SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KRŽ-05/161
Sarajevo, 23 October 2007

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, in the Panel of the Appellate Division of Section I for War Crimes, composed of Judge Azra Miletić as the Presiding Judge, and Judges Jose Ricardo Juan de Prada and Finn Lynghjem, as the Panel members, with the participation of Legal Advisor Melika Bušatlić as the record-taker, in the criminal case against the accused Gojko Janković, for the criminal offence of Crimes against Humanity in violation of Article 172 (1) (a), (d), (e), (f) and (g) of the Criminal Code of Bosnia and Herzegovina (CC BiH), deciding upon the appeal of the defence counsel for the Accused, attorney Milan D. Trbojević, filed against the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/161 dated 16 February 2007, at the session held in the presence of the Accused, his defence counsel, attorney Milan D. Trbojević, and the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina David Schwendiman, on 23 October 2007 rendered the following

VERDICT

The appeal filed by the defence counsel for the accused Gojko Janković is hereby partially upheld and the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/161 dated 16 February 2007 is modified in the legal qualification in regard to the acts of the commission of the criminal offence of Crimes against Humanity referred to in Article 172 (1) of the Criminal Code of Bosnia and Herzegovina of which he was found guilty in the manner that the Accused committed the following:

Under Section 1: imprisonment in violation of Article 172 (1) (e) as read with Article 29 of the CC BiH;

Under Section 2: murder, torture and imprisonment in violation of Article 172 (1) (a), (f) and (e) of the CC BiH;

Under Section 3: torture and rape in violation of Article 172 (1) (f) and (g) as read with Article 31 of the CC BiH.

Pursuant to Article 138 (3) of the CPC BiH and Article 56 of the CC BiH, the time the Accused spent in custody shall be credited towards the sentence imposed, namely starting from 14 March 2005 until he was committed to serve the sentence.

The first-instance Verdict remains unchanged in the remaining part.

REASONING

Under the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/161 dated 16 February 2007 the accused Gojko Janković was found guilty of having committed the criminal offence of Crimes against Humanity in violation of Article 172 (1) (a), (d), (e), (f) and (g) of the CC BiH, namely the acts described under Sections 1 through 7 of the operative part of the Verdict.

The first-instance Panel sentenced him to long-term imprisonment in the duration of thirty-four (34) years and, pursuant to Article 56 of the CC BiH, the time spent in custody as of 14 March 2005 onwards was credited towards the sentence. Pursuant to Article 188 (1) of the CPC BiH, the Panel imposed an obligation on him to reimburse the costs of the criminal proceedings, whereof a separate decision shall be rendered.

Pursuant to Article 198 (2) of the CPC BiH the injured parties have been advised to take civil action to settle their property claim.

The defence counsel for the Accused, attorney Milan D. Trbojević, appealed the Verdict and the Prosecutor's Office of BiH submitted their response to the appeal.

The defence counsel for the Accused appealed on all grounds of appeal set forth under Article 296 of the CPC BiH and proposed to the Appellate Panel to uphold it, overturn the contested Verdict and schedule a re-trial.

In the reasoning of the appeal, the defence counsel for the Accused has noted that the contested Verdict is entirely in contravention of the *in dubio pro reo* principle, in other words contrary to Article 3 (2) of the CPC BiH. With regard to the essential violations of criminal procedure provisions he noted that it is based on the violation of Article 297 (1) (a), (c), (d), (i) and (k) of the CPC BiH.

With regard to the essential violation of criminal procedure provisions referred to in item (a) of the referenced Article (improper composition of the Court), the defence counsel has noted that the composition of the Court was not based on the BiH Constitution and that the appointment of international judges is contrary to the constitutional and statutory regulations effective in BiH.

Furthermore, the defence counsel argues that the fact that the main trial was held without the presence of his client leads to the violation of criminal procedure provisions referred to in item (c) of the referenced Article.

The defence counsel has also noted that during the proceedings the right of the Accused to a defence was violated and that the first-instance Verdict is based on evidence which it cannot be based. This reflects the first-instance Panel deciding unjustifiably not to apply the principle of imminent presentation of evidence through reading of the testimonies of protected witnesses FWS-105 and FWS-186 and remove the Accused from the courtroom. Given that the Verdict is based on the testimonies of protected witnesses FWS-105, FWS-186, FWS-95 and FWS-75 which, in the opinion of the

defence counsel, cannot be used to base the Verdict thereon, it resulted in the above-mentioned violation of the criminal procedure provisions. In support of the above-mentioned, the defence counsel has noted that, according to the findings of the expert witness, witness FWS-95 is mentally ill, while her testimony was accepted by the contested Verdict as reliable and convincing. The testimony of witness FWS-75 was regarded as reliable by the first-instance Verdict, however, according to the assertions of the appeal, it is clear that she was not telling the truth on several occasions.

The defence counsel has noted that due to the failure to make a distinction between the conflict and an attack by one side in the war, in the particular case it resulted in the violation of the criminal procedure provisions referred to in Article 297 (1) (k) of the CPC BiH. The above-mentioned ensues from the fact that at one point the contested Verdict takes as established from other Verdicts that "there existed a widespread, systematic attack by the Army, the Police and paramilitary formations against the non-Serb population in the wider area of the Foča Municipality, whereby those civilians were captured, physically abused and killed...". In doing so, it does not state the presence of the Army of RBiH in the conflict or the victims on the side of Serb civilians, while in the other part it concludes that "from 8 April 1992 until at least February 1993, there was an armed conflict between Bosnian Serbs and Bosnian Muslims in the area of Foča", failing to state who came into conflict with whom or the fact that the mentioned conflict also resulted in victims on the part of the Serb civilians. Furthermore, as pointed out, the above-mentioned was merely to prejudice the Defence, given that it was no longer possible to prove anything in that regard, although the communication of the Veterans' Association of Foča presented to the Court ensues that there were civilian victims among the Serb civilians on several occasions, which is something the contested Verdict failed to address.

The defence counsel also contested the first-instance Verdict due to the erroneously established state of facts by reasoning this ground of appeal in relation to some sections of the convicting part of the Verdict.

With regard to Section 1 of the operative part of the Verdict it has been noted in the appeal that the Verdict does not contain reasoning concerning the important facts, in other words, it does not contain reasoning with regard to the command responsibility of the Accused. In addition, the defence counsel has noted that the contested Verdict does not address indisputable facts in this part, such as that some of the civilians were returned to their homes, then deprived of liberty again and taken away, but without the Accused being aware thereof or participating therein, although he was found guilty concerning these events as well.

With regard to Section 2 of the operative part of the Verdict, according to the assertions of the appeal, the testimonies of witnesses were erroneously evaluated. This particularly refers to the testimony of the witness Dr Nurudin Ašćerić, whose credibility was explicitly put into question by the Defence. According to the appeal, he cannot be regarded as a witness since he has no knowledge of the specific facts. Furthermore, the appeal has contested the conclusion of the Court that the Accused had a *de facto* command role in the entire operation on the Kremenik hill and has noted that the above-mentioned has no foundation in the evidence presented.

With regard to Section 3 of the operative part of the Verdict, the appellant has noted that evidence was erroneously evaluated, with particular reference to the testimony of witness FWS-75.

With regard to Section 4 of the operative part of the contested Verdict, the defence counsel based his appellate argument on the testimonies of witnesses FWS-95 and FWS-75 arguing that no decision can be based on the testimony of witness FWS-95 given that she has been a mental patient over many years and mentally incompetent.

With regard to Section 5 of the operative part of the Verdict, the Defence has noted that the Trial Panel inconsistently departed from the application of the principle of directness. The above-mentioned specifically refers to the fact that the testimony of witness FWS-105 was read at the main trial although it should not have been done, nor should the testimony of the witness have been used as evidentiary means, while prior testimonies of other witnesses were not read out. The defence counsel, therefore, argues that in the particular case it was prejudicial to the Defence. The Defence has concluded that the testimonies of the witnesses are indisputably inconsistent, particularly with reference to witness FWS-105 and witness FWS-186 who subsequently changed considerably her testimony given to the Agency for Investigation and Documentation (AID) concerning the force the Accused directly applied to her.

The above-mentioned argument of the appeal refers also to Sections 6 and 7 of the operative part of the contested Verdict. Witness D.B. was also not an eye-witness to the event which allegedly refers to witness FWS-105 but only on the following morning, when they had coffee and when she saw the expression on her face, could she conclude she had been raped.

With regard to Section 7 of the operative part of the Verdict the Accused has been particularly charged with the rape of a minor A.B. whose existence was not proven in the proceedings given that there were no documents in support of that, nor did any member of her family appear.

The defence counsel also contests the first-instance Verdict on the grounds of a violation of the Criminal Code, which, according to the appellate arguments, is a result of a wrong legal qualification pursuant to the CC BiH and not CC SFRY which was in force at the time of the commission of the offence and is more lenient and favourable for the Accused. In the particular case, the Accused should not have been charged with the commission of the criminal offence of Crimes against Humanity referred to in Article 172 of the CC BiH but the criminal offence of War Crimes against the Civilian Population referred to in Article 142 (1) of the CC SFRY.

With regard to Section 1 of the operative part, charging the Accused with the acts of commission referred to in Article 172 (1) (d) and (e) of the CC BiH (forcible transfer of population and imprisonment), the defence counsel has noted that in the particular case eight persons were captured by soldiers who were not subordinates to the Accused. Some were released and then re-captured and taken to the Penal and Correctional Institution /KPD/, but the defence counsel denied his client knew or took part thereto.

The description of the criminal acts, according to the appellate arguments, corresponds to the description of the criminal acts concerning the charges under item (c) but not also under item (d) of the Article.

With regard to Section 2, the appellant has noted that the acts of commission with which the Accused has been charged cannot be qualified as a murder and the transfer of population but the deprivation of liberty of civilians who were subsequently released.

Furthermore, with regard to Sections 3, 4, 5 and 7 of the operative part (torture and rape) the defence counsel has submitted that the criminal offence of rape includes the criminal offence of torture in this situation and that there cannot exist a concurrence of offences.

With regard to Section 6, the appellant has noted that the committed acts were qualified as torture and sexual slavery without a ground thereof, given that slavery did not exist. The injured parties voluntarily agreed to be protected in such a situation, they themselves chose the lesser evil in order not to be left to uncertainty with a group of soldiers. According to the appellate arguments, the above-mentioned might be qualified as rape but without the responsibility of the Accused in that regard. In addition, the fact that the Accused allegedly used and abused such a situation cannot be linked to him.

The defence counsel has also contested the first-instance Verdict on the grounds of the decision concerning the sentence and the costs of the criminal proceedings, noting that by applying the relevant provisions of the CC SFRY the sentence referred to in Article 142 (1), and not long-term imprisonment, should be imposed on the Accused.

The defence counsel also noted that the first-instance Panel in the contested Verdict, while meting out the punishment, found no mitigating circumstances on the part of the Accused. As the defence counsel has noted, mitigating circumstances reflect in the fact that the Accused voluntarily surrendered himself, he acted in a fair manner and cooperated with the Court, and his health situation, in which medical documents were submitted in support thereto.

Furthermore, the appeal has contested the decision of the Court on the costs of the proceedings and proposed that pursuant to Article 188 (4) of the CPC BiH the Court relieve the Accused of the costs. The Defence relates the above-mentioned with the fact that the ICTY has already established that the Accused had no means to choose a defence counsel and, therefore, one was assigned to him *ex officio*.

The Prosecutor's Office of BiH has submitted its response to the appeal, proposing that it be dismissed in its entirety, and that the first-instance Verdict be upheld. As for the decision of the Court on the reimbursement of the costs of the criminal proceedings, it has noted that the decision should be upheld or modified in the event that the Appellate Panel find it appropriate.

At the session of the Appellate Panel held on 23 October 2007 for the purpose of Article 304 of the CPC BiH, the defence counsel for the Accused submitted, in brief, the

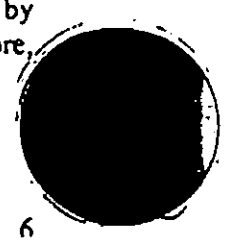
arguments of the appeal while the Prosecutor submitted his response to the appeal, and both parties adhered entirely to their presented arguments and proposals.

Having reviewed the contested Verdict within the limits of the appellate arguments, the Appellate Panel rendered the decision as stated in the operative part due to the reasons that follow:

According to the assessment of this Panel, the appellate arguments pointing at the essential violations of provisions of the criminal proceedings, namely with regard to Article 297 (1) (a), (c), (d), (i) and (k) of the CPC BiH, are entirely groundless. To wit, the issue of consideration of the constitutionality of the Law on the Court of Bosnia and Herzegovina does not constitute an appellate argument defined in Article 297 (1) (a) of the CPC BiH, therefore, the Appellate Panel of the Court does not have jurisdiction to consider the referenced issue. However, as regards the issue, the Constitutional Court of BiH has rendered its decision in the case No. U-26/01 finding the argument unjustified.

Furthermore, Article 24 of the CPC BiH prescribes that the Panel of the Court's Criminal Division composed of three judges shall adjudicate in first instance. Article 65 (4) of the Law on the Court of Bosnia and Herzegovina stipulates that several international judges may be appointed to Section I in the transitional period. Pointless are the appellate arguments by the defence counsel who submitted that there did not exist constitutional authorities to establish the Court of BiH, as well as to appoint international judges, because the Constitutional Court of Bosnia and Herzegovina rendered a decision on merits of the case No. AP 1785/06 ruling on the appeal filed by Abduladhim Maktouf.

Groundless is the appellate argument of the defence counsel noting that the main trial was held without the presence of the person whose presence was necessary pursuant to the law. To wit, during the main trial, on 31 August 2006 the first-instance Panel rendered a decision pursuant to Article 10 of the Law on Protection of Witnesses under Threat and Vulnerable Witnesses ruling that while witnesses E and J were examined the Accused should be removed from the courtroom. The first-instance Panel gave a detailed reasoning for rendering the decision in the contested Verdict. It ensues from the above-mentioned that by ruling on the reasoned Motion of the Prosecutor's Office of BiH and following the submission of the parties and the defence counsel, the first-instance Panel rendered a decision for the purpose of Article 235 of the CPC BiH to exclude the public during the testimony of witnesses E and J, primarily trying to protect their personal and private life. In order to further protect the witnesses pursuant to Article 10 of the Law on the Protection of Witnesses, the Panel rendered the decision to remove the Accused from the courtroom during the testimony of the witnesses. At the same time, the first-instance Panel decided to allow the Accused to follow their testimonies using technical means for transferring the image and sound in order to be able, following the direct examination, to consult his defence counsel concerning the cross examination. Contrary to the appellate arguments, the principle of the ban on trial in absentia was not violated by such conduct, nor was the Accused prevented from observing the trial and taking part in the main trial. The mentioned decision, according to this Panel, was rendered in its entirety and in the context of the guarantees secured by Article 6 of the European Convention on Human Rights (ECHR). Therefore,



ungrounded is the appellate argument of the defence counsel noting that the right to a defence was violated. To wit, standards set by Article 6 of the ECHR which are applicable to the particular procedural issue, require that the Accused be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation *against him*, which was indisputably done during the first hearing before the Preliminary Hearing Judge, by holding the plea hearing and opening *the main* trial by reading the Indictment. Furthermore, the Accused had the possibility to follow the direct examination of witnesses and consult the defence counsel concerning the cross examination. The right to a defence has been guaranteed by Article 7 of the CPC BiH by providing the right to the Accused to defend himself with the professional aid of a defence attorney and by providing that he must be given sufficient time to prepare a defence. In addition to the aforesaid, Article 6 (3) of the ECHR gives the right to the Accused to examine or have examined the witnesses against him. Having in mind the above-mentioned, and although the CPC does not explicitly prescribe such a procedural situation, the Law on the Protection of Witnesses in the particular case constitutes a *lex specialis*, and although the mentioned rights of the Accused were partially limited it was done in accordance with the statutory limitations and the ruling provided that the Accused follow the course of the main trial adequately, without violating his right to a defence.

Furthermore, the first-instance Panel rendered a decision to partially grant the Prosecution Motion for the exception regarding the imminent presentation of evidence concerning witnesses FWS-105 and FWS-186, pursuant to Article 273 (2) of the CPC BiH, Article 11 of the Law on the Protection of Witnesses and Articles 5 and 7 of the Law on the Transfer of Cases. This decision was reasoned in detail in the contested Verdict. The first-instance Panel correctly applied the standards established by the jurisprudence of the European Court of Human Rights, and as reasoned in detail in the contested Verdict, reading out the statements of the witnesses given in the course of the investigation per se does not constitute a violation of Article 6 (3) (d) of the ECHR if the rights of the defence have been complied with. Having in mind that the contested Verdict gives a detailed reasoning of all the steps taken by the Court to ensure the presence of the witnesses, not basing their decision exclusively or crucially on those statements, it is the assessment of this Panel that the Panel in the first-instance proceedings met the necessary requirements and thus the rights of the Accused have not been violated.

It is the assessment of the Appellate Panel that the appellate argument of the defence counsel that the contested Verdict is based on evidence which may not be used as the basis of a verdict, namely the grounds for appeal referred to in Article 297 (1) (i) of the CPC BiH, is unjustified due to the reasons that follow. In his appeal, the appellant submits an analysis of the substance of the evidence, namely the testimonies of witnesses FWS-105, FWS-186, FWS-95 and FWS-75, failing to state pursuant to which statutory provisions these pieces of evidence would be unacceptable. The arguments of the appeal refer to the assessment of the mentioned evidence and not its admissibility. According to this Panel, as regards witness FWS-95, the first-instance Panel carefully evaluated the testimony of FWS-95 in accordance with the principle of free evaluation of evidence, taking into consideration her psychological problems which are a consequence of the crime committed against her, and by relating her testimony with the

testimony of expert witness Marija Komšić and the testimony of witness FWS-87. The first-instance Panel correctly concluded that it was reliable evidence and the conclusion has been accepted by this Panel in its entirety.

Furthermore, as regards witness FWS-75, the appellant's argument regarding the evaluation of the credibility of the witness fails to provide any point of reference for his assertions. The appellant groundlessly noted that FWS-75 recognised the voice of the Accused coming from a walkie-talkie, even though she had never heard the voice before. However, the testimony of this witness clearly states that she recognised the voice of the Accused because she knew him well. As regards the testimonies of witnesses FWS-105 and FWS-186, the appellant noted that they should not have been used, failing to offer any explanation for such an assertion. The statements of these witnesses have been accepted pursuant to Article 273 (2) of the CPC BiH and Article 11 of the Law on the Protection of Witnesses, following a detailed and careful consideration of the existence of statutory grounds for such a decision which was reasoned in detail by the first-instance Panel in the contested Verdict. In addition to that, according to the assessment of this Panel, the first-instance Panel complied with the standards set forth by the jurisprudence of the European Court of Human Rights and did not exclusively or crucially base its decision on those pieces of evidence.

According to the assessment of the Appellate Panel and contrary to the arguments of the appeal, the first-instance Verdict is not incomprehensible or contradictory to itself or to the grounds of the Verdict. To wit, the appellant groundlessly noted that the first-instance Panel should not have concluded that there existed a widespread and systematic attack against the non-Serb population in the territory of Foča, while at the same time there existed the Army of BiH and victims on the Serb side, which, according to the arguments of the appellant, is contradictory to the established fact accepted from the ICTY case - *Kunarac et al.* that at the relevant time there was a conflict between Bosnian Serbs and Bosnian Muslims in the territory of the Foča Municipality. According to the assessment of this Panel, an attack and armed conflict are separate elements and are treated as such by the ICTY jurisprudence, for example in the *Kunarac et al.* case, the ICTY Appellate Chamber held that "the attack could precede, outlast, or continue during the armed conflict, (and may be) but it need not be a part of it". Furthermore, the appellant groundlessly noted that the first-instance Panel failed to take into consideration the fact that there were victims on the Serb side as well. To wit, while establishing whether there was an attack against a civilian population, it is irrelevant whether the other side also committed crimes against the civilian population of the opposing party. The existence of the attack of one side against the civilian population on the other side would not justify the attack on the civilian population of the opposing party, nor could a conclusion be drawn on that basis that the target of the forces of the other side actually was the civilian population as such. Any attack against the civilian population of the other side would be equally unlawful, and the crimes committed as part of such an attack, with all other requirements met, would constitute crimes against humanity (*see Kunarac et al.*, Trial Chamber Judgement dated 12 June 2002). According to the assessment of the Appellate Panel, the existence of the armed conflict was not in contradiction with the existence of a widespread and systematic attack against the civilian population, and the existence of victims outside the group which was

the target of the attack did not contradict the existence of the attack, and therefore this argument of the defence counsel is to be dismissed.

With regard to Section 1 of the conviction, the appellant has noted that the first-instance Panel failed to reason the grounds for the conclusion that the Accused commanded the group of soldiers that attacked the hamlet of Brežine/Zubovići. This Panel finds the appellate argument groundless in its entirety. In the Verdict, the first-instance Panel gave a detailed reasoning of the evidence based on established facts and circumstances which the first-instance Panel drew from to conclude on the role of the Accused, which is the conclusion entirely accepted by this Panel. Contrary to the arguments of the appeal, and as correctly reasoned and established by the first-instance Panel, the Prosecution witnesses themselves stated that the Accused had the command role, which was also confirmed by witnesses B, Ferida Glušac and Enes Hrnjić, who also testified about the order issued by the Accused to separate men from women and to take them away. Finally, the appellant pointlessly noted that the contested Verdict does not contain a reasoning of the conclusion that the Accused ordered that fire be opened at houses, because the first-instance Panel did not draw such a conclusion in the contested verdict.

Furthermore, the appellant noted that Section 1 of the convicting part of the Verdict is contradictory as it also contains assertions that civilians were captured and taken away by other soldiers who were not under the command of the Accused. This appellate argument is groundless in its entirety because the first-instance Panel did not establish in the contested Verdict that someone else captured the civilians and not the soldiers under the command of the Accused and who complied with his explicit orders. Based on the testimony of three eye-witnesses, the first-instance Panel correctly established that it was a person under the control of the Accused, and that the person in question, while obeying his order, took the captured male civilians away from the place of their capture and took them in the direction of Brod, which is clearly implied in the testimony of witness Enes Hrnjičić who was in the group that was taken away.

Furthermore, based on the presented evidence in the form of witness testimonies and physical evidence, the first-instance Panel legitimately concludes that Radmilo Babić was the platoon commander for the sake of formality, whereas the Accused had the actual control. Such a conclusion of the first-instance Panel regarding the role of the Accused is confirmed by the letter of the General Administration Department, Foča, No. 04-835/4 dated 22 January 2007 which reads that Gojko Janković was the unit leader at least as of April 1992.

Finally, the Appellant submits that the first-instance Verdict failed to consider the fact that at one point some of the imprisoned civilians were taken back to their homes, but shortly thereafter they were again taken into captivity without the knowledge and the participation of the Accused, yet the Accused was found guilty of that as well.

It entails from the testimony of the witness B and Ferida Glušac that two or three days following the capture, two men were brought back to their homes for a short while before they were again transferred to KPD. This Panel finds that the said fact is not a decisive fact which would affect the criminal liability of the Accused. The first-instance Verdict found the Accused guilty of the original deprivation of liberty based on a direct

intent, and of their imprisonment based on an indirect intention, since he could have predicted that his actions would result in a long-term imprisonment of those men. The fact that two of the men were taken back to their homes for just 15 minutes after which they were again taken to custody is not important to such a degree as to affect the linkage of cause and effect between the actions of the Accused and the imprisonment of the men. The Accused was not found guilty of the specific cases of abuse to which those men were subjugated during their incarceration (murders, beatings) but the important part in regard of the Accused's guilt is the predictable result, that is, the consequence of his actions which was the imprisonment of those men. The Panel does not find relevant the fact that someone else took two men out of detention and then brought them back. Mindful of the aforementioned, the Panel finds this appellate argument unfounded in its entirety.

With regard to Section 2 of the convicting part of the Verdict, the Appellant challenges the reference of the contested Verdict to the testimony of Dr Nerudin Ašćerić and submits that the doctor does not have any direct knowledge of any specific facts and that his credibility is doubtful. The Appellant, however, does not make a connection between the testimony of this witness and a specific finding or conclusion of the first-instance Panel. This Panel finds that the arbitrarily made and unsubstantiated arguments of the Appellant failed to challenge the credibility and reliability of this witness who, after all, did not testify on his direct knowledge of the events covered by this Section of the first-instance Verdict, but he corroborates the testimonies of some of the witnesses who were injured parties with regard to specific circumstances, that is, his evidence amounts to corroborative evidence.

The Appellant, furthermore, challenges the reference made in the first-instance Verdict to the letter of the Foča Tactical Group Commander, Colonel Marko Kovač, No. 01/705-1 dated 13 August 1993, which contains a proposal to proclaim the Accused as "Vojvoda" ("the Duke") and submits that such a proposal is "obvious nonsense of some likely drunken commander." This arbitrarily made and unsubstantiated appellate argument is unfounded in its entirety because the said document is not the only document based on which the first-instance Panel drew a conclusion about the Accused's role. The first-instance Panel legitimately evaluated this physical evidence in the context of many other documents and witness testimonies, and provided an extensive reasoning of the conclusion that the Accused was the platoon leader at the critical period of time. This Panel accepts such conclusion in its entirety.

Furthermore, the Appellant submits that the finding that the Accused had a *de facto* commanding role in the overall operation on Kremenik hill is wrong and without any basis in the presented evidence. The Appellant further states that such conclusion was drawn in order to conceal the fact that some soldiers who participated in it were members of units other than the platoon that was under the command of the Accused. It transpires from the testimonies of the witnesses such as FWS-75, FWS-88, DB, FWS-96, FWS 105, FWS 74 and FWS-87, that the Accused commanded the group of soldiers which attacked them; the size of that group approximately matches the size of a platoon. Furthermore, all the findings of the first-instance Panel related to the fact that the Accused commanded the operation on Kremenik hill, point to the group of soldiers who participated in the attack, the size of which equal the size of platoon. The

aforementioned testimonies clearly entail the conclusion of the first-instance Panel that the Accused was the *de facto* commander of that group of soldiers in as much as he issued orders which they carried out. The term "*de facto* commander" was not used by the first-instance Panel in order to expand the responsibility of the Accused but in order to conclude that some soldiers who executed the orders of the Accused on that day were not members of his platoon but were re-subordinated to the Accused for the purpose of that specific operation. This Panel accepts such conclusion in its entirety, wherefore the appellate arguments that the state of facts was incompletely and erroneously established in Section 2 of the convicting part of the first-instance Verdict are unfounded in their entirety.

With regard to Section 3 of the convicting part of the Verdict, the Appellant submits that the findings under this Section came as a result of the erroneous evaluation of evidence and particularly of the reference to the testimony of Witness FWS-75. The Appellate Panel finds that this appellate argument is unfounded in its entirety because the first-instance Panel legitimately and lawfully explained the way in which the testimonies and exhibits were evaluated with respect to all Counts of the Indictment, including this count as well. Article 15 of the CPC of BiH provides for one of the basic principles of criminal procedure, that is, the principle of free evaluation of evidence, according to which the Court has the right to freely evaluate the existence or non-existence of facts without being limited to special formal evidentiary rules that would *a priori* determine the value of evidence. In that regard, the Court is obligated to conscientiously evaluate each piece of evidence individually and in the context of other pieces of evidence, and to draw a conclusion on whether some fact was proven or not upon such evaluation of evidence. The evaluation of evidence is both logical and conscientious. In that regard, the first-instance Panel provided an extensive reasoning of each individual piece of evidence and of the context of all pieces of evidence presented within this section of the challenged Verdict, and provided an extensive reasoning as to which facts were found proven. The first-instance Panel, furthermore, provided a reasoning of its conclusion d, although only the witness FWS-75 testified on her interrogation and gang rape, the remaining part of her testimony was directly and indirectly substantiated by the testimonies of other witnesses. This Panel accepts such conclusion in its entirety. This Panel finds that the first-instance Panel rightfully evaluated the testimony of the witness FWS-75 and, therefore, the appellate argument in this regard is refused as unfounded.

With regard to Section 4 of the convicting part of the Verdict, the Appellant challenges the belief of the first-instance Panel in the testimony of the witness FWS-95 and all the conclusions which were drawn based on her testimony. The Appellant submits that the witness FWS-95 altered her previous statement to such a degree that the only logical conclusion would be that she planned it with someone. The Appellant, furthermore, submits that the testimony of the witness FWS-95 pertaining to the mass-scale rape at the football stadium was "so unbelievable" that it needs more than one confirmation in order to be accepted as valid, further stating that the witness has had psychiatric treatment for many years, which practically makes her mentally incapable. The witness FWS-95 explained the reasons for which she did not mention the events in her statement made in 1996, by stating that she thought it would be a brief statement during which she was not able to recount everything and that she now takes medications and is able to

remember more things. Furthermore, a neuropsychiatrist expert witness Dr Komšić stated that the witness FWS-95 was capable of providing valid testimony although she suffered from PTSP. Based on the aforementioned, the first-instance Panel properly drew a conclusion that the witness FWS-95 was a reliable witness, all the more because her testimony was substantiated by the testimony of the witness FWS-87. With regard to the contents of the testimony of the witness FWS-95 pertaining to the mass-scale rape at the stadium, this Panel is satisfied that the first-instance Verdict was reached upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina No. KT-RZ-163/05 which does not cover, nor is the Accused charged with that event, wherefore it was not considered in the challenged Verdict at all, which makes the respective appellate argument irrelevant for the decision-making upon the appeal filed against the first-instance Verdict.

With regard to Section 5 of the convicting part of the Verdict, the Appellant reiterates the argument that the first-instance Panel was wrong in granting and presenting the statement of the witness FWS-105 which was read out, and emphasizes that the first-instance Panel should have presented all the statements made by the witness FWS-105 so that possible discrepancies might be examined. The first-instance Panel provided an extensive reasoning for not granting the statement of the witness made to the ICTY because it was made in the criminal case against *Kunarac et al.* where the Accused Kunarac, Kovač and Vuković had a *de jure* opportunity to cross examine the witness in the main trial before the ICTY where they might have tried to exonerate themselves by putting blame on other persons who were involved, including the Accused Gojko Janković. The Panel is fully satisfied that the first-instance Panel made a proper conclusion by stating that this raises a considerable degree of suspicion with regard to reliability and overall fairness, which constitutes a violation of the ECHR standards. Furthermore, the statement of the witness FWS-105, which was read out in the main trial of Gojko Jankovic, was substantiated by the testimony of the witness DB who was together with the witness FWS-105 taken by the Accused and "Beba" to the house in Trnovača, upon which "Beba" took her to a room and raped her, while the witness FWS-105 remained in the company of the Accused. Although DB did not see the rape of FWS-105, she concluded that FWS-105 had undergone the same turmoil because of the way she looked the following morning when DB saw her, but also based on DB's own experience. Besides that, the first-instance Panel provided an extensive reasoning in the contested Verdict for its decision which was also based on the testimonies of the witnesses FWS-75 and FWS-96 who testified of what happened with the witness FWS-105. Given the aforementioned, the Panel is satisfied that the first-instance Panel drew a proper conclusion that the Accused raped the witness FWS-105 in the manner described under Section 5 of the first-instance Verdict.

With regard to Section 6 of the convicting part of the Verdict, the Appellant refers to the inconsistencies between the statement that the witness FWS-186 made to AID stating that she consented to sexual intercourse with the Accused and her subsequent statements that she was raped at a gunpoint. This argument of the appeal is also unfounded in its entirety. To wit, the statement that the witness FWS-186 gave to AID was not presented in the case file. The Prosecutor did not use that statement and he did not move the Panel to read it out in the main trial. Having consulted the case file, it is established that the Prosecutor submitted the respective statement to the defence along with other

evidentiary material attached to the Indictment, but he did not use it in the main trial. Furthermore, it transpires that the defence had a copy of the respective statement at its disposal throughout the proceedings, but failed to submit it as a defence exhibit. Article 295 (4) of the CPC of BiH reads that new facts and new evidence, which despite due attention and cautiousness were not presented at the main trial, may be presented in the appeal. The appellant has to state the reasons for which such evidence was not previously presented. Contrary to this provision, in his appeal the Appellant did not state the reasons for which he failed to tender the said statement of the witness FWS-186 in the course of the main trial. Furthermore, bearing in mind that the defence had a copy of the statement, this Panel finds that the appeal by the Defence Counsel indicates his own negligence and conscious maneuvering.

With regard to Section 7 of the convicting part of the first-instance Verdict, the Appellant challenges the existence of an underage A.B. but fails to substantiate such averment. The Appellate Panel, therefore, finds this argument unfounded in its entirety. Based on the extensive and coherent testimonies of the witnesses FWS-75, FWS-87, FWS-132 and FWS-191, the first-instance Panel found that the Accused raped the underage A.B. in the fashion extensively described under Section 7 of the first-instance Verdict, thereby, the Appellate Panel accepts such conclusion in its entirety. In their testimonies, the aforementioned witnesses clearly and specifically mentioned an underage girl A.B. who was 12 years old and known to them. Based on their testimonies it transpires that the underage A.B. did exist. The fact that it is not known what became of the underage A.B. is not a critical fact in terms of the Accused's criminal liability because, based on the testimonies of the aforementioned witnesses, it can be assumed with a high level of likelihood that the underage A.B. is not alive.

Unfounded is also the Defence Counsel's argument that Article 298 of the CPC of BiH was violated because the Court applied the CC of BiH instead of the Criminal Code of SFRY which was in force at the time when the criminal offence was committed and, according to the defence counsel, more lenient to the perpetrator. In terms of the application of substantive law, the first-instance Panel provided extensive and valid reasoning in terms of departing from the principle of lawfulness and the valid timeframe of the criminal code, and also in terms of the status of crimes against humanity in international customary law, with the conclusion that the punishment prescribed under the Criminal Code of BiH is nonetheless more lenient than the capital punishment which was prescribed at the time when the criminal offence was committed. The Appellate Panel accepts this conclusion in its entirety and finds that the appellate arguments are not sufficient to challenge the extensive and exhaustive reasoning of the first-instance Panel.

Notwithstanding the aforementioned, the Appellant's argument is well-founded in stating that the criminal code was violated by the actions the Accused is charged with under Sections 1 and 2 of the operative part of the first-instance Verdict which were legally qualified as a forcible transfer of population and imprisonment in violation of Article 172 (1) (d) and (e) as read with Article 29 of the CC of BiH under Section 1, and as murders, tortures and a forcible transfer of population in violation of Article 172 (1) (a), (f) and (d) as read with Article 29 of the CC of BiH under Section 2. The Appellant's argument is well-founded that the specific situation under Section 1 of the

challenged Verdict deals with the capture of eight persons and that the factual description pertains to the deprivation of liberty and imprisonment as prescribed under Article 172 (1) (e) of the CC of BiH, which also applies to the factual description under Section 2 which does not have any elements for the legal qualification of the transfer of population but of the deprivation of liberty of civilians. To wit, in order to establish the crime of imprisonment as a crime against humanity the following elements must be established: i) an individual is deprived of his or her liberty; ii) the deprivation of liberty is imposed arbitrarily, that is, no legal basis can be invoked to justify the deprivation of liberty; iii) the act or omission by which the individual is deprived of his or her physical liberty is performed by the accused or a person or persons for whom the accused bears criminal responsibility with the intent to deprive the individual arbitrarily of his or her physical liberty, or in the reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty. (*see Paragraph 115, Judgment of the Trial Chamber in the Krnojelac case dated 15 March 2002*). The first-instance Panel rightfully established on the basis of the presented pieces of evidence that the deprivation of physical liberty of eight men was imposed arbitrarily without any legal basis, which constitutes the crime of imprisonment or other deprivation of liberty in violation of basic rules of international law. With regard to Section 1 of the operative part of the challenged Verdict, the Accused had a direct intent in the very beginning to deprive them of liberty and had an indirect intent to keep them imprisoned in the long term, bearing in mind that it was predictable, based on the given circumstances, that those eight men would be kept in captivity for a rather long period of time (to wit, a rather large contemporaneous operation of capturing other persons), as well as with regard to Section 2, in the part in which it was established that women and children were taken away in the manner reasoned in the challenged Verdict. Contrary to that, the established state of facts under Sections 1 and 2 of the operative part of the Verdict does not provide sufficient ground for the following elements of forcible transfer of population to be met: i) forcible transfer of individuals by moving them or by other coercive actions out of the area where they legally reside to other locations within the state border without any basis under the international law and ii) the intention of the perpetrator to forcibly move out individuals where the intention does not necessarily have to refer to permanent transfer. The first-instance Panel provided reasoning for the first element only, at the same time failing to apply the second requirement covered by the definition of forcible transfer.

Therefore, Sections 1 and 2 of the challenged Verdict rightfully and completely establish the state of facts but draw a wrong legal conclusion, which resulted in the wrong application of substantive law. For that reason, the appeal of the Defence Counsel was upheld and the challenged Verdict partly revised in as much as the challenged Verdict is revised in terms of the legal qualification of the actions constituting Crimes against Humanity in violation of Article 172 (1) of the CC of BiH of which the Accused was found guilty as follows: under Section 1 - imprisonment in violation of Article 172 (1) (e) as read with Article 29 of the CC of BiH; under Section 2 – murders, tortures and imprisonment in violation of Article 172 (1) (a), (f) and (e) as read with Article 29 of the CC of BiH.

Furthermore, the Appellant submits that the first-instance Panel violated the Criminal Code by providing the legal qualification of the Accused's actions as torture and rape in

violation of Article 172 (1) (f) and (g) of the CC of BiH in Sections 3, 4, 5 and 7 of the convicting part of the Verdict, and submits that there cannot be any concurrence of these two criminal offences since the offence of rape includes the offence of torture. The Panel finds this argument unfounded in its entirety. This Panel finds that the two criminal offences are in an ideal concurrence where each requires considerably different elements to be proved. To wit, the first-instance Panel legitimately found that cumulative convictions based on the same conduct are permitted, providing that each of the crimes contains a distinct element which requires proof of a fact not required by the other. This Panel upholds such position in its entirety. The criminal offence of rape requires the element of sexual penetration to be proven, which at the same time is not an element required by the criminal offence of torture. The criminal offence of torture, however, requires the forbidden intention such as obtaining information or a confession, or punishing, intimidating or coercing the victim or a third person, or discriminating, on any ground, against the victim or a third person. (*see Kunarac et al., Paragraph 142, Judgment of the Appeals Chamber dated 12 June 2002*). Given the aforementioned, the Panel finds the Appellant's argument unfounded in its entirety.

With regard to Section 6 of the convicting part of the Verdict, the Appellant submits that the first-instance Panel violated the Criminal Code by providing the legal qualification of actions under this Section both as torture and sexual slavery in violation of Article 172 (1) (f) and (g) of the CC of BiH. The appellate argument is unfounded in its entirety. The first instance-Panel legitimately applied the following elements that constitute the crime of sexual slavery: i) intentional exercise of any or all of the powers attaching to the right of ownership over a person; ii) the perpetrator subjected a victim to sexual intercourse on one or more occasions. The first-instance Panel legitimately concluded, based on the presented evidence, that the injured parties were placed in the house in Trnovača against their will since they did not have an opportunity to genuinely consent to it, and that the witnesses FWS-186 and FWS-191 were subjugated to the conditions that amount to sexual slavery. Therefore, the first-instance Panel legitimately concluded that these actions amount to the elements of the criminal offence of torture due to the pain and suffering imposed on the injured parties and the discriminatory intention which is in the basis of that crime.

Having analysed the challenged Verdict in the part that pertains to the punishment, contrary to the averments in the appeal the Appellate Panel finds that the first-instance Panel applied Article 48 of the CC of BiH and properly meted out the sentence, mindful of all the circumstances that have an impact on the duration of the sentence, both subjective and objective ones, which pertain to the criminal offence and its perpetrator. To wit, the first-instance Panel sentenced the Accused to 34 years of imprisonment, which is an adequate punishment given the degree of the criminal responsibility, motives of the offence, degree of violation of protected value, number of actions, and the personal situation of the Accused. The appellate argument that the first-instance Panel should have taken into consideration the fact that the Accused voluntarily turned himself in is unfounded in its entirety. All the more, the decisive fact in this regard is that it was almost nine years that took the Accused to turn himself in to the relevant authorities, namely, from 26 June 1996 when the ICTY filed the first Indictment against him and issued an arrest warrant until 14 May 2005 when he turned himself in. The failure of the Accused to turn himself in during this period of almost nine (9) years

degrades the meaning of voluntary surrender as a mitigating circumstance. (*see Simić et al. case, Paragraph 1086, Judgment of the Trial Chamber dated 17 October 2003*). Furthermore, this Panel holds that the cooperation with judicial authorities may be taken into consideration in case of entering a guilty plea or an agreement on the admission of guilt, otherwise every accused person is expected to conduct properly before the Court during the proceedings because the law clearly prescribes the measures which may be taken for the sake of procedural discipline. For the foregoing reasons, this Panel finds that the fact that the Accused's conduct was fair during the proceedings does not amount to a mitigating circumstance in terms of meting out the sentence. Furthermore, the issues concerning the ill health of a convicted person should normally be a matter for consideration in the execution of the sentence, while only in exceptional circumstances or rare cases should ill health be considered as a mitigating circumstance (*see the Simić case, Paragraph 98, Judgment of the Trial Chamber dated 17 October 2002*). However, in this specific case the requirements have not been met to consider the health situation of the accused, Gojko Janković, in mitigation. The Appellate Panel finds that the pronounced sentence is adequate in view of the severity of the criminal offence of which the Accused was found guilty, where the protected value is of a wider social importance and as such it is also treated through international jurisprudence. Furthermore, it carries a special bearing from the psychological, moral, religious, customary and other aspects, including the lives of the victims themselves and their family members. The Panel finds that the pronounced sentence of long-term imprisonment was legitimately meted out and is adequate in achieving the purpose of the criminal sanction and the purpose of sentencing.

Furthermore, having analysed the case file, and contrary to the appellant's averments, the Panel finds that on 15 May 2006, an *ex officio* Defence Counsel was appointed for the Accused based on Article 45 (3) of the CPC of BiH, that is, because this Article of the CPC of BiH provides for mandatory defence by prescribing that after an indictment has been brought for a criminal offense for which a prison sentence of ten (10) years or more may be pronounced, the accused must have a defence attorney at the time of the delivery of the indictment. Furthermore, it was not proven in the criminal proceedings that the Accused is indigent, so bearing in mind that the Appellant failed to substantiate his arguments based on which the Panel could find that the payment of the criminal proceedings costs would endanger the subsistence of his family members, the Appellate Panel finds that the legal requirements have not been met to relieve the Accused of the duty to reimburse the costs of the criminal proceedings as prescribed by Article 188 (4) of the CPC of BiH.

Furthermore, after the first-instance verdict was handed down, custody of the accused was extended in line with Article 287 of the CPC BiH, as read with Article 138 (1) of the CPC BiH, which, according to the Decision, may last until the verdict becomes final. Bearing in mind that Article 2 of the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, dated 13 April 2007, effectively amends Article 138 (3) of the CPC BiH by allowing that custody, ordered or extended under Paragraph 1 of the mentioned article, may last until the person is committed to serve his prison sentence, but not longer than the period of punishment imposed by the final verdict, the Appellate Panel has reached the decision as stated in the operative part of the Verdict, so that the time the Accused spent in custody between 14 March 2005 and

the moment of his committal to serve the prison sentence shall be credited towards the sentence.

For the foregoing reasons, in line with Article 310 (1) as read with Article 314 of the CPC of BiH, the decision was reached as stated in the operative part of this Verdict.

Record-keeper
Melika Bušatlić

Presiding Judge
Azra Miletić

LEGAL REMEDY: This Verdict may not be appealed.

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

Sarajevo, 29 January 2008
[redacted]
Certified Court Interpreter for English