remorse and the persistent denying of his involvement as "conduct and personal circumstances of the Accused (...) in terms of aggravating (...) and (...) relevant to considerations of deterrence and rehabilitation", with respect to the sentence imposed on the Accused. It was error and a violation of the Accused's rights to consider such conduct as an aggravating factor in determining the appropriate sentence for the Accused.

The Appellate Panel considers that it was an error and a violation of the Accused's rights to consider such conduct as an aggravating factor in determining the appropriate sentence for the Accused. In fact, the Accused has the right to enter a "not guilty" plea (Article 229 (1) of the CPC) and, more precisely, "a plea of not guilty shall never be held against the accused in fashioning a sentence if the accused is found guilty at the trial (...)" (Article 229 (3) of the CPC). On the other side, he "shall be presumed innocent until proved guilty" (Article 6 (2) of the ECHR and Article 3 of the CPC BiH).

The Appellate Panel, taking into account the mentioned legal provisions and principle, also considers that the Accused's failure to display remorse and the persistent denying of his involvement cannot be taken as an aggravating circumstance as it would be a violation of the referred provisions and principle. If the Accused manifested remorse during the trial, it could be deemed an admission of guilt on his part and deny him his right to be presumed innocent until proven guilty beyond a reasonable doubt in violation of his rights under

⁴³ Under Section (4), Conduct during this case, pg 83.

⁴⁴ pg 83

⁴⁵ pg 83

⁴⁶ pg 83

the CPC as well as the European Convention on Human Rights. Since the Trial Panel erroneously considered the Accused's lack of remorse as an aggravating factor in imposing the sentence on the Accused, this Panel is compelled to correct that error and reduce the sentence imposed on the Accused.

Furthermore, in accordance with Article 303 of the CPC BiH, the reporting judge, inspecting the contents of the appeal with respect to new evidence and new facts, obtained new reports and documents on the health condition of the Accused. These reports and documents clearly show that the health condition strongly and significantly deteriorated after the delivery of the first instance Verdict.

The Trial Panel correctly considered in the Verdict¹⁷ that the injuries he suffered "have resulted in his hospitalization for a series of surgeries to his face over the period between June 1992 and the present. He continues to suffer from his disability and will likely need additional medical care intermittently for the rest of his life. He is without a lower jaw and teeth, which results in physical deformity as well as serious difficulty in maintaining nutrition, which in turn has led to a deterioration of his general health". It considered his disability and need of additional medical care as a mitigating circumstance.

The Appellate Panel understands that the strong and significant deterioration of the health condition of the Accused impacts substantively the fundamental right of the Accused to life and nothing can affect or disturb its guarantee. Consequently, for the purpose of Articles 49 and 50 of the CC BiH, that Panel considers that circumstance as highly extenuating, indicating that the purpose of punishment can be attained by a reduced and lesser punishment, below the statutory minimum prescribed for this criminal offence. Consequently, following the reasoning on balancing aggravating and extenuating circumstances, it considers that the new circumstance of the health condition strongly and significantly having been deteriorated after the delivery of the first instance Verdict must be reflected on consideration of deterrence and rehabilitation.

C) Conclusion

In all, the Appellate Panel concludes that a new balance has to be made between aggravating and extenuating circumstances by eliminating the fact of

¹⁷ Pg 82-83

the Accused not displaying remorse and the persistent denying of his involvement as an aggravating circumstance and including the strong and significant health condition deterioration as a highly extenuating factor.

Therefore, the Appellate Panel finds that the appropriate sentence to be given, in accordance with the principle of the necessity and proportionality of punishment of the Accused, is eight years of imprisonment.

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

Minutes-taker

Željka Marenčić

/Signature affixed/

PRESIDING JUDGE

Dragomir Vukoje

/Signature and stamp affixed/

LEGAL REMEDY: There is no right of appeal against this Verdict.

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

Sarajevo, 30 May 2008

Certified Court Interpreter for English

