



The other parts of the Verdict remain unchanged.

### REASONING

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

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

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

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

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

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

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

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

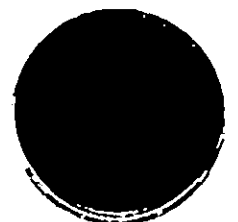
## **I. Grounds for contesting a verdict as referred to in Article 296 of the CPC BiH**

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

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

### **I. Legal Errors**

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



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

## 2. Factual Errors

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

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



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

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

## **II. The Case Grounds of Appeal**

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

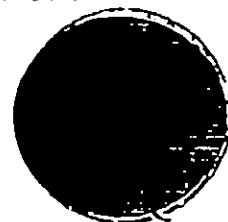
1. violation of the European Convention on Human Rights and Fundamental Freedoms;
2. an essential violation of the criminal procedure;
3. the erroneously or incompletely established state of the facts;
4. a violation of the criminal code, and
5. the decision as to the sanction.

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

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

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<sup>1</sup> In its reasoning in the case AP 661/04



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

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

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

## 2. Essential Violations of the Criminal Procedure

### 2.1 General allegations

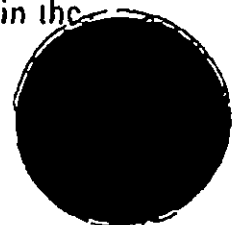
The Defence alleges in its appeal that: the Verdict is incomprehensible, contrary to itself and its grounds and lacks grounds. Namely, the Verdict is based exclusively on subjective evidence, particularly on witness statements. No matter how thorough, the witness statements cannot be unreservedly accepted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

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

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

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

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



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

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

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

Having reviewed the Verdict, the Appellate Panel notes that the Trial Panel adduced evidence by examining both Prosecution and Defence witnesses and reviewing the proposed material evidence and evaluated the evidence individually and in combination<sup>2</sup>, including inconsistencies of testimonies and credibility of witnesses.

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

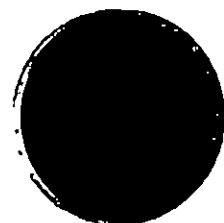
In terms of establishing the "participation" of the Accused in the widespread and systematic attack, his actions are clearly described, on one side, when the Trial Panel considered the nexus between the acts of the Accused and this attack and, on the other side, the prohibited acts which were committed by the Accused as part of this attack and his knowledge of this attack<sup>4</sup>. The prohibited acts are described in detail in the Counts of the Indictment of which he is found

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<sup>2</sup> At pg 17.

<sup>3</sup> At pg. 18

<sup>4</sup> At pgs 19 and 21



guilty and consist in depriving the lives of persons, aiding in rape, acting as a co-perpetrator in torture, forcible transfer and destruction of Muslim property, that were taking place during the period immediately after the widespread and systematic attack against the civilian population of Višegrad Municipality; his actions were part of that attack and were designed to further the progress of this larger attack. It has been established that the Accused was involved in taking the civilians for interrogations which would result in inhumane and degrading treatment either by the Accused himself or other individuals<sup>5</sup>.

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

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

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

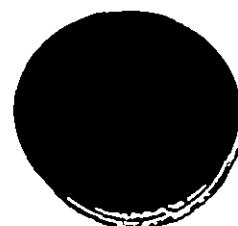
The Appellate Panel cannot find anything, at least in relation to these general allegations of the Defence, which makes the Verdict internally inconsistent about the conclusions or the reasoning used by the Trial Panel in finding the Accused guilty that were not well founded in the evidence. Further,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

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<sup>5</sup> Pg 19

<sup>6</sup> Pg 21

<sup>7</sup> Pg 21



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

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

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

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

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

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

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

### **2.3. Violation of Article 14 of the CPC BiH**

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

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

### **2.4. Credibility of certain Prosecution witnesses**

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

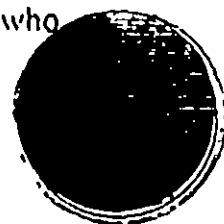
The Defence further alleges that "following a detailed analysis of the statements of certain witnesses from 1994 up until the handing down of the verdict, the Women-Victims of War Association headed by Bakira Hascić had the most decisive influence on the witnesses. It is the Association's legitimate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

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

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

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

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



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

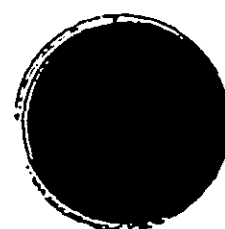
### **3. The erroneously or incompletely established state of the facts**

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

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

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

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



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

### 3.1. Section 1 of the Verdict

#### A) The Appeal

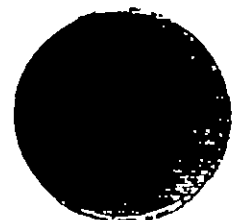
The Defence claims that the Verdict found the accused Nenad Tanasković guilty solely on the basis of the testimony of one witness, whose contradictory statements given during the investigation most seriously throw into doubt the truthfulness of her testimony given at the trial. Even more, these contradictions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

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

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

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

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



## B) The Verdict

The Appellate Panel notes that the Defence made the same objection, in its closing argument<sup>8</sup>. The Trial Panel took into consideration the objection "that this Count of the Indictment was based on the testimony of only one witness, that is, the protected witness, and that a conviction cannot be established on such testimony"<sup>9</sup>.

In response to these assertions, the Trial Panel<sup>10</sup> explained that "it is free to evaluate the evidence. Pursuant to Article 15 of the BiH CPC, the Court has the right to evaluate the existence or non-existence of facts and that right is not related to special formal evidentiary rules. In the opinion of the Panel, if certain evidence is lawful and valid, and if it is authentic and credible, such evidence can be sufficient to establish that a criminal offense has been committed, even if that evidence comes from only one witness. The crime of rape is rarely committed before witnesses. The Panel noted that Witness A gave a highly emotional and, for her, painful testimony. The Trial Panel found that there were no inconsistencies in her testimony with regard to what happened to her or with regard to the actions of the Accused. Furthermore, part of her testimony is supported by Defence witness Dragiša Trifković. It is also important to note that the rape occurred in Višegrad, which is indicated by the established fact that is adopted by this panel as number 21: 'Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes or beatings'<sup>11</sup>.

The Appellate Panel also observes that the Trial Panel<sup>11</sup> described the criteria it relied on to evaluate the evidence given by the witness A. In its explanation of the criteria it placed special emphasis on how it evaluated the evidence from a single eye-witness. The criteria used by the Trial Panel are consistent with the legal provisions of the CPC of BiH and the international practice<sup>12</sup>. The Trial Panel, in addition, looked to other reliable evidence, including testimony of other witnesses and its direct observation of the demeanour of the witness during her trial testimony. After the Trial Panel discussed the evidence that corroborated Witness A's account, including testimony from one of the

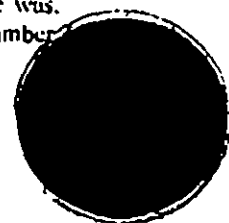
<sup>8</sup> Pg 16 of the Verdict: When Count 1 of the Indictment is in question, the Accused did not have any control over the events in the Police Station, and the evidence does not show that he committed the offense of rape. This Count of the Indictment is based on the statement of only one witness,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

<sup>9</sup> Pgs 29 and 30

<sup>10</sup> Pg 30 of the Verdict

<sup>11</sup> Page 30 of the Verdict

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



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

Regarding the allegation that it is not proven that Nenad Tanasković arbitrarily deprived Witness A of her liberty and as for the circumstances of the alleged deprivation of liberty of Junuz Tufekčić, the Appellate Panel notes that evidence was adduced from at least two witnesses who corroborated the events and the participation of the Accused, including his level of participation. In fact, the Trial Panel clearly and thoroughly analysed the evidence<sup>13</sup> which allowed it to conclude that "in that same manner and resulting in the same consequence for the victim (apprehension and taking to the police station), the Accused also arbitrarily and intentionally deprived Junuz Tufekčić of his liberty without giving him any explanation or information as to why he was apprehending him or where he was taking him".

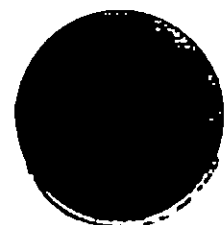
The Trial Panel also explained why and how it reached the conclusion that Nenad Tanasković acted as an accomplice when depriving Witness A and Junuz Tufekčić of their liberty. The Verdict<sup>14</sup> reads that "the fact that the accused was an accomplice is reflected not only in the fact that he, by acting with Nenad Mirković, deprived these two persons of their liberty, but also in the fact that the Accused made a decisive contribution to the subsequent detention of those persons during the time they spent in the police station where other persons took control over them; to which the Accused made a decisive contribution as described above".

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

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

<sup>13</sup> Pg 23-26

<sup>14</sup> Pg 25-26



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

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

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

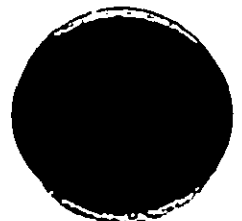
The Appellate Panel further notes that the Verdict reasonably explains how the Accused is an accessory in the criminal offence of rape. The Verdict reads that "the causative-consequential connection between the actions of the Accused and the consequence that resulted is clear, and, considering the event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

In relation to the personal responsibility of the Accused, the Trial Panel requalified<sup>16</sup> the mode of responsibility of the Accused. After carefully and in

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<sup>15</sup> Pg 27

<sup>16</sup> Pg 28





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

#### B) The Verdict

The Appellate Panel notes that the argument was already presented in the Defence closing argument<sup>17</sup>. The Trial Panel took it under due consideration<sup>18</sup> and explained as follows: "With regard to Count 2 of the Indictment, the Defence objected that the evidence concerning the beating up of the brothers was not reliable. The Accused stated that he had taken away the Dolovac brothers for interrogation, but only upon the order of Vlatko Trifković. With regard to this, the Panel points out that the conviction on the basis of this Count is based on the testimony of witness Suvad Dolovac, who is himself the victim of this action of the Accused. The testimony of this Witness is substantiated in its key part with the testimony of witness Islam Cero who is the direct eye-witness of the Dolovac brothers' apprehension. There are minor inconsistencies between the accounts of these two witnesses: Islam Cero recalled the vehicle in which the Dolovac brothers were taken away to be a Red Passat, whereas Suvad Dolovac identified it as a Renault 21, a shade between blue and green. Further, Islam Cero recalled two soldiers in the trunk of this vehicle. However, the Panel finds that these discrepancies are irrelevant to the substance of the Count and that it is inevitable that accounts will differ between witnesses in minor respects, particularly given the passage of time. As such, these inconsistencies do not undermine the credibility of witness Suvad Dolovac who gave a detailed, consistent and credible testimony".

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

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

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

<sup>18</sup> Pg 38











































