



COURT OF BOSNIA AND HERZEGOVINA

Case No.: X-KRŽ-08/500

Date: **Delivered: 12 July 2010**

Panel of the Appellate Division:

Judge Dragomir Vukoje, Presiding Judge
Judge Azra Miletić, Reporting Judge
Judge Carol Peralta, Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

MIODRAG NIKAČEVIĆ

SECOND INSTANCE VERDICT

Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina:

Behaija Krnjić

Defense Counsels for the Accused, Attorneys:

Izet Bažadarević
Bajro Čilić

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Number: X-KRŽ-08/500
Sarajevo, 12 July 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Panel of the Appellate Division composed of Judge Dragomir Vukoje, as the Presiding Judge, and Judge Azra Miletić and Judge Carol Peralta, as members of the Panel, with the participation of Legal Adviser Melika Murtezić, as the record-taker, in the criminal case against the Accused Miodrag Nikačević, for the criminal offense of Crimes against Humanity in violation of Article 172(1)(g) and (e) of the Criminal Code of Bosnia and Herzegovina (CC B-H), having decided on the respective Appeals by the Prosecutor's Office of Bosnia and Herzegovina, the Accused, and the Defense Counsel for the Accused, Attorney Izet Baždarević and Attorney Bajro Čilić, from the Verdict of this Court No. X-KR-08/500, dated 19 February 2009, at a session of the Panel held pursuant to Article 304 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC B-H) on 12 July 2010 rendered the following:

VERDICT

The respective Appeals by the Prosecutor's Office of B-H, the Accused Miodrag Nikačević and his Defense Counsel are hereby partially granted and the Verdict of the Court of B-H No. X-KR-08/500, dated 19 February 2009, **revised** so that the Accused Miodrag Nikačević, pursuant to Article 284(a) of the CPC B-H, is hereby

ACQUITTED OF THE CHARGES

that between early April 1992 through late March 1993, as part of a widespread and systematic attack of the military, paramilitary and police forces of the Serb Republic of B-H, subsequently Republika Srpska, directed against Bosniak civilians in the Foča Municipality, having knowledge of such an attack and that his acts constituted part of the attack, as a member of the aforementioned forces, he knowingly aided in unlawful imprisonment and deprivation of physical liberty of another, in as much as he:

On 2 August 1992, carrying an automatic weapon, together with two other armed members of the Armed Forces of Republika Srpska, he came to the house of the Klapuh family in the place of Humsko, the Foča Municipality, looking for Rasim

Klapuh; as Rasim was doing some farm work on a nearby meadow, one of them went there and brought him in front of the house, whereupon they apprehended him and took him to a meadow close to the place of Geuši, Republic of Montenegro, where they interrogated him; thereupon they took him back home and then took him and handed him over to the military police in the Army Command stationed in the place of Velečevo, Foča Municipality, from where Rasim was taken and unlawfully imprisoned in the Foča KPD [Penal and Correctional Institution]; he was detained there but no proceedings were ever instituted against him, nor did he ever receive any decision containing the reasons for his detention; after that, on an undetermined day he was taken out of the KPD by unidentified persons and murdered at an unknown site.

Therefore,

within a widespread and systematic attack of the military, paramilitary and police forces of the Serb Republic of Bosnia and Herzegovina against Bosniak civilian population in the Foča Municipality, having knowledge of that attack and that his acts constituted a component part of that attack, as a member of the aforementioned forces, he intentionally aided other persons in confining and depriving another of physical freedom, in contravention of the rules of international law,

whereby he committed the criminal offense of Crimes against Humanity, in violation of Article 172(1) (e) of the CC B-H, as read with Article 31 of the CC B-H, and as read with Article 180(1) of the CC B-H;

and with respect to the decision on the sanction, so that for the acts described in Sections 1(a) and 1(b) of the operative part of the First Instance Verdict **for which the Accused was found guilty of the criminal offense of Crimes against Humanity, in violation of Article 172(1)(g) of the CC B-H, he is hereby**

SENTENCED

to imprisonment for a term of 10 (ten) years

Pursuant to Article 56 of the CC B-H, the time the Accused spent in custody, from 14 February 2008 until 20 January 2009, shall be credited towards the pronounced sentence of imprisonment.

The remaining part of the First Instance Verdict is unchanged.

REASONING

Procedural History

1. By the Verdict of the Court of B-H, No. X-KR-08/500, dated 19 February 2009, the Accused Miodrag Nikačević was found guilty that with his acts described in Sections 1(a) and 1(b) and 2 of the operative part of the Verdict he committed the criminal offense of Crimes against Humanity, in violation of Article 172(1)(g) and (e) of the CC B-H, as read with Article 31 of the CC B-H, all as read with Article 180(1) of the CC B-H.
2. For the referenced criminal offense the First Instance Panel sentenced the Accused to imprisonment for a term of 8 (eight) years, and credited the time the Accused spent in custody from 14 February 2008 to 20 January 2009 towards the pronounced sentence, pursuant to Article 56 of the CC B-H. Pursuant to Article 188(4) of the CPC B-H, the Accused was relieved of the duty to reimburse the costs of the criminal proceedings.
3. Pursuant to Article 198(2) of the CPC B-H, all aggrieved parties were referred to take civil action with any potential claims under property law.
4. The Prosecutor's Office of B-H, the Accused Miodrag Nikačević, and his Defense Counsel, Attorney Izet Baždarević and Attorney Bajro Čilić, filed Appeals from the referenced Verdict within the statutory timeframe.
5. The Prosecutor's Office of B-H filed an Appeal on the grounds of the decision on the sentence and the decision on the costs of the proceedings referred to in Article 300(1) of the CPC B-H, and moved the Panel of the Appellate Division of the Court of B-H to fully grant the Appeal as well-founded, to revise the contested Verdict by imposing on the Accused the same type of punishment only longer, within the limits prescribed by the law for the criminal offense of Crimes against Humanity, in violation of Article 172(1)(g) and (e) of the CC B-H, and to make the Accused reimburse the costs of the proceedings, pursuant to Article 188(1) of the CPC B-H.
6. The Accused Miodrag Nikačević and his Defense Counsel, Attorney Izet Baždarević, submitted to the Court a Response to the Prosecutor's Appeal, commenting on the arguments therein and moving the Court to refuse the Appeal as unfounded.
7. The Accused, his Defense Counsel Izet Baždarević and his Co-Counsel Bajro Čilić filed Appeals on the grounds of essential violations of the provisions of criminal procedure, referred to in Article 297 of the CPC B-H, violation of the Criminal Code, referred to in Article 298 of the CPC B-H, incorrectly or

incompletely established facts, referred to in Article 299 of the CPC B-H, and the decision on the sentence, referred to in Article 300 of the CPC B-H. The Defense moved the Appellate Panel to grant the Appeals as well-founded and revise the contested Verdict by "pronouncing the Accused innocent" of all the charges he had been found guilty of, or to revoke the contested Verdict in its entirety and schedule a retrial.

8. The Prosecutor's Office of B-H filed Responses to the Appeals by the Defense Attorneys and the Accused objecting the reasons and grounds of the Appeals and moving the Appellate Panel to refuse them as unfounded.
9. At a session of the Panel of the Appellate Division held on 12 July 2010, pursuant to Article 304 of the CPC B-H, the parties and the Defense Counsels briefly presented their Appeals and Responses to them and completely adhered to their written submissions and motions.
10. Having reviewed the contested Verdict insofar as contested by the Appeal, the Panel of the Appellate Division (hereinafter: the Appellate Panel or the Panel) rendered a decision as quoted in the operative part for the reasons that follow:

11. GENERAL CONSIDERATIONS

11. Before providing reasoning for each ground of the Appeals, the Appellate Panel notes that, pursuant to Article 295(1)(b) and (c) of the CPC B-H, an Appellant is obliged to state in his Appeal the grounds for contesting the Verdict and the reasoning behind the Appeal.
12. Given that the Appellate Panel reviews the Verdict only insofar as it is contested by the Appeal, pursuant to Article 306 of the CPC B-H, the Appellant needs to draft the Appeal in such a way that it may serve as a basis for reviewing the Verdict.
13. In that respect, the Appellant must specify the grounds for contesting the Verdict, specify which part of the Verdict, piece of evidence or procedure of the Court he contests and present a clear and well-reasoned explanation corroborating his appeal.
14. A mere general citing of the grounds for appeal, as well as pointing at alleged irregularities in the course of the first instance proceedings without specifying which ground of appeal the Appellant refers to does not constitute a valid basis to review the First Instance Verdict, wherefore the Appellate Panel *prima facie* refused the unreasoned and unclear grounds of appeal as unfounded.
15. Given the kind of decision stated in the operative part of this Verdict, the

Reasoning thereof contains a detailed analysis of submissions on all grounds of appeal with respect to Sections 1(a) and 1(b) of the operative part of the First Instance Verdict. With respect to Section 2 of the operative part of the First Instance Verdict, given that this Panel found the appeal arguments well-founded and that it established a violation of the substantive law, the Reasoning contains an analysis of the appeal submissions on the referenced ground.

I) ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS

16. The Appellate Panel first of all reviewed whether the appeal allegations indicating essential violations of the criminal procedure provisions referred to in Article 297(1) of the CPC B-H were well-founded and concluded that they were unfounded.

17. Essential violations of the criminal procedure provisions as grounds of appeal are defined in Article 297 of the CPC B-H and are specifically listed in Sub-Paragraphs (a) through (k) of Article 297(1) of the CPC B-H.

18. As to the gravity and significance of the procedure violations, the CPC B-H differentiates between those violations which, if established, give rise to an irrefutable assumption that they have affected the validity of the pronounced Verdict (absolutely essential violations), and such violations regarding which it is up to the Court to assess, in each specific case, whether they have or could have affected the validity of the Verdict (relatively essential violations).

19. Unlike the absolutely essential violations, the relatively essential violations are not specifically listed in the Code, but exist *if the Court has not applied or has improperly applied some provisions of this Code either during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict (Article 297(2) of the CPC B-H).*

20. Should the Panel find that there exist any essential violations of the criminal procedure provisions it shall be bound, pursuant to Article 315(1)(a) of the CPC B-H, to revoke the First Instance Verdict.

21. In their Appeal the Defense Counsel argue essential violations of the criminal procedure provisions referred to in Article 297(1)(j) and (k) of the CPC B-H.

22. In his Appeal, the Lead Defense Counsel points at the grounds referred to in Article 297(1)(j) of the CPC B-H, stating that "the operative part of the Verdict is incomprehensible, internally contradictory or contradicts 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". The Appellate Panel finds it necessary to stress

that the Defense Counsel made an incorrect reference to an Article of the Code, since Article 297(1)(j) stipulates exceeding of the charges as an essential violation of the criminal procedure provisions. Except for the reference to this Sub-Paragraph of Article 297 of the CPC B-H, the Defense Counsel does not corroborate the existence of this essential violation, hence the Appellate Panel cannot review the alleged violation.

23. Article 297(1)(k) of the CPC B-H stipulates that an essential violation exists if the wording of the verdict is incomprehensible, internally contradictory or contradicts the grounds of the verdict or if the verdict has no grounds at all or if it does not cite reasons concerning the decisive facts.

24. In the opinion of the Appellate Panel, the submissions of the Defense concerning the existence of an essential violation referred to in Article 297(1)(k) of the CPC B-H are general and unfounded. In other words, the Defense does not refer to specific elements of the operative part or the reasoning of the contested Verdict that would indicate the existence of this essential violation of the criminal procedure provisions.

25. An absolutely essential violation of the criminal procedure provisions pursuant to Article 297(1)(k) of the CPC B-H exists where a first instance verdict, as an official judicial document, contains certain defects in the operative part and/or reasoning of such nature that they prevent a review of the lawfulness and validity thereof.

26. Having reviewed the contested Verdict with respect to the possible existence of defects that might constitute an essential violation of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC B-H, the Appellate Panel is of the opinion that the Verdict does not contain defects referred to in Sub-Paragraph (k), as generally argued in the Appeals, hence the appellate submissions by the Defense Counsels are hereby refused as unfounded.

27. The factual description of the acts in Sections 1(a) and 1(b) of the operative part is clear, determined and complete, and contains facts and circumstances constituting the essential elements of the criminal offense the Accused was found guilty of. It clearly indicates the place and the time of the commission of the criminal offense as well as a complete rendering of the acts of the Accused. Thus it comprises all essential elements of the criminal offense in violation of Article 172(1)(g) of the CC B-H, with a precise description of the individual criminal acts cited. The Reasoning of the Verdict lists all the evidence, its contents and evaluation of its credibility. The contested Verdict also provides reasons on the decisive facts relevant for ruling in this criminal matter with a detailed and comprehensive evaluation of each piece of evidence, individually and its correspondence with all the other evidence.

28. With respect to Section 2 of the operative part of the First Instance Verdict, the Appellate Panel considers the complaints by the Defense to be partially founded, but the defects do not constitute an essential violation of the criminal procedure provisions, but a violation of the substantive law, on which this Panel will present its view in Part II, *Violation of Substantive Law* (paragraphs 74-105).

29. Although the Defense Counsel argues a violation under Article 297(1)(i), that is, basing the verdict on evidence which may not be used as the basis of a verdict under the CPC, he substantially describes a violation as defined in Article 297(2) of the CPC B-H.

30. The Defense considers that the Court should have secured the right to appeal in terms of Article 318(1) of the CPC B-H from the decision on the acceptance of the facts established by legally binding judgments of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as proven, rendered pursuant to Article 4 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of B-H and the Use of Evidence Collected by ICTY in Proceedings Before the Courts in Bosnia and Herzegovina (LoTC). The Defense is of the opinion that the said Decision should have been reviewed by the Panel of the Appellate Division pursuant to Article 321(1) of the CPC B-H in the course of the proceedings, and not in an appeal from the First Instance Verdict, as it is too late at that stage to submit additional evidence.

31. In the opinion of the Appellate Panel, this ground of the Appeal is unfounded.

32. The First Instance Panel inferred correctly that the Decision on the acceptance of facts established by legally binding ICTY judgments as proven constitutes a judicial decision that may be contested only by way of an appeal from the First Instance Verdict.

33. In other words, Article 318(2) of the CPC B-H stipulates that a decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal from the verdict.¹ Therefore, this does not mean that the right to appeal does not exist, but that it can be exercised when appealing from the verdict. From the contested decision of the First Instance Panel it is abundantly clear that the Defense was informed in a clear and direct manner that the facts established in the ICTY proceedings were regarded as proven, but that the Defense could contest these facts during the main trial. The Defense, therefore, groundlessly argues that it did not have the opportunity to contest such accepted facts. The fact that the Defense did not present any evidence to contest these accepted facts was a decision made solely by the Defense itself and does not constitute a violation of the right to defense guaranteed by Article 7 of the CPC

¹ Article 318(2) of the CPC B-H: "A decision rendered in order to prepare the main trial and the verdict may be contested only in an appeal against the verdict."

B-H and Article 6 of the ECHR. The Defense also failed to use that possibility in the Appellate proceedings.

34. The Defense also alleges a violation of the *in dubio pro reo* principle. Given all the inconsistencies in the statements of the Prosecution witnesses and the fact that the expert witness for the Prosecution is obviously biased, the Defense is of the opinion that by convicting the Accused Miodrag Nikačević, the Trial Panel violated his right to the presumption of innocence.

35. The *in dubio pro reo* principle is a direct consequence of the presumption of innocence and the law explicitly prescribes that, when in doubt, a Court must decide in favor of the Accused.² Therefore, any doubt as to the existence, or otherwise of some legally relevant fact must be resolved in favor of the Accused. The facts that are to the detriment of the Accused (*in peius*) must be established with absolute certainty and should a reasonable doubt exist, these facts cannot be regarded as established or proven. Facts in favor of the Accused are considered to be established even when they are only probable, that is, if their existence is doubted.

36. The Appellate Panel considers that the First Instance Panel based its Verdict on the facts and evidence presented at the main trial which it assessed, individually and in their entirety. On the basis of this assessment, it concluded as to the existence of legally relevant facts.³ Therefore, formally speaking, the First Instance Panel acted entirely in accordance with Article 15 of the CPC B-H and the obligations referred to in Article 281(1) and (2) of the CPC B-H. However, the Appellate Panel considers that the application of the *in dubio pro reo* principle should be viewed within the framework of the Defense's submissions as to whether the state of facts has been correctly and completely established, that is, in the context of the probative value of the adduced evidence; hence a detailed analysis for each Count in the Indictment will be presented in Part II of this Verdict (*Erroneously or Incompletely Established State of Facts*).

II) ERRONEOUSLY OR INCOMPLETELY ESTABLISHED STATE OF FACTS

37. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. The Appellate Panel shall substitute the findings of fact by the First Instance Panel with its own finding only where a

² Article 3(2) of the CPC B-H: "A doubt with respect to the existence of facts constituting elements of a criminal offense or on which the application of certain provisions of criminal legislation depends shall be decided by the Court verdict in the manner more favorable for the accused."

³ Article 281 of the CPC B-H: "(1) The Court shall reach a verdict solely based on the facts and evidence presented at the main trial. (2) The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved."

reasonable trier of fact could not have found the contested state of facts.

38. When determining whether the First Instance Panel's conclusion is such that no objective trier of fact could arrive at such a conclusion, the Appellate Panel will not lightly disturb the findings of fact by the First Instance Panel. The Appellate Panel is of the opinion that it is, primarily, the task of the First Instance Panel to hear, assess and weigh the evidence presented at the main trial. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

39. The Appellate Panel shall revoke a First Instance Panel's Verdict only if an error of fact has brought about 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.

40. In order to prove that a miscarriage of justice has occurred, an Appellant must demonstrate that the alleged erroneous and incomplete state of facts established by the First Instance Panel, justifiably calls into question the guilt of the accused. In order to prove that a miscarriage of justice has occurred, the Prosecutor must demonstrate that, once the errors of fact the First Instance Panel may have committed are taken into account, any reasonable doubt with respect to the guilt of the Accused is eliminated.

41. Therefore, it is only in cases where the Appellate Panel concludes that no objective trier of facts could have reached the contested findings of facts, and, that such error of fact caused a miscarriage of justice, will the Appellate Panel grant the Appeal filed pursuant to Article 299(1) of the CPC B-H declaring that the state of facts has been erroneously and incompletely established.

42. Article 299 of the CPC B-H prescribes when a verdict may be contested because of incorrectly or incompletely established state of facts. Decisive facts may be established directly by means of direct evidence, or indirectly based on other facts (indicia or control facts). Only those facts that have been established by a verdict can be considered to exist and, although decisive facts exist, an inference about their existence must always be made. Otherwise, state of facts has not been established (incompletely established state of facts). If a decisive fact has not been established the way it existed in the reality of an event, then an erroneously established state of facts is occasioned.

43. The Appellate Panel will assess whether the state of facts was erroneously established with respect to the facts and findings that the Defense referred to in its Appeal. The criterion that should be applied for this assessment is the evaluation on the basis of the appeal submissions as to whether a decisive fact corresponds to the results of the evidence adduced.

44. In the opinion of the Appellate Panel, the submissions of the Defense Appeal that the First Instance Panel erroneously and incompletely established the state of facts with respect to Sections 1(a) and 1(b) of the operative part of the contested Verdict are unfounded. The Appellate Panel is of the opinion that the First Instance Panel provided detailed and clear reasoning for its decision, which this Panel fully accepts.

45. With respect to Section 2 of the operative part of the contested Verdict, the Appellate Panel considers that the First Instance Panel made a wrong inference that the act described in the Indictment constitutes a criminal offense in violation of Article 172(1)(e) of the CC B-H, and it will be reviewed in Part III, *Violation of the Criminal Code*, of this Verdict. The Appellate Panel finds that in this respect, it is necessary to revise the First Instance Verdict pursuant to Article 314 of the CPC B-H.

Appeal Submissions related to Section 1 of the Contested Verdict

46. The Appellate Panel considers that the appeal submissions for which the First Instance Verdict is contested with respect to Sections 1(a) and 1(b) of its operative part are unfounded, finding that the First Instance Panel correctly inferred that it has been proved beyond any reasonable doubt that the Accused Nikačević forced the injured parties Munira Hodžić and Almira Čeligija to sexual intercourse, whereby he committed the criminal offense in violation of Article 172(1)(g) of the CC B-H.

47. With respect to Sections 1(a) and 1(b) of the operative part of the contested Verdict, the Defense points to particular submissions and theories that do not seem to be based on any evidence adduced without indicating from which evidence such state of facts might result.

48. Decisive facts correspond to the results of the presented evidence and with its appeal submissions the Defense did not challenge the correctness of the factual findings and conclusions of the First Instance Panel, which this Panel fully accepts. The First Instance Panel correctly established all decisive facts on which the application of substantive and procedural provisions depends.

49. The Appellate Panel finds that in having correctly evaluated the key evidence – the statements of witnesses–victims and the statements of other witnesses, the First Instance Panel established in a correct and reliable way that the Accused Nikačević committed the criminal acts he was found guilty of, which inference this Panel also entirely accepts.

50. The Appellate Panel finds the Defense arguments to be completely unfounded, especially since, except for general statements on the alleged incorrectness/untruthfulness of the witnesses-victims' statements, they do not

contain a single valid counter-argument or provide evidence which could challenge the witnesses' statements. Contrary to this, the First Instance Panel gave credence to the examined witnesses–victims in a complete and correct manner, given that it follows clearly from their statements, which differ only to the extent confirming that they were not rehearsed, but reflect different perceptions of different persons in extraordinary and extremely stressful and humiliating circumstances in which the victims undoubtedly found themselves, that the Accused Nikačević committed the acts in the manner described in Sections 1(a) and 1(b) of the operative part of the First Instance Verdict.

51. The Appellate Panel accepts the reasons cited in the Reasoning of the First Instance Panel, since it was rendered after properly and lawfully conducted proceedings and since its Reasoning contains indisputable facts fully and clearly presented, as well as reasons for which the disputable or contradictory facts were considered as proven, and a valid assessment of the credibility of the contradictory evidence whereas the appeal submissions were not sufficient to contest such a proper and complete finding.

52. It is the opinion of the Appellate Panel that the First Instance Panel provided a detailed and comprehensive analysis of the victims' statements, which were evaluated with particular care exactly because the victims were the only witnesses to the act of rape. With respect to the rape of Munira Hodžić, in addition to the statement of the victim, the First Instance Panel also evaluated the statements of other witnesses (Fatima Dervišević, Almira Čeligija, Jasmina Fazlić and Emira Smajkan) relating to the events that immediately preceded and followed the rape. The statement of the victim Almira Čeligija was evaluated in the same way, along with the evaluation of the statements of witnesses Fatima Dervišević and Munira Hodžić concerning the circumstances before and after the event.

53. Contrary to the appeal submissions, the Appellate Panel is of the opinion that the First Instance Panel did not have a single reason not to fully trust the witnesses - victims Munira Hodžić and Almira Čeligija, given that their statements are clear, consistent and not challenged in any way, which is why they were accepted as credible with regard to the rape committed by the Accused Nikačević.

54. The Defense unjustly contests the credibility of the evidence of Munira Hodžić by pointing to the "privileged" position of the victims, primarily victim Munira Hodžić, as compared to other Bosniaks in Foča. The fact that the victims in this case did not live in the same conditions as other women detained in detention camps does not constitute a valid ground to contest the credibility of their statements or to downgrade their status as parties aggrieved by this criminal offense.

55. The actions of Munira Hodžić related to her departure to and return from Foča and her friendship and contact with the chief of the police constituted a search for the ways to survive in times of war and chaos and an attempt to protect her daughter. It follows clearly from the adduced evidence that the victim was in danger and was continuously scared, and that her father's political status had a significant effect on her position at the time, as had the fact that she was divorced and a mother who feared for her daughter's safety.⁴ It also follows from the evidence by the witnesses heard that the victim Munira Hodžić was wanted by various military and paramilitary formations.

56. With respect to the victim Almira Čeligija, it must be emphasized that she was raped at the beginning of the conflict when soldiers came to the apartment looking for weapons because her father was in the army. On that occasion she was raped while her mother and brother were in the apartment.

57. The position of these two young women, raped, exposed to various kinds of attacks, and fearing for their lives and the lives of their next of kin, cannot be defined as "privileged". A completely opposite conclusion results from the evidence produced, which was reasoned in detail in the contested Verdict and which this Panel accepts in its entirety.

58. With respect to some contradictions in the statements of the victims and other examined witnesses, the Defence points exactly to the same differences which the First Instance Panel referred to in the contested Verdict. The Appellate Panel finds that the First Instance Panel correctly evaluated the witnesses' statements, individually and in relation to the other statements, and correctly concluded that their inconsistencies are not relevant, that is, that they do not challenge the credibility of the witnesses. The differences in the statements refer to facts that are not directly related to the factual description in the Indictment and concern irrelevant details. In other words, the witnesses confirm in agreement that Munira Hodžić moved to the apartment of Fatima Dervišević through the premises in the basement. Although there are certain discrepancies as to who took Munira through these premises, these inconsistencies are such that they do not challenge the witnesses' credibility, but are a result of the elapse of time and of different perceptions or different sources of information.

59. The Appellate Panel notes that the statements of the examined witnesses do not contain deviations or contradictions with respect to the key facts.

60. The Defense unreasonably notes as a failure on the part of the First Instance Panel the fact that it did not establish the exact dates of the rapes. It is the opinion of the Appellate Panel that the First Instance Panel provided a detailed and comprehensive analysis of the witnesses' statements regarding the dates of rapes,

⁴ See: Defense witness Jadran Đuderija.

that is, the time of the commission of the offense. Given the elapse of time and the circumstances under which the incriminating acts happened, it is understandable that the victims cannot give the exact dates of the rapes. The Appellate Panel considers that the time of the commission of the offense was established with sufficient precision, although it is not the exact dates that was established but rather the time period during which the rapes occurred. Given the context of a widespread and systematic attack that was taking place at the time of the criminal offense, as well as the abnormal and exceptionally stressful living conditions of all witnesses in this case, it is absolutely understandable that the only manner in which to make the time of the commission more specific is to link it with some other events.⁵

61. The Defense submissions that both victims reported the rape after an extremely long period of time to a non-governmental organization, and, therefore, that their motive was of financial nature, are unfounded in the opinion of this Panel and do not challenge the credibility of the victims' statements. Primarily, these Defense assertions are not founded on evidence produced during the trial. The First Instance Panel analyzed in detail all the facts and circumstances and correctly deduced that the statements of the witnesses-victims and other Prosecution witnesses are identical and consistent in their fundamental and important elements, while several different interpretations of some facts certainly do not challenge the authenticity and credibility of their statements, which conclusion the Appellate Panel also accepts in its entirety. The First Instance Panel correctly assessed the facts and circumstances related to the environment and the mentality in the area from which the witnesses come, the time of the commission, and the statements of the witnesses-victims indicating that they feared the reaction of the community, family and friends, but that, at the same time, they suffered visible harmful consequences of sexual violence. Given the circumstances at the time of the commission and the fact that those were exceptionally stressful and traumatic events with lasting consequences for both victims, and taking into consideration the fact that, in a patriarchal community

⁵ See case No. X-KR-08/500, Miodrag Nikačević, First Instance Verdict dated 19 February 2009 (First Instance Verdict), p. 43, para. 3 [p. 35, para. 3 of the English version; translator's note]: *"With respect to the exact date of the relevant event, the witness-victim said that she went to Fatima's apartment a couple of days following the start of the shelling of Foča and that the Accused took her away the first night upon her arrival to Fatima's apartment. Witness Fatima Dervišević stated that Munira Hodžić came to her place around 10 April 1992 and stayed for 5-10 days and that Nikačević came to take Munira one night while Munira was staying in her apartment. Witness Almira Čelegija also stated in her evidence that the Accused took Munira away in April, a couple of days after the start of the shelling, on 9 or 10 or 11 April 1992."* Page 51 [p. 41 of the English version; translator's note]: *"On one occasion, in June, when the Accused's wife was not in the apartment, he called her to clean the apartment insisting that she should go, not her mother. He raped her on that occasion. The witness states that the sexual violence took place on 15 or 16 June 1992. Witness Fatima Dervišević corroborated that the Accused Nikačević took the injured party Almira to his empty apartment mid-June. Witness Munira Hodžić said that it was some time in the period from 1 to 10 July that she heard from Almira that the Accused had raped her, which supports the conclusion that she was raped before 1 July."*

from which the victims come, the act of rape is shameful for the victim, it is reasonable to conclude that the victims did not talk about it until the moment they felt safe enough to face the past and report the rapes.

62. The fact that the victims first reported the rapes to the *Women Victims of War* association does not reduce the truthfulness or credibility of their statements. Actually, it is logical that women who have undergone exceptionally traumatic events decide to first share their experience with the women who have undergone identical or similar situations.

63. From the aforementioned facts and circumstances that had been elaborated in the contested Verdict, the First Instance Panel drew a completely correct inference that reporting the rape 15 years later does not necessarily challenge the credibility of the victims' statements.

64. The submission of the Defense Counsel as to the alleged bias of the expert witness, Dr. Senadin Ljubović, is completely unfounded. The First Instance Panel properly assessed the forensic psychiatric report by this expert witness, Dr. Ljubović, noting that the opinion of an expert witness in some field must not relate to the testimony of an injured party "per se", but must solely be related to the personality of the injured party. Given the fact that Dr. Ljubović is an expert witness of long-standing practice and is amongst the first to conduct expert analysis of rape victims, some 1,000 of them, the First Instance Panel concludes correctly that his findings and opinion are impartial and, therefore, gave them full credence.

65. By merely attacking the credibility of this evidence as contradictory and overestimated, the Defense fails to offer any evidence in corroboration of its allegations. Therefore, this Panel must dismiss these arguments as unfounded.

66. The Defense challenges the credibility of witness Almira Čeligija, emphasizing that the Accused and his wife entrusted the victim with caring for their newly born. This fact alone should put in doubt the alleged rape. The Appellate Panel finds this argument of the Defense to be completely unfounded. Except for the hypothetical argument as to why the Accused should entrust the woman he allegedly raped with the care for his newly born child, the Defense does not provide any evidence or fact which corroborates this view. One could also counter-argue as to why the victim had returned to clean the Accused's home, babysit his child and wash his uniforms. Is this the result of a pre-war close friendship between the Accused and the victim or does this indicate between them the existence of a relationship similar to slavery which the Accused imposed on the victim as a "guardian", taking advantage of the specific circumstances which existed at the time?

67. A Court must base its decision on factual considerations as emanating from

presented evidence, so hypothetical assumptions are not acceptable in evidentiary procedure. Contrary to the assertion in the Appeal, the First Instance Panel has explained in detail, the position of the victims at the relevant time, both in the wider context of the events in the Foča Municipality (the existence of a widespread and systematic attack and all the events affecting the Bosniak population), and the living circumstances of the victims in this case (unprotected women who lived under extremely stressful and abnormal circumstances).

68. Given these indisputable facts, this Panel also considers that the First Instance Panel has established that sexual intercourses between the Accused and the victims did take place under coercion and that there existed such circumstances that may be considered coercive (*coercive circumstances*).

69. Furthermore, the Defense questions the credibility of the statements of the victims Almira Čeligija and Munira Hodžić, stressing that the circumstances surrounding the abortion performed are not entirely clear. In the opinion of the Appellate Panel, the First Instance Panel correctly assesses the statements of these victims, especially Almira Čeligija, regarding the fact that she conceived after the rape and had this pregnancy terminated. Contrary to the allegations in the Appeal, the contested Verdict has explained in detail the facts and circumstances surrounding the abortion and correctly argues that the pregnancy and abortion are not facts that would carry a decisive weight in establishing the existence of the crime itself and that, given the trauma, humiliation and stigma which also surrounds the issue of abortion, the inconsistencies and confusion in the witnesses' statements are not serious considerations. On page 56 [*page 45 of the English version; translator's note*], the First Instance Panel provides a detailed overview of the confusion of victim Hodžić relating to the name of the doctor who performed the abortion and to the non-existence of documentation. Also, Dr. Aščerić personally confirms that at the relevant period, he was in private practice in Novi Pazar where women from Eastern Bosnia were examined and where abortions were performed. However, given the passage of time and the lack of documentation, it is completely understandable that Dr. Aščerić does not remember the specific case of the victim Almira Čeligija's abortion.

70. In his Appeal, the Accused again points at his alibi, which the Appellate Panel also finds unacceptable and it accepts the inferences of the First Instance Panel in their entirety as it follows beyond doubt from the adduced evidence that witnesses⁶ saw the Accused in the building where he lived at the time of the rapes. Hence the Appellate Panel does not consider that the Defense managed to challenge these pieces of evidence or that it offered sufficient evidence to challenge the established state of facts.

⁶ See the First Instance Verdict, p 46 [p. 37 in the English version; translator's note]; witnesses Almira Čeligija, Munira Hodžić, Fatima Dervišević.

71. Given the above, the Appellate Panel is of the opinion that the Defense has not managed to challenge with its Appeals the state of facts correctly and completely established by the First Instance Panel. Therefore, the submission of the Defense relating to Sections 1(a) and 1(b) of the operative part of the First Instance Verdict are hereby dismissed as unfounded pursuant to Article 299 of the CPC B-H.

III VIOLATION OF THE CRIMINAL CODE

72. An appellant alleging an error of law must, as a minimum, identify, the alleged error, present arguments in support of this claim, and explain how the error affects the decision resulting in its unlawfulness.

73. Where an error of law arises from the application of a wrong legal standard in the Verdict of the First Instance, the Appellate Panel may articulate the correct legal standard to be applied and review the relevant factual findings of the Trial Panel accordingly. In so doing, the Appellate Panel not only may correct a legal error, but also apply the correct legal standard to the evidence contained in the trial record in the absence of additional evidence. It must therefore determine whether it itself is convinced beyond any reasonable doubt as to the factual finding challenged by the Defense before that finding is confirmed on appeal.

74. Where the Appellate Panel concludes that the Trial Panel has committed an error of law but is satisfied as to the factual findings reached by the Trial Panel, the Appellate Panel will revise the Verdict in light of the law as properly applied and determine the correct sentence, if any, as provided under Articles 314 and 308 of the CPC of BiH.

A- Whether the act for which the Accused is being prosecuted constitutes a criminal offense

75. Violation of the Criminal Code as to whether the act for which the Accused is being prosecuted constitutes a criminal offense may appear in three forms: 1) an erroneous assessment as to whether the act for which the Accused is being prosecuted constitutes a criminal offense or not, 2) an erroneous evaluation as to the existence or lack of existence of the elements of the criminal offense and 3) an erroneous evaluation as to the existence or lack of existence of unlawfulness.

76. The requirements for the existence of a criminal offense are that all the elements of the general concept and specific elements of the criminal offense charged are satisfied. Violation of the law exists if the court erroneously concludes that all the elements of a particular criminal offense are satisfied.

Appeal Submissions pertaining to Section 2 of the Contested Verdict

77. The Appellate Panel deems it necessary to indicate that in their Appeals, the Defense Counsels for the Accused, within grounds for appeal due to essential violation of the criminal procedure provisions under Article 297 of the CPC of BiH have erroneously subsumed the reasoned violations under the provisions of the Article. Furthermore, the Defense, in the part of the Appeal contesting incorrectly or incompletely established facts, described an appellate ground that by its nature constitutes a violation of the criminal code under Article 298 a) of the CPC of B-H but at the same time the appellant only invokes a violation of Article 298 d) of the CPC of B-H.

78. In the interest of the Accused, the Appellate Panel has viewed the Defences' submissions as obvious oversights and has evaluated each submission reasoned in the appeals and reviewed the contested Verdict insofar as contested by the appeal submission. When taking such a position the Appellate Panel has taken into consideration a number of fundamental principles relating to criminal procedure from which the basic rights of the Accused derive, as guaranteed by both the CPC of B-H and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

79. Although Article 6 of the ECHR does not explicitly provide for the Accused to have legal assistance, it follows that the Accused must have legal assistance if the interests of justice so require. If the Accused is entitled to free legal assistance he is entitled to practical and effective legal assistance and not only to theoretical or illusory one.⁷ Pursuant to Article 6 (3) c) of the ECHR the Court is required to intervene if a legal aid lawyer manifests obvious inadequacies in representing a client.⁸ In the opinion of the Appellate Panel, the omission of the defense, in other words, obvious slips by the Defense Counsels, are not of such a nature as to violate the Accused's right to defense. However, by strict interpretation of legal provisions, particularly Article 306 of the CPC of B-H, the Accused could be placed in an adverse position. Thus, the Appellate Panel decided to review the Verdict insofar as contested by the appeal although in respect to Section 2 of the operative part of the contested Verdict, the Defense referred to incorrect grounds for the appeal (incorrectly or incompletely established facts).

80. The application of the fundamental principle *in dubio pro reo* also corroborates the aforementioned conclusion of the Appellate Panel. A doubt with respect to the existence of facts on which the application of provisions of substantive as well as procedural law depends, shall be resolved by the Court in

⁷ See: Judgment dated 30 April 1980, *Artico v. Italy*

⁸ Judgment dated 19 December 1989, *Kamasinski v. Austria*

the manner more favorable for the accused. The Appellate Panel holds that by any standard the decision made pursuant to Article 284 a) of the CPC of B-H⁹ is more favorable to the Accused compared to Article 284 c) of the CPC of B-H.¹⁰ In other words, it is not disputable that there is merit to the claim of the Defense indicating the error of the First Instance Panel with regard to Section 2 of the operative part of the Verdict and that the Accused should have been acquitted of the charge. Strict acceptance of the classification of the grounds of the Defense appeal as incorrectly or incompletely established facts would result in the application of Article 284 c) of the CPC of B-H in the decision upon the appeal. On the other hand, correct qualification of the submissions of the appeal results in the application of Article 284 a) of the CPC of B-H.

81. The Panel notes that the Appellant is of the opinion that the First Instance Panel incorrectly established the state of facts (grounds for the appeal - the state of facts incorrectly or incompletely established under Article 299 of the CPC of B-H) and refers to facts which do not follow from the Indictment itself, which essentially constitutes the grounds of appeal in terms of Article 298 a) of the CPC of B-H.

82. In other words, the Appeal repeats several times that the Accused acted in his capacity as a member of the Foča Police, that he acted upon the orders of his supervisor, the Chief of Police Dragan Gagović, both when the victim Rasim Klapuh was arrested and when he was handed over to the military police, adding that, even under the Indictment, it was the military police who decided on the subsequent fate of Klapuh. The Appeal indicates that the Court itself only in the reasoning of the Verdict draws the conclusion that the Accused knew how detainees were treated in the Foča KPD, where unknown perpetrators, military police members, imprisoned the victim, as well as the conclusion that the Accused knew about it and assisted them.

83. In relation to Section 2 of the operative part of the First Instance Verdict, the Appellate Panel finds that the appellate submissions are grounded and that the operative part of the contested Verdict lacks the elements established by the law as constituting a criminal offence because the described acts of the Accused lack some of the essential elements of the criminal offense under Article 172(1) e) of the CC of B-H.

⁹ Article 284 a) of the CPC of B-H: „The Court shall pronounce the verdict acquitting the accused of the charges in the following cases: a) if the act with which he is charged does not constitute a criminal offense under the law.”

¹⁰ Article 284 c) of the CPC B-H: “ c) if it is not proved that the accused committed the criminal offense with which he is charged

Crimes against Humanity

Article 172

(1) *Whoever, as part of a widespread or systematic attack directed against any civilian population, with knowledge of such an attack perpetrates any of the following acts:*

....

*e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
shall be punished by imprisonment for a term not less than ten years or long-term imprisonment*

84. The elements of the offense in terms of Article 172(1) e) of the CC of B-H are satisfied when the perpetrator has imprisoned one or several persons or in some other way deprived one or several persons of their liberty, the gravity of the committed offense being such that it violates the fundamental rules of international law and the perpetrator is aware of the real circumstances that result in the gravity of the act concerned.

85. The basic rules of international law pertaining to detention of civilians are contained in Article 42 and 43 of the Convention relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)¹¹, Article 9 of the Universal Declaration of Human Rights (Universal Declaration) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR).

86. Article 42 of the Geneva Convention (IV) regulates that internment or placing in assigned residence protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary while Article 43 of the Geneva Convention (IV) guarantees minimum procedural guarantees that the protected persons are entitled to.

87. Also, Article 9 of the Universal Declaration regulates that “*No one shall be subjected to arbitrary arrest, detention or exile.*” Article 9 of the ICCPR stipulates that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention”. Article 5 of the ECHR

¹¹ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949., Article 42: “*The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.*” Article 43 reads: *Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case*

prohibits deprivation of liberty save in the cases specified and in accordance with a procedure prescribed by law.¹²

88. The rules of international law, enumerated and cited above, clearly stipulate that detention or deprivation of liberty can only be exercised on the legal grounds and in compliance with procedural guarantees.

89. Furthermore, when considering the aforementioned submissions on appeal, the Appellate Panel, in the first place, would like to refer to some legal provisions:

Article 280 of the CPC of B-H - Correspondence between the Verdict and Charges

The verdict shall refer only to the accused person and only to the criminal offense specified in the indictment that has been confirmed, or amended at the main trial.

The Court is not bound to accept the proposals of the Prosecutor regarding the legal evaluation of the act.

90. This provision under paragraph 1 provides for the issues of objective and subjective identity of the charges and the verdict, starting from the accusatory principle (adversarial principle). The issue of the **objective identity** of the charges and verdict means that the proceedings may only be conducted against the person covered by the motion of the prosecutor and only **for the criminal offense described in the motion of the prosecutor.** .

91. The Court is bound by the state of facts as specified in the confirmed Indictment or an Indictment amended at the main trial. This means, that the Court is not only bound by the act charged as a certain event from the past but also by the description of the act and the event, as presented or described in the Indictment. The Court is not allowed to exceed that description, that is, to take into consideration facts established at the main trial but not included in the Indictment, to the detriment of the Accused. Effectively, the Court is not allowed to exceed the complex of the facts as described in the Indictment and take into

¹² The European Convention on the Protection of Human Rights and Fundamental Freedoms, *Article 5 (1)* *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.*

consideration these facts not covered by the charges to the detriment of the Accused.

92. In contrast, the change of the criminal action description which would change the identity of the offense, even if the relevant facts are established beyond doubt, cannot be taken into consideration if the Prosecutor does not amend the Indictment. Such action would represent exceeding of the charges, that is, an essential violation of the provisions of criminal procedure under Article 297(1) j) or under Article 297(1) h) of the CPC of B-H, when the Court does not entirely resolve the contents of the charge.

Article 285 of the CPC of B-H- Guilty Verdict

(1) In a guilty verdict, the Court shall pronounce the following:

- a) the criminal offense for which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends*
- b) the legal name of the criminal offense and the provisions of the Criminal Code that were applied;*
- c) to d) (the rest left out)*

93. The guilty verdict or the **so-called conviction is the verdict accepting the arraignment as stated in the confirmed Indictment or as amended at the main trial**. By such a verdict, the accused is found guilty of the offenses as indicted by the prosecutor and sentenced accordingly.

94. **Regarding subparagraph a)** there exists an indisputable requirement that the factual description of the criminal offense in the operative part of the Verdict (factual grounds of the verdict) specifies the act which constitutes the criminal offense, citing the facts and circumstances that constitute the elements of the criminal offense and confirming that the Accused committed the criminal offense in question.

95. Also, all other facts and circumstances, on which the application of the provisions of the substantive criminal law depends, should be stated.

96. Specifically, the section of the operative part referring to the acts of the Accused, reading:

“ Between early April 1992 through late March 1993, as part of a widespread and systematic attack of the military, paramilitary and police forces of the Serb Republic of B-H and subsequently of Republika Srpska, directed against the Bosniak civilians in the Foča Municipality, having knowledge of such an attack

and that his acts constituted part of the attack, as a member of the aforementioned forces, he knowingly aided in unlawful imprisonment and deprivation of physical liberty, in as much as he:

On 2 August 1992, carrying an automatic weapon, together with two other armed members of the Armed Forces of the Republika Srpska, he came to the house of the Klapuh family in Humsko, Foča Municipality, looking for Rasim Klapuh; as Rasim was doing some farm work on a nearby meadow, one of them went there and brought him in front of the house, whereupon they apprehended him and took him to a meadow close to the place of Geuši, Republic of Montenegro, where they interrogated him; thereupon they took him back home and then took him and handed him over to the military police in the Army Command stationed in the place of Velečevo, Foča Municipality

does not include the facts and circumstances indicating the unlawful acts, that is, unlawful deprivation of liberty.

97. The part of the operative part clause indicating the unlawfulness, reading:

“from where Rasim was taken and unlawfully imprisoned in the Foča KPD /Penal-Correctional Institution/; he was detained there while no proceedings were ever instituted against him, nor did he ever receive any decision containing the reasons for his detention; after that, on an undetermined day he was taken out of the KPD by unidentified persons and murdered at an unknown site.

98. are facts and circumstances relating to the conduct of other persons-perpetrators and do not contain the description of actions and the required intent of the Accused which would indicate that the Accused participated in the said criminal offense as an accessory. The factual description of the criminal offense of which the Accused **is found guilty as an accessory** in the operative part of the Verdict, must include all facts and circumstances showing that the Accused had knowledge of both the offense and the perpetrator, as well as that, that by his acts, he supported the act of the perpetrator.

99. The First Instance Panel correctly established **that the Accused got the task (a verbal order from the Police Chief Dragan Gagović)** to apprehend Rasim Klapuh for interrogation and that this is a legitimate order.

100. The contested Verdict also establishes that the Accused, together with other policemen, took Rasim Klapuh to the gate in Velečevo where the Command of the Army of Republika Srpska and the Military Police were quartered, and handed him over. **The persons who took over the victim, escorted and detained him unlawfully** in the Foča Penal and Correctional Institution (Foča

KPD). Subsequently, on an unidentified day, the victim was taken away and killed by **unidentified persons** at an unknown site.

101. The event which is the subject of the charges must be considered from the description given in the Indictment and not from the aspect of the established facts concerning the manner in which the event took place in reality (provided that the prosecutor does not amend the Indictment), and a decision should be made accordingly.

102. In this specific case, the aforementioned facts are those described in the Indictment while other facts, forming the basis for conviction in the contested Verdict and reasoned therein to mean that the Accused was aware that the actions of the unidentified military policemen were unlawful and that his handing over of the victim to the military policemen, irrespective of the given order, as well as his knowledge about it make him an accessory with regard to the described unlawful acts, exceed the factual substance of the Indictment as *“Only the facts established in favor of the Accused can be taken into consideration even without amendment of the Indictment.”*

103. Given that the Appellate Panel concluded that the operative part of the contested Verdict, as well as the Indictment, with regard to the criminal offense of which the Accused was found guilty under Section 2 of the contested Verdict, lack the elements of the criminal offense concerned, in application of Article 314 of the CPC of B-H in conjunction with Article 284 a) of the same Law, the Panel, revised the First Instance Verdict and acquitted the Accused of the criminal offense of Crimes against Humanity under Article 172(1) e) of the CC of B-H.

B- Whether an inapplicable law was applied to the criminal offense charged

104. The Defense is of the opinion that in this case the CC SFRY¹³ should have been applied and not the CC of B-H because it was the law in effect at the time of the alleged commission of the offense and it is the law that is more lenient to the accused.

105. The Defense makes reference to several cases before lower courts in which the CC SFRY was applied. The Defense believes that it is unacceptable for one party to the proceedings (the Prosecutor’s Office) to decide on the jurisdiction of the court making it possible to discriminate against citizens on ethnic, religious, political, racial or other grounds.

¹³ See: Decree Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and Criminal Code of the Socialist Federal Republic of Yugoslavia adopted as the republic code during the Immediate War Danger or the State of War (Official Gazette RB-H No. 6/92) and the Law on Confirmation of the Decree Law (Official Gazette RB-H No 13/94).

106. The appeal submissions of the defense referring to the substantive law application are entirely groundless.

107. In other words, it is indisputable that at the time of the perpetration of the act that the Accused is charged with, which, satisfies all the essential elements of the criminal offense of Crimes against Humanity in terms of Article 172(1) of the CC of B-H, the aforementioned criminal offense as such was not stipulated by the criminal code applicable at the time (CC SFRY).

108. It is also indisputable that pursuant to the principle of legality, no punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, was not defined as a criminal offence by law or international law and for which a punishment was not prescribed by law.¹⁴ Pursuant to time constraints in relation to the applicability, the law that was in effect at the time of the commission of the criminal offense shall apply; if the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied.¹⁵ However, Article 4 subparagraph a) of the CC of B-H, which the First Instance Verdict correctly invokes, states that Articles 3 and 4 of the CC of B-H shall not prejudice trial and punishment of any person for any act or omission, which at the time of the commission, was criminal according to the general principles of international law. The provisions of Article 7 (2) of the ECHR and Article 15 (2) of the ICCPR were adopted by such regulations thus providing for an exceptional departure from the principle laid down in Article 4 of the CC of B-H.

109. The First Instance Panel correctly indicates that the foregoing is reflected in this case because it concerns a charge which includes a violation of international law. At the relevant time, the criminal offense of Crimes against Humanity was a criminal offense under customary international law, as well as under the principles of international law. The First Instance Panel presented a detailed and comprehensive argument which the Appellate Panel finds valid and correct, so it fully accepts it.

110. Furthermore, the Appellate Panel finds correct the position of the First Instance Panel that Bosnia and Herzegovina, as the successor state of the former SFRY, ratified the ECHR and ICCPR, and that these international instruments are binding on it. Given that they regulate the obligation to try and punish any

¹⁴ Article 3 of the CC of B-H: (1) *Criminal offences and criminal sanctions shall be prescribed only by law.*
(2) *No punishment or other criminal sanction may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offence by law or international law, and for which a punishment has not been prescribed by law.*

¹⁵ Article 4 of the CC of B-H: (1) *“The law that was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator of the criminal offence.*
(2) *If the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.*

person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law, which is definitely the case with Crimes against Humanity, it is indisputable that the submissions of the Defense, contesting the decision of the First Instance Panel in this respect, are entirely ungrounded and must be dismissed as such

111. As regards submissions that the SFRY CC is more lenient to the perpetrator in respect of the imposed criminal sanction, the Appellate Panel notes that at the time of the commission of the crime the Accused is charged with, it was possible to pronounce a death penalty. The death penalty was abolished after the ratification of Protocol 13 of the ECHR on 29 July 2003. By the Protocol, the signatory countries committed not to prescribe the death penalty in their criminal laws, although according to the criminal legislation of Bosnia and Herzegovina applicable at the time, it was not possible to pronounce a death penalty (Criminal Code of the Federation of BiH (1998), Criminal Code of Republika Srpska (2000) and Criminal Code of the Brčko District (2000), and the Criminal Code of B-H of 1 March 2003). Therefore, it follows that the Law which does not provide for the pronouncement of a death penalty, meaning the Criminal Code of B-H, is in any event more lenient to the perpetrator.

112. The issue of the application of a more lenient law is a factual issue and reference of the appellant to other cases in which the law in force at the time of perpetration of the criminal offense was applied is not relevant nor does it constitute a valid ground of appeal.

IV) DECISION ON THE SENTENCE

113. A decision on sentencing may be appealed on two distinct grounds, as provided in Article 300 of the CPC of BiH.

114. A decision on sentencing may first be appealed on the grounds that the Trial Panel failed to apply the relevant legal provisions when fashioning the punishment.

115. However, the Appellate Panel will not revise the decision on sentence simply because the Trial Panel failed to apply all the relevant legal provisions but the Appellate Panel will only reconsider the decision if the appellant establishes that the failure to apply all relevant legal provisions resulted in a miscarriage of justice. If the Appellate Panel is satisfied that such a miscarriage of justice occurred, it will determine the correct sentence on the basis of the Trial Panel's factual findings and correct application of the law.

116. On the other hand, the appellant may challenge the decision on sentence on the grounds that the Trial Panel used its discretion in determining the appropriate sentence. The Appellate Panel emphasizes that the Trial Panel is vested with

broad discretion in determining the appropriate sentence, as the Trial Panel is best positioned to weigh and evaluate the evidence presented at trial. Accordingly, the Appellate Panel will not disturb the Trial Panel's analysis of aggravating and mitigating circumstances and the weight given to those circumstances unless the appellant establishes that the Trial Panel has abused its considerable discretion.

117. In particular, the appellant must demonstrate that the Trial Panel has given weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations or has made a clear error as to the facts upon which it exercised its discretion, or that the Trial Panel's decision was so unreasonable or plainly unjust that the Appellate Panel is able to conclude that the Trial Panel must have failed to exercise its discretion properly.

Prosecution and Defense Appeal Submissions

118. The Appellate Panel finds that the Defense appeal submissions contesting the appealed Verdict with regard to the decision on the sentence by way of moving for the pronouncement of a more lenient sentence are entirely ungrounded. The Appellate Panel finds that the facts and circumstances relevant to meting out of the sentence are correctly established in the contested Verdict in their entirety and this Panel accepts them as such.

119. The Defense's reference to judgments pronounced by the ICTY is also groundless. The issue of an adequate sentence is a factual issue depending on a number of facts and circumstances specific to each and every case and relevant to the personality of the Accused and the criminal offense of which the Accused is found guilty. The fact that some other person was found guilty of the same criminal offense and pronounced a certain punishment is not legally relevant to the meting out of the sentence. In rare cases, the analogy may be theoretically possible when the same aggravating or extenuating circumstances are established in respect of several accused who participated in the perpetration of a factually identical offense, which is not the case here.

120. On the other hand, in his appeal the Prosecutor is of the opinion that the First Instance Panel, correctly and completely established the state of facts without having committed any essential violations of the provisions of the CPC B-H but it did not pronounce the term of imprisonment which would be proportionate to the degree of liability, circumstances under which the criminal offence was perpetrated and especially not to the gravity of the consequences caused to the victims – injured parties by the perpetration of this criminal offence.

121. According to the Prosecutor the Trial Panel exceeded its discretion and found that there exist particular extenuating circumstances in favor of the Accused and set the punishment below the limit prescribed by law (sentencing

him to 8 (eight) years of imprisonment). The Prosecutor notes that the Trial Panel failed to evaluate as particularly aggravating circumstances the grave consequences resulting from the criminal offence perpetrated by the Accused.

122. The Appellate Panel finds grounded the appellate submissions of the Prosecutor pertaining to the decision on the sentence.

123. In other words, pursuant to Article 49 b) of the CC of B-H, the Court may impose a milder type of punishment when it determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment may be attained by a lesser punishment. Highly extenuating circumstances are those extenuating circumstances which significantly diminish the danger of the offense and guilt of the perpetrator. Based on the overall estimate of all the circumstances surrounding the commission of the offense concerned, the Appellate Panel finds that the circumstances in favor of Accused Nikačević do not have the character of highly extenuating circumstances and that therefore, the requirements for a milder punishment, pursuant to Article 49 b) of the CC B-H, are not met.

124. The First Instance Panel correctly established the circumstances and facts referring to the degree of liability, conduct and personal circumstances (before, during and after the commission of the criminal offense), as well as the motivation and personality of the Accused. However, the Appellate Panel finds that there are grounds for the Prosecutor to believe that the First Instance Panel, when evaluating the circumstances, overrated the mitigating circumstances in favor of the Accused, whereas it did not correctly assess the aggravating circumstances which resulted in fact that the pronounced sanction. (8 year imprisonment) is not an adequate sanction for the committed criminal offense from the aspect of both general and special prevention.

125. Considering the foregoing, the Appellate Panel has revised the contested Verdict in the part pertaining to the sanction and so for the criminal offense under Article 172(1) g) of the CC B-H, factually described in Section (1) a) and b) of the operative part of the First Instance Verdict, sentenced the Accused to a term of 10 (ten) years imprisonment. When deliberating on the sentence this Panel evaluated all the facts and circumstances established by the First Instance Panel: the degree of liability, conduct and personal circumstances (before, during and after commission of the criminal offense), as well as the motivation and personality of the Accused which had been correctly established but not correctly evaluated. The imprisonment for a term of ten (10) years constitutes an adequate reflection of the gravity of the criminal offense the Accused was found guilty of, wherein the protected value is of a greater social importance and as such it is also sanctioned by international law. It also has special importance from the psychological, moral, religious, customary and other aspects of life of the aggrieved parties and their families.

V) DECISION ON THE COSTS OF CRIMINAL PROCEEDINGS

126. The Prosecutor's Office also contests the First Instance Verdict with regard to the decision on the costs of the criminal proceedings stating that the Court, when deciding on the costs, did not correctly apply Article 188 (4) of the Criminal Procedure Code of BiH as it only generally referred to this legal provision, without any reasoning.

127. According to the Appellate Panel, given that the appellant did not provide arguments for his claim or corroborate it with evidence, the First Instance Panel correctly applied Article 188(4) of the CPC B-H.

128. Pursuant to the foregoing and Article 310 (1) in conjunction with Article 314 of the CPC of B-H it was decided as stated in the operative part of the Verdict.

Minute -taker:
Melika Murtezić

PRESIDING JUDGE
JUDGE
Dragomir Vukoje

LEGAL REMEDY: No appeal lies from this Verdict.