31 07. 2008. god.

SUD BOSNE I HERCEGOVINE

СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Суд БиХ / Суд БиХ
Кривично одјељење I Апелационо одјељење /
Кривично одјељење I Апелационо одјељење
Одјел I I Одјел II / Одјел I и Одјел II
Одјелење за ратне злочине / Одјелење за судску управу
x. KR-07/431
Prend dok. br. 316.

No. X-KR-07/431
Sarajevo, 29 April 2008

IN THE NAME OF BOSNIA AND HERZEGOVINA!

Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel composed of Judge Davorin Jukić as the Presiding Judge and Judges Lars Folke Bjur Nysurom and Patricia Whalen as the Panel members, with the participation of the Legal Advisor Melika Bušatlić as the minutes-taker, in the criminal case against the accused Suad Kapić for the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC BiH) in conjunction with Article 180(1) of the CC BiH, following the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-225/07, dated 16 October 2007, which was confirmed on 19 October 2007, after the main trial, parts of which were closed for the public, in the presence of the accused Suad Kapić, his defense counsel, Attorney Senad Kreho, and the Prosecutor of the Prosecutor's Office of BiH Milorad Barašin, on 24 April 2008 reached and on 29 April 2008 publicly announced the following

VERDICT

THE ACCUSED

SUAD KAPIĆ, aka *Hodža*, son of Mujo and Rasima, née Huskić, born on 31 July 1975 in Cazin, Personal Identification Number 3107975112462, residing at the address Ćoralići bb in Ćoralići, Muslim – Bosniak, BiH citizen, bee-farmer, literate, completed Two-Year College of Economics, married, father of two underage children, served the army in 1994 in the RNC /*Recruit Training Center*/ Koprivna, corporal, no decorations, no prior convictions, no other criminal proceedings underway, of average financial standing,

Pursuant to Article 284(c) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC BiH)

IS HEREBY ACQUITTED OF THE CHARGES

That

During the state of war in BiH, as a member of the 3rd Battalion of the 517th (Liberation) Cazin Brigade of the 5th Corps of the Army of the Republic of Bosnia and Herzegovina, in the area of the Sanski Most Municipality, within the military operation *Sana 95* in September 1995, he acted contrary to the rules of international humanitarian law, Article 3(1) and (2)(a), Articles 4, 5 and 13 of the Third Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, and contrary to Article 4(2) of the Protocol II Additional to the Geneva Conventions, and relating to the Protection of Victims on Non-International Armed Conflicts of 12 August 1949, namely that:

On 18 September 1995, early in the morning, in the area of the village of Dabar, the Sanski Most Municipality, as a member of the 3rd Battalion of the 517th (Liberation) Cazin Brigade of the 5th Corps of the Army of RBiH, in the combats with members of the VRS /the Army of

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Republika Srpska/, which also included the 6th Sana Brigade and the civilian police of the Public Security Station Sanski Most, together with other members of the 517th Brigade of the 5th Corps of the Army of RBiH, he participated in the capturing of Duško Čuković, son of Rajko, born on 12 April 1958 in D. Kozica – Sanski Most Municipality, Dragan Stupar, son of Miloš, born on 26 April 1972 in Sanski Most, Radovan Mudrinić, son of Milan, born on 27 May 1969 in the village of Dabar – Sanski Most Municipality, Goran Šućur, son of Mirko, born on 18 November 1971 in D. Kozica – Sanski Most Municipality, Milovan Mastikosa, son of Dušan, born on 14 June 1974 in Sanski Most, and Slaviša Đukić, son of Boško, born on 5 October 1974 in Kljevci – Sanski Most Municipality; they disarmed and then tied them in pairs of two with a rifle-cleaning rope so that Dragan Stupar and Milovan Mastikosa, Duško Čuković and Radovan Mudrinić, Slaviša Đukić and Goran Šućur were tied in pairs, and then, while they were tied in such a manner, they took them towards the nearby hill of Mrežnica, while the members of the Army of RBiH were saying to each other that they should call one *Hodža* and, soon afterwards, together with five or six unidentified soldiers, members of the 517th Brigade of the 5th Corps of the Army of RBiH, Suad Kapić, aka *Hodža*, came along and approached Slaviša Đukić, held a knife to his throat, and then put it back into the belt leather sheath, saying: "According to the Koran, it is a sin to slit one's throat, but not to kill", and then he ordered the captives to stand up as they were previously kneeling and, together with several other members of the Army of RBiH, he transferred them to another location about 20 meters up the hill of Mrežnica and ordered them to kneel down forming a line, their backs turned to him and to other members of the Army of RBiH, which they did in the manner that they kneeled down two by two at the distance of about two to three meters away from each other, so that Dragan Stupar and Milovan Mastikosa were the last in the line, and then an elderly soldier of about 50 years of age passed by them, carrying bread and military food containers, so called *manjirka* and, after asking someone of the members of the Army of RBiH who were present there: "Have you fed them?", he put a piece of bread into the mouth of every captive, and after that soldier left, there was silence which lasted for one to two minutes, and then Suad Kapić, aka *Hodža*, being aware that those were prisoners of war, with the intention to deprive them of their lives, fired in rapid succession from an automatic rifle and immediately after that he fired another round, which caused the following persons to fall down as they were shot to death: Goran Šućur, Slaviša Đukić and Duško Čuković, while the captives Dragan Stupar and Milovan Mastikosa remained kneeling, and Radovan Mudrinić, being seriously wounded, was still kneeling and „moaning" showing signs of life, and then someone of the members of the Army of RBiH who was present there said: "Stab that fat one, it seems that he had plenty of pork", and then Suad Kapić, aka *Hodža*, ordered to an unidentified soldier by his side to finish off Radovan Mudrinić, which he did by firing one more bullet at him, and immediately after that Suad Kapić, aka *Hodža*, said via the radio communications: "A small escape attempt, but it has been prevented", and shortly afterwards, Hasan Hadžalić, aka *Haro*, the Commander of the Reconnaissance and Sabotage Platoon of the 517th Brigade of the 5th Corps of the Army of RBiH *Apači* came to the scene, together with *S2* and other members of the Reconnaissance and Sabotage Platoon *Apači* and, after cutting off the rope with which they were tied, they took the surviving Dragan Stupar and Milovan Mastikosa with them and some 24 hours after that handed them over to the Military Police of the 5th Corps of the Army of RBiH, while the bodies of the killed Goran Šućur, Slaviša Đukić, Duško Čuković and Radovan Mudrinić were found at the same location several days after the described event.

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Therefore,

During the state of war in BiH, in violation of the rules of international humanitarian law, he deprived four prisoners of war of their life.

Whereby he would have committed the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) of the CC BiH in conjunction with Article 180(1) of the same Code.

Pursuant to Article 189(1) of the CPC BiH, the costs of the criminal proceedings shall be borne by the budget.

Pursuant to Article 198(3) of the CPC BiH, the injured parties Rajko Čuković, Mirko Šućur and Ljiljana Mudrinić, with the claims under property law which they have filed, and other injured parties, if they wish to file claims under property law, are hereby referred to take civil action.

Reasoning

Under the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ-225/07, dated 16 October 2007, which was confirmed on 19 October 2007, Suad Kapić was charged with committing the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) of the CC BiH in conjunction with Article 180(1) of the CC BiH by the acts described under Count I of the Indictment.

The accused Suad Kapić pleaded not guilty of the criminal offense charged against him in the Indictment.

The Prosecutor presented the following evidence:

Upon the motion of the Prosecutor's Office of BiH, the following persons were examined as witnesses: Izet Sović, Mesud Majetić, Hase Žunić, Ćazim Handanagić, Ale Rekić, Amir Hozdić, Ibrahim Nadarević, Hasan Hadžalić, Mile Šolaja, Ljiljana Mudrinić, Dragan Stupar, Milovan Mastikosa, the protected witnesses S1 and S2, Mirko Šućur and Rajko Čuković.

Furthermore, during the main trial the Court inspected the following documentary evidence which was tendered into evidence upon the motion of the Prosecutor's Office of BiH: Record of the examination of the witness Izet Sović, number KTN-RZ-66/07, dated 10 September 2007 (T-1); Record of the examination of the witness Mesud Majetić, number KTN-RZ-66/07, dated 11 September 2007 (T-2); Record of the examination of the witness Ćazim Handanagić, number KTN-RZ-66/07, dated 7 September 2007 (T-3); Scheme of the 517th Brigade of the 5th Corps of the Army of BiH (T-4); Record of the examination of the witness Ibrahim Nadarević, number KT-RZ-225/07, dated 11 October 2007 (T-5); Record of the examination of the witness Hasan Hadžalić, number KTN-RZ-66/07, dated 10 September 2007 (T-6); Record of the examination of the witness S1, number KTN-RZ-66/07, dated 7 September 2007 (T-7); Record of the examination of the witness S2, number KTN-RZ-66/07, dated 10 September 2007 (T-8); Information and documents relating to the VRS members who were killed, number 789-1/2007, dated 1 October 2007 (T-9); Excerpt from the criminal

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record, number 05-1/07-2-04-3-809/07, dated 26 September 2007 (T-10); Letter of the Cantonal Ministry for Issues of Veterans and Disabled Veterans, Cazin Section, number 12/6-41-2967/07, dated 28 September 2007 (T-11); Decision of the Cantonal Ministry for Issues of Veterans and Disabled Veterans, Cazin Section, number UPI-12/6-41-21/07, dated 10 January 2007 (T-12); CIPS record for Suad Kapić (T-13); Decision on declaring the state of war, Official Gazette of RBiH number 7, dated 20 June 1992 (T-14); List of soldiers sent to carry out the combat task, dated 6 September 1995 (T-15); Soldiers sent to carry out the combat task, Army of BiH, 517th Obr, 3rd Liberation Battalion, dated 10 September 1995 (T-16); List of the members of the 517th Liberation Brigade (T-17); Order for attack, operational number 01-1/352-327, strictly confidential, *Sana*, dated 17 August 1995, a textual-tabular section of the *Sana* operation plan, Deployment of forces 18089501 (T-18); Combat order, operational number 02/271-12, dated 12 September 1995 (T-19); Analysis of the completion of the combat task, number 02/497-2, dated 13 October 1995 (T-20); Analysis of the *Sana* operation – Report, strictly confidential number 02/3019-1, dated 3 December 1995 (T-21); Death certificate for Goran Šućur, number 202-100/07, dated 11 October 2007 (T-22); Death certificate for Duško Čuković, number 05-13-3-1/07, dated 11 October 2007 (T-23); Death certificate for Radovan Mudrinić, number 05-13-3-1/07, dated 11 October 2007 (T-24); Death certificate for Slaviša Đukić, number 05-13-3-1/07, dated 11 October 2007 (T-25).

The Defense for the accused presented the following evidence:

The following persons were examined as witnesses: Amir Dupanović, Arif Beganović, Firhad Porić, Dragan Stupar and Safet Begić.

Upon the motion of the Defense, the following documentary evidence was tendered: Record of the examination of the witness Amir Dupanović, number KTN-RZ-66/07, dated 6 September 2007 (O-1); Record of the examination of the witness Amir Hozdić, number KTN-RZ-66/07, dated 18 September 2007 (O-2); Record of the examination of the witness Ale Rekić, number KTN-RZ-66/07, dated 18 September 2007 (O-3); Record of the examination of the witness Hase Žunić, number KT-RZ-117/07 and KTN-RZ-66/07, dated 6 September 2007 (O-4); Record of the examination of the witness Mile Šolaja, number KT-RZ-225/07, dated 16 October 2007 (O-5); Record of the examination of the witness Ljiljana Mudrinić, number KT-RZ-225/07, dated 10 October 2007 (O-6); Record of the examination of the witness Milovan Mastikosa, number KT-RZ-117/07, dated 17 April 2007 (O-7); Record of taking the statement from the witness Dragan Stupar, number 10-02/2-656/05, dated 11 November 2005 (O-8); Record of the examination of the witness Dragan Stupar, number KT-RZ-117/07 and KT-RZ-30/05, dated 17 April 2007 (O-9); Record of the examination of the witness Mirko Šućur, number KT-RZ-225/07, dated 11 October 2007 (O-10); Record of the examination of the witness Rajko Čuković, number KT-RZ-225/07, dated 4 October 2007 (O-11); Two photographs of the accused Suad Kapić (O-12); Finding, evaluation and opinion, number 06/96-9595/95, dated 28 November 1995 (O-13); Copy of the BIRN BiH web page of 25 February 2008 (O-14); *Cazinetarhiva*, newsweekly, 19 January 2008 – 25 January 2008, number 109, year 4, 26 January 2008 (O-15); Overview of changes of personal details, 5th Corps (O-16).

In terms of Article 261(2)(e) of the CPC BiH, the Court presented the evidence by the additional examination of the witness Hasan Hadžalić and the protected witness S1.

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Procedural decisions

Pursuant to Article 235 of the CPC BiH, on 14 February 2008 and 21 February 2008, having heard the parties and with the consent of the parties and the defense counsel, the Court excluded the public from a part of the main trial in order to consider the Motion of the Prosecutor's Office of BiH to order additional witness protection measures since, according to the assessment of the Panel, that was necessary for the protection of interests of the protected witnesses. Under the Decision of the Preliminary Proceedings Judge number X-KRN-07/431, dated 21 September 2007, the witness protection measures were ordered so that the personal details of the witnesses remained confidential during the investigation and after the Indictment was filed, and the witnesses were given the pseudonyms S1 and S2, while the Prosecution was obliged to reveal to the Defense the name and surname of the witness at least 30 days prior to testifying at the main trial. On 14 February 2008, the Court considered the motion in relation to the witness S1 and on 21 February 2008 in relation to the witness S2 and found that in this case additional protection measures were also necessary during the testimony at the main trial. The Court assessed the fact that these witnesses were members of the same military unit as the accused and that they live in the area where witnesses or accessories and aiders and abettors also live. During the proceedings, the witnesses S1 and S2 were allowed to testify from a separate room, utilizing electronic distortion of the voice and image. The mentioned witnesses were informed about the additional protection measures which were proposed and ordered and they agreed to them, while the Court finds that exactly the measures which were ordered constitute adequate protection measures and that the purpose of the protection of the witnesses S1 and S2 may be achieved by their application.

Application of the substantive criminal law

The Court has established that the Prosecutor correctly qualified the factual allegations stated in the Indictment as the criminal offense of War Crimes against Prisoners of War referred to in Article 175(1)(a) of the CC BiH in conjunction with Article 180(1) of the same Code, and acquitted the accused of the charges due to lack of evidence.

Therefore, accepting the legal qualification given in the Indictment, the Court finds it necessary to point to the relevance of the principle of legality and the principle of time constraints regarding applicability in respect of the time of the commission of the criminal offense and the substantive law applicable at that time.

Article 3 of the CC BiH (Principle of Legality: *nullum crimen et nulla poena sine lege*) prescribes that "Criminal offenses and criminal sanctions shall be prescribed only by law" and that "No punishment may be imposed on any person for an act which, prior to being perpetrated, has not been defined as a criminal offense by law or international law, and for which a punishment has not been prescribed by law".

On the other hand, Article 4 of the CC BiH (the principle of time constraints regarding applicability) prescribes that "The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense" and that "If the law has been amended on one or more occasions after the criminal offense was perpetrated, the law that is more lenient to the perpetrator shall be applied".

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The principle of legality has also been prescribed by the European Convention on Human Rights (hereinafter: the ECHR) which, pursuant to Article 2(2) of the BiH Constitution, shall have priority over all national laws of BiH. Article 7(1) of the ECHR reads: "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offense was committed." This provision bars the imposition of a heavier penalty in comparison with the penalty applicable at the time of the perpetration of the criminal offense, without prescribing mandatory application of the law that is more lenient to the perpetrator of the criminal offense. However, Article 7(2) of the ECHR stipulates that: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."

In addition, Article 15(1) of the International Covenant on Civil and Political Rights (hereinafter: the ICCPR) prescribes that "No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby". Article 15(2) of the ICCPR, however, prescribes that: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

Finally, Article 4(a) of the CC BiH prescribes that "Articles 3 and 4 of this Code shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law".

Generally speaking, Article 4(a) of the CC BiH refers to "the general principles of international law". Article 7(2) of the ECHR refers to "the general principles of law recognized by civilized nations", and Article 15(2) of the ICCPR to "the general principles of law recognized by the community of nations". International law, the ECHR or the ICCPR do not recognize the term identical to the term used in Article 4(a) of the CC BiH and, therefore, the used phrase is the combination of "principles of international law" recognized by the UN General Assembly and the International Law Commission, on the one hand, and "general principles of law recognized by the community of nations" recognized by the Statute of the International Court of Justice and Article 7(2) of the ECHR and Article 15(2) of the ICCPR, on the other hand.

In fact, Article 4(a) of the CC BiH explicitly adopts the provision of Article 7(2) of the ECHR which enables considerable departure from the principle of Article 3 and Article 4 of the CC BiH, as well as the departure from the mandatory application of a more lenient law in the proceedings pending for the criminal offenses according to international law, which is exactly the case in the proceedings against the accused because that is exactly a criminal offense

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which includes the violation of international law. This has been the jurisprudence of the Court of BiH so far.[1]

Article 175 of the CC BiH prescribes War Crimes against Prisoners of War, which, at the critical time, was prescribed under Article 143 of the adopted Criminal Code of SFRY, which was then applicable in Bosnia and Herzegovina. The fact that the criminal offenses prescribed under Article 175 of the CC BiH can also be found in Article 143(1) of the CC SFRY provides for the conclusion that the criminal offense of War Crimes against Prisoners of War was prescribed by the law.

Also, as it is evident from these provisions, the punishment stipulated by Article 175 of the CC BiH is surely more lenient than the death penalty stipulated by Article 143 of the CC SFRY, which was applicable when the criminal offense was committed. As for Article 7(1) of the ECHR, the Court concludes that the application of Article 4(a) continues to be justified and meets the principle of time constraints regarding applicability, or, in other words, the application of "a more lenient law to the perpetrator". The Defense in this case did not challenge the application of the substantive law in the way the Prosecution legally qualified it in the Indictment.

The essential elements of the criminal offense charged against the accused are the existence of the armed conflict, the violation of the rules of international law by the accused, and the acussed's acts or omissions which are contrary to international law in relation to prisoners of war, that is, the existence of one of the relevant acts stipulated under subparagraphs (a) through (c) of Article 175 of the CC BiH.

Assessment of the presented evidence

Having conscientiously assessed evidence individually and collectively, the Court has ruled as stated in the operative part for the following reasons. It is indisputable that the state of war existed in the critical period of time, which was proved by the Decision of the Presidency of RBiH on Declaring the State of War, dated 20 June 1992 – Exhibit T-14 and also corroborated by the testimonies of the examined witnesses. Moreover, it indisputably follows from the presented evidence that the accused Suad Kapić was a member of the Army of RBiH, 5th Corps, 517th Liberation (Cazin) Brigade, 3rd Battalion, which is suggested by Exhibit number T-17 – List of the 517th Liberation (Cazin) Brigade of the 5th Corps, marked as strictly confidential, under number 1183, as well as Exhibit number T-15 – List of soldiers sent to carry out the combat task, dated 6 September 1995 (he is mentioned as a member of the *Karl Gustav* crew from the 517th Liberation Brigade, which is also confirmed by Exhibit number T-16 – List of soldiers of the 517th Liberation Brigade, 3rd Battalion, sent to carry out the combat task, dated 10 September 1995, where the name of Suad Kapić is mentioned under number 63. The Defense also did not challenge the mentioned fact during the evidentiary proceedings, while it was also confirmed by the testimonies of the examined witnesses.

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[1] *Verdict of Section I of the Appellate Division of the Court of BiH pronounced against Abduladhim Maktouf, number KPZ 32/05, dated 4 April 2006, whose appeal from this Verdict was dismissed by the Constitutional Court of BiH on 30 March 2007; Verdict of Section I of the Court of BiH pronounced against Dragoje Paunović, number X-KR-05/16; Verdict of Section I of the Court of BiH pronounced against Radovan Stanković, number X-KR-05/70; Verdict of Section I of the Court of BiH pronounced against Nikola Andrun, number X-KR-05/42; Nikola Kovačević, number X-KR-05/40*

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However, the Court was not presented with any evidence from which it would follow that the accused participated in the capture of Duško Čuković, Dragan Stupar, Radovan Mudrinić, Goran Šućur, Milovan Mastikosa and Slaviša Đukić. What is more, it follows from the testimonies of the witnesses who survived, Milovan Mastikosa and Dragan Stupar, that the person whom they called by the nickname *Hodža* came after their capture, that is, that that person was *not in the group of soldiers* who captured them.

The examined witnesses describe the critical event in different ways. Thus, it follows from the testimonies of the witnesses - survivors Dragan Stupar and Milovan Mastikosa that after the capture all of them were disarmed and tied two by two with a rifle-cleaning rope, their hands behind their back, after which they were taken towards the hill to a certain location. The witness Milovan Mastikosa stated that they were subsequently brought to a certain Hodža, while the witness Dragan Stupar stated that the members of the Army of BiH were saying to each other that they should call a certain Hodža and that Hodža came after a couple of minutes with 5 or 6 more soldiers. The witnesses Milovan Mastikosa and Dragan Stupar described that they were ordered to kneel down, after which they were taken to another location where they were also ordered to kneel down with their backs turned to the soldiers, and then an elderly soldier came carrying bread, and a piece of bread was put into the mouth of every captive, then there was silence, and then a burst of fire followed, as a result of which Goran Šućur and Slaviša Đukić were killed on the spot, while Mudrinić and Čuković were moaning, after which Čuković died, while Mudrinić tried to get up. The witness Stupar stated that Hodža fired a shot again after the burst of fire and that Radovan Mudrinić fell down again, but even then he tried to get up, and after the comment "this one had plenty of pork", filling up of the rifle ammunition clip followed, and a shot was heard again as a result of which Mudrinić fell down again. The witness Milovan Mastikosa stated that Hodža fired one more bullet in Mudrinić's back, then he stumbled again and fell down and when he got up for the second time, he probably ran out of ammunition, since he said to a soldier next to himself: "Stab this fat one, he had pork, you cannot knock him down", after which that other soldier fired a bullet and nothing more was heard. It follows from the testimony of the witness Milovan Mastikosa that after that he heard the filling of the ammunition clip behind his back and then the putting of the clip into the rifle and that he felt the rifle leaned against the right part of his back, and then the witness described the arrival of a person who he thinks saved him, and who argued with Hodža not to kill them, and then the Commander Hare came and, according to the testimonies of these witnesses, took over both survivors.

Although there are certain discrepancies in the testimonies of the survivors in relation to the shots which followed after the burst of fire and which were aimed at the killed Radovan Mudrinić, both survivors stated that three captives were killed after the first burst of fire and finally that all four captives were killed from fire weapons. However, the Court finds that the testimonies of the witnesses Dragan Stupar and Milovan Mastikosa are contrary to the testimony of the witness Dr. Mile Šolaja with respect to the injuries and wounds sustained by the four persons who were killed.

The Court gave full credibility to the testimony of the witness Dr. Mile Šolaja, finding his testimony credible, objective and reliable. This witness, as a doctor in the 6th Krajina Brigade, in the presence of a judge of the Municipal Court and a crime technician, made an external examination of the bodies of the persons who were killed. It follows from the testim

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this witness that the hands of the killed persons were tied with wire behind their backs and that there were numerous stab wounds all over their bodies, on all four corpses, while those wounds were caused both while they were alive and postmortem. This witness stated that all four corpses had a stab wound in the heart region, which was deeper than the other ones, a cut in the front part of the neck and were shot from fire weapons in the head, and that some of them had injuries inflicted by small caliber fire weapons, which doctor Šolaja concluded on the basis of the fact that there was no exit wound. In addition, it follows from the testimony of this witness, which constitutes Exhibit O-5, that the stab wounds were between 3 and 5 cm deep, that the wounds were inflicted while they were alive, and that it seemed as if someone was playing. Although more than 12 years have passed since this witness examined the bodies of the four persons killed, he remembers the examination well since he knew the killed persons, in particular Duško Čuković, who was Deputy Commander and with whom he played football, while it follows from his testimony that he also knew Radovan Mudrinić, and exactly those facts are the reason why he remembers the examination of exactly those four bodies even after so much time elapsed. Doctor Šolaja stated in his testimony that, exactly for the foregoing reasons, the examination of these four corpses is indelible even after 13 years, despite seeing so many things during the war, and he pointed out that it was not the first time that he was giving a statement about this event and that he did so previously in the District Court in Banja Luka and the Prosecutor's Office of BiH. In his testimony, doctor Šolaja additionally explained that he personally participated in the events on the Stanića hill, where he was also surrounded, and he remembered an event when during that period of time an acquaintance of his, with whom he played football, "got a stiffening pain in his back", and he had to take him together with a driver in an unknown direction, via Palanka, all of which additionally suggests that he remembers well the events related to those few days.

The Court also assessed the facts that Dr. Šolaja served the Yugoslav People's Army, that he is a doctor by his military occupational specialty, that he was engaged in the Sixth Krajina Brigade from the beginning of the conflict until the signing of the Dayton Agreement, and that he is an emergency medicine specialist. The Panel finds it necessary to point out that it indisputably follows from the presented evidence that the autopsy was not performed on the bodies of the killed persons and that Dr. Šolaja is not a forensic medicine expert; however, according to the assessment of the Panel, it indisputably follows from the foregoing facts that Dr. Šolaja has expert knowledge and experience on the basis of which he can objectively and professionally present facts relating to the injuries on the bodies of the killed persons, which Dr. Šolaja directly noticed during the external examination of the bodies of the killed persons.

Dr. Šolaja also stated that he knows Ljiljana Mudrinić, Radovan Mudrinić's wife, who also gave her testimony at the main trial, on which occasion she stated that, although she could not remember whether Dr. Šolaja told her anything about the time of death, "the only words of Dr. Šolaja I remember are that they were massacred and killed brutally."[1] This entirely confirms the fact that the witness Šolaja spoke truth before the Court and that he convincingly testified about what he had seen.

The exhumation and autopsy of the corpses were not carried out during the investigation in order to possibly resolve the dilemma concerning the injuries inflicted on all four persons, since the manner in which the mentioned persons were killed according to the survivors' description differs diametrically from the testimony of the witness Šolaja, the doctor who performed the external examination of the corpses. Due to the mentioned omissions in the

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investigation, serious doubts have also been raised about the allegations in the Indictment that the mentioned persons were fired at from automatic weapons, or the execution was carried out by small caliber weapons and cold weapons, as the witness Šolaja claimed. The testimonies of the witness Hasan Hadžalić and the witnesses S1 and S2 also leave room for the possibility that the mentioned persons were killed subsequently, after the witnesses who survived were taken over by soldiers of the Army of RBiH.

The testimonies of the witnesses Hasan Hadžalić, aka Hare, and the protected witnesses S1 and S2 are contrary to the testimonies of the survivors, since it follows from the testimonies of these witnesses that the two survivors were taken over by *Apači* members at the moment when all six captives were alive, and not after four of them were killed; according to their testimonies, those four captives remained alive at the moment when Dragan Stupar and Milovan Mastikosa were taken away with a fairly large group of members of the Army of RBiH. The witness Hasan Hadžalić stated in his testimony that the captives were brought to the Mrežnica hill and that six captives were tied, but he did not know exactly with what they were tied, and that he asked whether anyone of the captives was from Sana, after which a captive called Dragan responded and said that his colleague was also from that area, and the witness Hadžalić took them along with him after he had ordered that these two should be untied. It follows from the testimony of this witness that the other four captives remained in the mass of soldiers, while the two survivors practically spent two days and one night with him and his unit, after which he personally handed them over to the Corps Police. The witness Hadžalić mentioned the witnesses S1 and S2 as persons who were present when the two captives were taken away. In their statements given during the investigation and testimonies given at the main trial, the protected witness S2 and the witness Amir Hozdić, aka Ante, confirmed the testimony of the witness Hasan Hadžalić in all important and relevant parts and described the event in the same manner.

At the main trial, the protected witness S1 changed his testimony in relation to the statement given in the Prosecutor's Office of BiH, number KTN-RZ-66/07, dated 7 September 2007. At the main trial held on 14 February 2008, the protected witness stated that he knew nothing about four captives, that he did not see them either alive or dead and that he could only tell the truth regarding the two survivors. The witness repeated several times that Suad Kapić did not commit that crime and added that he did not personally see that Kapić killed the captives and he pointed out the fact that the accused was issued with some cannon, like a hand-held launcher, called *Karl Gustav*. Also, the witness S1 did not mention Hasan Hadžalić up until the moment when "a shell fell and those shells from Serb soldiers and tanks and cannons and anti-aircraft guns, then those bursts of fire were heard and then he shouted "What is going on up there" in the radio. The witness claimed that that was Hadžalić and that he heard the response that the 502nd should stop firing.

Contrary to the foregoing, during the investigation this witness stated that it was correct that 6 members of the Serb Army were captured, that 4 were killed, that members of the 3rd Battalion of the 517th Brigade did that, that Suad Kapić did that, but not alone. In his statement, the witness S1 repeated two times that he considered that Suad Kapić had not killed the four captives alone. The witness also stated that it was exactly he who asked *Hodžo*, that is, Suad Kapić not to kill the other two captives. Also during the investigation phase the witness stated that he was not present during that event, but that he only heard shots, and that he saw four of them dead when they were coming down from the village of Dab[redacted]

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statement, the witness S1 did not explain in any way on what basis he concluded that Suad Kapić participated in the killing of the four captives, bearing in mind that the witness is not an eyewitness to that event. Also during the investigation this witness did not state that Hasan Hadžalić was present when the two captives who survived were taken over or that he was with members of the *Apači* unit during the time which the two survivors spent with that unit. Given the contradiction between the initial statement of this witness and his testimony given at the main trial, in terms of Article 261(2)(e) of the CPC BiH, the Court *ex officio* summoned this witness, who pointed out in the reexamination that he did not remember the best everything he stated in the course of the investigation and that he was afraid during the examination because he was threatened with being handcuffed in Cazin. The witness explained that Hasan Hadžalić had brought the two captives who survived and that he was not sure if he had seen the four killed captives at all, since he saw some bodies, but he was not sure whether it was them. Also, the witness stated that Suad Kapić was in charge of the weapon *Karl Gustav* and that at one moment he asked for one of the captives from the witness, but he did not know why. Due to a number of contradictions and conflicting statements, the Court could not give credibility to the witness S1, while his initial statement was also not corroborated by other evidence in this case.

It follows from the presented evidence that members of the *Apači* unit took over the two captives who survived, Dragan Stupar and Milovan Mastikosa; however, their possible involvement in the events relating to the killed captives was not proven or explained.

Furthermore, the witness Arif Beganović, who was also in the area of the Dabar village in Grmečke koride, stated that he saw around twenty soldiers, out of whom six were captives, while the rest of them were members of the Army of RBiH; more precisely, there was Hare with 4 or 5 *Apači* members, one of whom was Ante, and there were soldiers in black fatigues, too. The witness described that he watched that group of soldiers with captives for some ten minutes and that Haro was arguing with his neighbor Sead Begić, who arrested the six Serb soldiers, and from whom Haro requested to take two captives, and, according to the witness, he finally did so. Also, the witness Amir Hodzić, aka Ante, confirmed that he heard from Sead Begić, a soldier who is recorded under number 10 in Exhibit T-16 as a member of the 3rd Banalion of the 517th Brigade, that there were 6 captives in total, that he captured them personally, and that four were killed. The witness Arif Beganović also described that prior to meeting that larger group of soldiers, he met an acquaintance of his with the nickname Tičar, who was one of those in charge of the weapon *Karl Gustav*, whom he asked for cigarettes. In his testimony, the witness Firhad Porčić also confirmed the meeting with the witness Arif Beganović (aka Afa Perin). It follows from the testimony of the witness Firhad Porčić that he was in charge of the weapon *Karl Gustav* as an assistant, together with Suad Kapić, who was a gunner, and that they moved together towards the forward command post, that is, the forest estate when they met a group of about 15 soldiers together with five or six captives. This witness also stated that he recognized Hare and another *Apači* member whose nickname is Ante in that group of soldiers and that he saw that Haro had a quarrel with someone. The witness Safet Begović confirmed the allegations of the witnesses Arif Beganović and Firhad Porčić.

Taking into consideration the foregoing, it is an indisputable fact that six captives were captured and that four were killed; however, the Court could not establish beyond reasonable doubt that the relevant event happened exactly in the manner stated in the factual description

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of the Indictment of the Prosecutor's Office of BiH. Bearing in mind that the burden of proof is on the Prosecution, as a party to the proceedings, the Court finds in the present case that the Prosecutor did not prove the allegations stated in the Indictment.

Identification of the accused

The Panel finds it necessary to point out that the criminal law systems of many countries recognize the need to exercise the utmost caution prior to convicting the accused on the basis of the testimony of a witness who identified him in difficult circumstances. In the second instance decision of the International Criminal Tribunal for the former Yugoslavia, the Appeals Chamber stated the factors which courts in many countries take as relevant to an appellate court's determination of whether a fact finder's decision to rely upon identification evidence was unreasonable: for example: "*identifications of defendants by witnesses who had only a fleeting glance or an obstructed view of the defendant; identifications occurring in the dark and as a result of a traumatic event experienced by the witness; inconsistent or inaccurate testimony about the defendant's physical characteristics at the time of the event; misidentification or denial of the ability to identify followed by later identification of the defendant by a witness; the existence of irreconcilable witness testimonies; and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.*"[2]

Regarding the identification of the accused, the Court could not establish beyond any reasonable doubt that the perpetrator of the criminal offense is exactly Suad Kapić. The witnesses Milovan Mastikosa and Dragan Stupar gave their statements on several occasions and, finally, their testimony at the main trial in this case. In his statement given to the Banja Luka Public Security Center, which constitutes Exhibit O-8, the witness Dragan Stupar described *Hodža* as a person of about twenty seven to thirty years of age, with a civilian visor cap on his head and a case sheath with a knife, which was made of calf leather, red and white color, and the witness stated that he could not give a more detailed description since he was not allowed to look at them, as they were constantly shouting "Keep your head down". During the investigation in the Prosecutor's Office of BiH, this witness stated that the person with the nickname *Hodža* is Hodžić from Bužim, which he was told by a soldier who guarded him later, and he described Hodža as a person who is 1.85 m tall, with a visor cap on his head and a short beard, which was not neat, but he probably had a beard because he did not shave since he was in the field, and as a person who was not of a large build, but rather thin, about 25 to 30 years old. In his statement given to the Prosecutor's Office of BiH, which constitutes Exhibit O-7, the witness Milovan Mastikosa stated that *Hodža* is short, dark, with prominent features and short, thin beard. Although in the same statement the Prosecutor asked the witness Milovan Mastikosa whether he was ready to identify *Hodža* in case he was arrested, no evidence was delivered to the Court that the identification of the accused by any witness was done during the investigation in terms of Article 85 of the CPC BiH. Although the witnesses Dragan Stupar and Milovan Mastikosa pointed at the accused in the courtroom as the person they consider the perpetrator of the criminal offense, that is, the person whom they referred to as *Hodža* in their testimony, the Court could not accept this as identification in terms of Article 85 of the CPC BiH. Bearing in mind the contradictions which exist between the description of the person called *Hodža* given during the investigation by the witnesses

[2] Case No. IT-95-15-A, Appeals Chamber Judgment of 23 October 2001, page 15, paragraph 40;

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Dragan Stupar and Milovan Mastikosa and the description of the accused, the Court could not give credibility to these witnesses when they pointed at the accused as the perpetrator of the criminal offense in the courtroom. Particularly in the cases with one accused, it is quite unquestionable and indisputable which person in the courtroom is the accused, given the arrangement of seats in it, especially for the witnesses Stupar and Mastikosa, who are police officers by profession. It follows from the testimonies of these witnesses that they saw the person whom they refer to as *Hodža* almost 13 years ago and during a relatively short period of time, in extremely difficult circumstances, while they faced a great danger and uncertainty about their own lives.

According to the assessment of the Panel, exactly the mentioned circumstances of this case indicated from the early stage of the investigation that there was a need to carry out identification in the way prescribed by the CPC BiH, in order to check whether the witnesses, after describing the person, are able to identify among several similar persons the person whom they previously saw at the place where the criminal offense was committed.

The Court notes the fact that the accused was 20 years and 2 months old at the time of the alleged perpetration of the criminal offense, and given the contradictions which follow from the statements and testimonies of the witnesses Milovan Mastikosa and Dragan Stupar, the Panel assesses that the Prosecutor failed to carry out identification in the way prescribed by the CPC BiH. Furthermore, it follows from the testimony of the witness Hasan Hadžalić that, while taking his statement in the Prosecutor's Office of BiH, the Prosecutor showed him a photograph of Suad Kapić, before which the witness did not know the name, surname or figure, and that he remembered only later, right after that photograph, and he stated that he saw Suad Kapić a couple of times, in passing. The witness Izet Sović also mentioned in his testimony that a photograph of the accused Suad Kapić was shown to him during the investigation. The showing of a photograph to those witnesses in the course of the investigation is not recorded in the records of the examination of the witnesses during the investigation, which constitute Exhibits T-1 and T-6.

Conclusion

The Court finds it necessary to point out that, in addition to the presumption of innocence, *in dubio pro reo* constitutes one of the basic principles of the criminal law. This means that in case of doubt, judgment should be passed in favor of the accused. When the Court has doubts regarding the question whether a certain fact which is to the detriment of the accused exists or not, the Court has to consider it unproven. In accordance with the principle *in dubio pro reo*, the Court will render a verdict of acquittal not only when it follows from the presented evidence that the accused did not commit the criminal offense, but also when the guilt of the accused was not proven, which means that any doubt about relevant facts must be reflected in favor of the accused, and it also means that the Court has to establish those facts with certainty and cannot have doubts about their existence.

Moreover, it is worth noting that the Court also took into consideration all other evidence presented at the main trial, but it did not find it necessary to assess all the evidence individually, since the evidence mentioned above and individually assessed is sufficient to raise serious doubts about the allegations stated in the Indictment, which finally resulted in the verdict of acquittal. Article 15 of the CPC BiH stipulates the principle of free evaluation

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of evidence without formal limitations and free from any rules, which again means that, in respect of the conclusions regarding the facts, the Panel is obliged to draw only those conclusions which have essential significance for the establishment of possible guilt.

Pursuant to Article 189(1) of the CPC BiH, given that the verdict which acquits the accused of the charges has been rendered, the costs of the criminal proceedings shall be borne by the budget. Also, pursuant to Article 198(3) of the CPC BiH, the injured parties Rajko Čuković, Mirko Šućur and Ljiljana Mudrinić, with the claims under property law which they have filed, and other injured parties, if they wish to file claims under property law, are hereby referred to take civil action.

Minutes-taker
Melika Bušatlić

PRESIDENT OF THE PANEL
JUDGE
Davorin Jukić

LEGAL REMEDY: An appeal from this Verdict may be filed with the Panel of the Appellate Division of the Court within 15 days from the receipt of the Verdict.

[1] Case: Sund Kapić, X-KR-07/431, dated 31 January 2008, page 64 of the transcript of the main trial

I hereby confirm that this document is a true translation of the original written in Bosnian/Serb/Croat.
Sarajevo, 07.07.2008

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