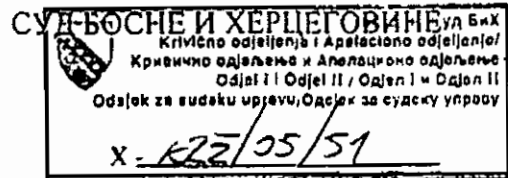


SUD BOSNE I HERCEGOVINE

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



25-12-2007



IN THE NAME OF BOSNIA AND HERZEGOVINA

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

VERDICT

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

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

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

REASONING

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

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

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

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

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

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

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

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

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

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

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

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

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

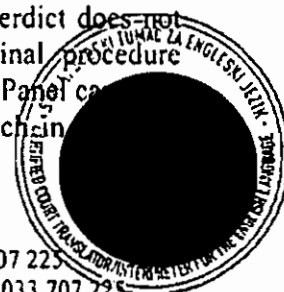
With regard to Section 6 of the operative part of the Verdict, this Panel is satisfied that the first-instance Panel extensively evaluated the evidence regarding the intolerable conduct of the Accused toward persons who were imprisoned in the camp (to which the following persons testified: Eset Muračević,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

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

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

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

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



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

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

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

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

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



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

Record-taker

Melika Bušatlić

Presiding Judge

Azra Miletić


LEGAL REMEDY: This Verdict cannot be appealed.

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

Sarajevo, 10 December 2007


Certified Court Interpreter for English Language




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