SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: KRŽ-07/405
Sarajevo, 2 September 2008

Court of Bosnia and Herzegovina, in the Appellate Division Panel of Section I for War Crimes, composed of Judge Azra Miletić as the President of the Panel and Judges Dragomir Vukoje and Marie Tuma as the Panel members, with the participation of the legal officer Medina Hababeh as the record-keeper, in the criminal case against the accused Ranko Vuković and Rajko Vuković for the criminal offense of Crimes against Humanity referred to in Article 172(1)(h) in conjunction with subparagraphs (a) and (g) of the Criminal Code of Bosnia and Herzegovina (the CC BiH), in conjunction with Article 29 of the CC BiH, all in conjunction with Article 180(1) of the CC BiH, deciding upon the appeals filed by the Prosecutor's Office of Bosnia and Herzegovina (the Prosecutor's Office of BiH) number KT-RZ 31/06, dated 28 March 2008, and the defense counsel for the accused, Attorney Veljko Ćivša from Sokolac, dated 11 April 2008, from the Verdict of the Court of Bosnia and Herzegovina number X-KR-07/405, dated 4 February 2008, at the session held in the presence of the Prosecutor of the Prosecutor's Office of BiH Behaija Krnjić, the accused themselves and their defense counsel, Attorney Senad Kreho from Sarajevo, on 2 September 2008 rendered the following

V E R D I C T

I The appeal filed by the defense counsel for the accused **is hereby upheld** and the Verdict of the Court of BiH number X-KR-07/405, dated 4 February 2008, **is hereby revoked in the convicting part,** and therefore a hearing shall be held concerning that part before the Appellate Division Panel of Section I for War Crimes of the Court of BiH.

II The appeal filed by the Prosecutor's Office of BiH **is hereby dismissed as unfounded** and the Verdict of the Court of BiH number X-KR-07/405, dated 4 February 2008, **is hereby upheld in the acquitting part**.

R e a s o n i n g

Under the Verdict of the Court of Bosnia and Herzegovina (the Court of BiH) number X-KR-07/405, dated 4 February 2008, the accused Ranko and Rajko Vuković were found guilty of committing the criminal offense of Crimes against Humanity referred to in Article 172(1)(h) in conjunction with subparagraph (a) of the CC BiH *(Section 1 of the operative part)*, in conjunction with Article 29 of the CC BiH, all in conjunction with Article 180(1) of the CC BiH, by the acts described in the operative part of the mentioned Verdict.

For the mentioned criminal offense the first instance court sentenced each of the accused to twelve (12) years of imprisonment and pursuant to Article 56 of the CC BiH the time spent in custody was credited towards the sentence imposed on them, namely the time from 18 September 2007 onwards was credited towards the sentence imposed on the accused Ranko Vuković and the time from 12 July 2007 to 19 September 2007 and from 26 September 2007 onwards was credited towards the sentence imposed on the accused Rajko Vuković, and pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC BiH), they were relieved of the duty to reimburse the costs of the proceedings, while pursuant to Article 198(1) and (2) of the CPC BiH, the injured parties Aljo Hukara and Munib Bekrija were referred to take civil action with their potential claims under property law.

Under the same Verdict, the accused Ranko Vuković was acquitted of the charges that, in the manner described under Section 2 of the operative part of the Verdict, he committed the criminal offense of Crimes against Humanity referred to in Article 172(1)(h) in conjunction with subparagraph (g) of the CC BiH, all in conjunction with Article 180(1) of the CC BiH, and the injured party was referred to take civil action with her claim under property law pursuant to Article 198(3) of the CPC BiH.

Within the statutory time-frame, the Prosecutor's Office of BiH filed an appeal from both the convicting and acquitting part of the Verdict, challenging the Verdict on the grounds of essential violations of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC BiH, incorrectly established facts referred to in Article 299(1) of the CPC BiH and the decision on the sentence referred to in Article 300(1) of the CPC BiH, and proposing that the Appellate Panel entirely uphold the appeal as well-founded, revise the contested Verdict in the acquitting part by finding the accused Ranko Vuković guilty of the committed acts and the offense charged against him under Count 2 of the amended Indictment, and then establish and impose on him a prison sentence for a term longer than the one imposed or revoke the Verdict in the acquitting part and conduct new proceedings, whereas with regard to the accused Rajko Vuković, revise the contested Verdict in its convicting part and impose on him the same type of punishment, but for a longer period of time.

The defense counsel for the accused also filed an appeal within the statutory time-frame on the grounds of a violation of the European Convention on Human Rights and Fundamental Freedoms, essential violations of the criminal procedure provisions, violation of the Criminal Code and incorrectly and incompletely established facts, proposing that the Appellate Panel uphold the appeal, revoke the first instance Verdict and order that the main hearing be held before this Panel.

In terms of Article 304 of the CPC BiH, at the public session of the Appellate Panel held on 2 September 2008, both parties presented their appeals and gave their responses to them. The Prosecution entirely maintained its allegations, while the newly chosen defense counsel, Attorney Senad Kreho, stated that the defense withdrew the part of the filed appeal relating to Article 297(1)(a) of the CPC BiH, pointing out that the defense did not want to challenge the professionalism of the judges, as it was done in the appeal. As for the remaining part of the appeal, the defense counsel entirely maintained the allegations stated in the appeal, referring in more detail to reasons which suggest essential violations of the criminal procedure provisions and incorrectly and incompletely established facts.

Having reviewed the contested Verdict within the limits of the allegations stated in the appeals in terms of Article 306 of the CPC BiH, the Appellate Panel decided as stated in the operative part for the following reasons:

With regard to the defense objections stated in the appeal and referring to the convicting part of the Verdict, which may be basically taken as the objection that the first instance Verdict made various forms of essential violations of the criminal procedure provisions referred to in Article 297(1)(k) of the CPC BiH, the Appellate Panel found that the objections were well-founded and that all requirements stated in the cited provision were met, given that the wording of the verdict is incomprehensible, internally contradictory and contradicts the grounds of the verdict and that the verdict contains no grounds or does not cite reasons concerning the decisive facts, because of which the state of the facts cannot for now be accepted as correctly or completely established and the application of the criminal code cannot be assessed as proper. Of course, the consequence of these violations is a mandatory revocation of the Verdict in the contested part, without reviewing the merits of the remaining objections stated in the appeal.

Only one of the violations referred to in this appeal is sufficient to bring about a mandatory revocation of the Verdict, and it refers to the omission in its operative part under Section 1 of the factual description where, describing the existence of a widespread and systematic attack carried out by military, paramilitary and police forces of the then Serb Republic of BiH, directed against Bosniak civilians of the Municipality of Foča, it does not specify the time of that attack. There are no indications as to when that attack began or until when it lasted. This determinant constitutes an important fact exactly for the revision of the validity of the facts established in the operative part according to which the relevant acts of the accused, which are linked to late May 1992, could be placed within the time frame of that attack, in other words, for establishing correctly whether the acts alleged in the Indictment to be committed by the accused constituted part of that attack. Without specifying the time frame of the widespread and systematic attack, it is impossible to establish the knowledge and awareness of the accused of its existence, as well as that their acts constituted part of that attack, without which there is no criminal offense referred to in Article 172 of the CC BiH.

In accordance with the foregoing, this Panel concludes that the operative part of the contested Verdict does not contain facts and circumstances which constitute the element of the criminal offense of Crimes against Humanity referred to in Article 172 of the CC BiH of which the accused were found guilty under Section 1 of the operative part of the contested Verdict, all of which makes the operative part of the Verdict incomprehensible.

Article 285(1)(a) of the CPC BiH stipulates that, in a guilty verdict, the Court shall pronounce the following: "the criminal offense of which the accused is found guilty along with a citation of the facts and circumstances that constitute the elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends".

The Indictment presented, and the first instance court accepted in the convicting part of the Verdict, the factual description of the offense which does not satisfy the criteria stipulated under the cited article.

The basic characteristic or general element *(chapeau)* of the criminal offense of Crimes against Humanity referred to in Article 172 of the CC BiH constitutes "a widespread and systematic attack directed against any civilian population, knowledge and awareness of the perpetrator that his acts constitute part of that attack and the commission of acts stated in the legal provision by the perpetrator".

On the basis of the accepted facts established by the ICTY, the first instance court indisputably established in the reasoning of the contested Verdict that *the armed conflict* in Foča broke out on 8 April 1992, which was sufficient for the conclusion that *"It is indisputable that a widespread and systematic attack against non-Serb civilians was ongoing at the time of the relevant events in the area of the Foča Municipality, which was established by the final ICTY Judgments in the cases Prosecutor v. Kunarac (case number IT-96-23-T and IT-96-23-23/1-T) and Prosecutor v. Krnojelac (case number IT-97-25-T)".*

This Panel holds that it is unclear on what basis the conclusion was drawn that the attack indisputably existed at the time of the relevant events in the village of Potkolun when such a conclusion cannot be drawn with certainty by a detailed analysis of the established facts accepted by the first instance court.

As the first instance Verdict acknowledges, a conclusion can be drawn from the established facts that *the armed conflict* in Foča began on 8 April 1992, which essentially implies the existence of two actively opposing parties, so the logic of the first instance Verdict that the

existence of the armed conflict *a priori* implies also the existence of a widespread and systematic attack cannot be accepted without an adequate factual basis. The first instance Verdict makes no attempt to notionally analyze the issue of the existence of the armed conflict and attack as described despite the fact that the information that also Kozja Luka, the village of the accused Vukovićs, was burnt by the Muslim forces because of which they fled to Miljevina and, finally, that their brother Luka was killed in that conflict, runs through the margin of the established factual complex, based on the testimonies of both groups of witnesses, those for the prosecution and for the defense.

Partially accepting the facts under its Decision dated 14 December 2007, the first instance court found it proven that Foča fell into the hands of Serbs sometime between 15 and 18 April 1992, that the attack against the non-Serb civilians continued after that, and that there were large-scale arrests of non-Serb civilians between 10 April and early June of the same year, but under the mentioned decision that court also accepted as an indisputable fact that the Serb forces attacked the Muslim civilian population from July to November 1992, so it is unclear which period the first instance Verdict took as the beginning of the attack.

If we add to this the position of the Court stated in the third paragraph on page 11 of the reasoning of the Verdict according to which "the attack" in the context of Crimes against Humanity under customary international law is not restricted exclusively to the existence of the "armed conflict", "that is, that (the attack) does not have to be part of the conflict", and if we bear in mind the proven fact under item 13 of the cited Decision, according to which an armed conflict between the Serb and Muslim forces broke out in Foča on 8 April 1992, paragraph 567, we may conclude from the foregoing that the first instance Verdict took the position that the attack took place outside of that conflict, that is, that it was linked to the period from July to November 1992, that is, after the relevant events in the village of Potkolun in late May of the same year, hence at the time when the relevant acts of the accused could by no means be incorporated in the broader contextual basis of the attack and thereby constitute part of that attack in terms of elements of this criminal offense.

The first instance Verdict not only failed to resolve in the convicting part all those major dilemmas relating to the issue of the time period of the mentioned attack, thus remaining incomprehensible, but it also did not mention in the factual description in the operative part the intent as a subjective element of persecution, without which it is not possible to constitute the criminal offense under Article 172(1)(h) of the CC BiH. The concept of persecution is defined under paragraph 2, subparagraph (g) of the cited article, and in terms of this article it is determined by the existence of the discriminatory intent; therefore, the Prosecutor's assertion made in the response to the appeal that mentioning the intent is irrelevant seems completely unfounded.

Although the legislator defined the act of persecution alternatively (persecution against any identifiable group or collectivity on political, racial, national, ethnic, religious or sexual gender or other grounds that are universally recognized under international law), these three models of persecution are cumulatively represented in the Verdict, without differentiation for each of them through adequate factual substrata in the operative part of the Verdict, which makes it additionally incomprehensible.

Things are no better regarding the intent of the accused to commit the criminal offense referred to in Article 172(1)(h) in conjunction with subparagraph (a) of the CC BiH, although not a single fact was stated in the factual description in the operative part under 1 from which the subjective attitude of the accused as perpetrators towards the act and the planned consequence could be visible.

Furthermore, it is stated in the legal description that the relevant criminal offense was committed by the accused in the way that "acting in collusion with other persons, they participated in *the joint criminal enterprise* with a common aim to deprive other persons of their lives", although that is by no means established in the factual description, that is, no facts were presented from which such a conclusion would follow.

Under the operative part of the Verdict, the accused were found guilty of committing the offense as co-perpetrators, so, in accordance with that, the acts of each of the co-perpetrators should have been clearly differentiated both in the operative part and in the reasoning of the Verdict and the acts of each of the accused as co-perpetrators from which legal elements follow should have been specified, since the existence of co-perpetration and the application of Articles 29 and 32(1) of the CC BiH depend on the description of those acts, given that each co-perpetrator is responsible within the limits set by his own intent. Since the contested Verdict failed to individually state the acts of each co-perpetrator in its operative part, it thus necessarily became incomprehensible.

The Appellate Panel points out that, in terms of Article 285(1)(a) of the CPC BiH, the factual description of the offense in the operative part of the convicting verdict must specify the act which constitutes the criminal offense and cite the facts and circumstances that constitute the elements of the criminal offense and those on which the application of a particular provision of the Criminal Code depends, which the first instance Verdict failed to do. This part of the Verdict has to be clear and definite, as well as complete, and it is inadmissible to replace the factual description with a paraphrase of the legal regulation.

All the foregoing and other omissions in the operative part of the Verdict which the defense meticulously presented in the appeal can be subsumed under a sub-ground of the appeal, which is basically the absence of reasons concerning the decisive facts.

The concepts of joint criminal enterprise and co-perpetration have no factual basis in the contested Verdict, but what we have here is a mere citation of the legal provisions or their interpretation. As the appeal properly noted in the context of the foregoing, it is impossible to find more responsibility of the accused in the legal conclusion than it follows from the factual description of the offense.

At this point it is important to note that the contested Verdict places joint criminal enterprise in parallel with co-perpetration, which the Appellate Panel finds unacceptable, since these two concepts are mutually exclusive and their coexistence is not possible. Article 29 of the CC BiH clearly defines the concept of co-perpetration, stating that: "if several persons, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution has been made to its perpetration, have jointly perpetrated a criminal offense." In that sense, if several persons were found guilty of committing the criminal offense as co-perpetrators, hence as the perpetrators of their own acts, the criminal acts of each individual co-perpetrator must be previously stated in the operative part of the verdict, since the existence of co-perpetration and the application of the cited article depend on the description of those acts. Furthermore, Article 32 of the CC BiH relies on the concept of the limited responsibility of accomplices and on the principle of subjective criminal responsibility which is completely autonomous and independent of others. Each accomplice is held responsible commensurate with the degree of his culpability, regardless of the extent to which other participants are held responsible or whether they are held responsible at all. Since the Verdict did not differentiate acts of each of the co-perpetrators either in the operative part or in the reasoning, which the defense noted in the appeal, it could not clearly and unequivocally establish the culpability of each of the accused, but the Verdict, contrary to Article 32(1) of the CC BiH, explained the

form of culpability jointly for both of the accused through the thesis of collective intent. Accordingly, it was not possible to establish the degree of criminal responsibility of each of them or, thereby, ultimately, successfully realize the legal principle of individualization of punishment.

On the other hand, the concept of joint criminal enterprise is not stipulated or defined in our criminal legislation nor did the first instance Verdict try to explain it conceptually; to wit, it is not known whether this is a case of a particular criminal offense[1] or a form of criminal responsibility, and if we accept the latter one, this concept is hardly in accordance with the classical concept of co-perpetration recognized by our criminal code.

The difference is incontestable between each of the three forms of joint criminal enterprise[2] established in the ICTY jurisprudence and the concept of co-perpetration in terms of Articles 29 and 32 of the CC BiH, particularly in the field of *mens rea,* since joint criminal enterprise implies common intent on the level of subjective element, in which the first instance Verdict is also explicit, while co-perpetration implies the principle of limited responsibility, so it is impossible to equalize criminal responsibility stipulated under the cited article with the concept of joint criminal enterprise developed in the ICTY jurisprudence, as the first instance Verdict completely erroneously did.

The Appellate Panel also concludes that, even if the concept of joint criminal enterprise in accordance with the ICTY jurisprudence would be accepted as a form of the perpetration of the offense, as the Prosecutor submits in the response to the appeal, without linking it to co-perpetration, the issue remains open concerning the proving of facts from which would follow the existence of both intellectual and voluntary element on the part of the accused with respect to their participation in the aspect of the realization of the joint plan, the establishment of *nexus* with it, as well as the occurrence of consequences envisaged by that joint plan. The Trial Panel went so far as to conclude that the accused need not have committed physically the act of murder to be held responsible (hence the impersonal form of the wording of the Verdict in the reasoning when it states that Avdo Hukara was killed), but it was sufficient that they willingly participated in the aspect of the common plan and that they intended to have that outcome, without presenting facts based on which that conclusion was drawn. One would say that the Verdict of the first instance court tries to make up for the lack of evidence in that field by the construction of joint criminal enterprise and the existence of common intent, which certainly cannot be done, at least not in the way in which the Verdict does so.

The analysis of the allegations of the defense witness Pašana Sejfić, who stated at the main trial that the fourth soldier in the column, unlike the third one who held the rifle at the ready, showed with his hand to run away, automatically demolishes the concept of common intent relating to the commission of murder as a fundamental offense within Crimes against Humanity, that is, common intent as a subjective element of joint criminal enterprise. So, at least one of the four Serb soldiers who entered the village on the relevant day, and from the presented evidence we do not know which one, showed with the mentioned gesture that he at least distanced himself from what followed later – deprivation of two persons of their lives, and therefore, for now, it was not possible to prove beyond reasonable doubt the intent on the part of the accused, that is, participation with others in the realization of the common objective. This very important factual detail gives full sense to the defense warning stated in the appeal according to which it was necessary to differentiate the acts of each of the co-perpetrators

[1] Article 180(1) of the CC BiH, from whose extensive interpretation the thesis about joint criminal enterprise is derived, is systematized under Chapter XVII of the CC BiH, hence outside of the general provisions of that code.
[2] See the Judgment of the ICTY Appeals Chamber in the *Tadić* case, dated 15 July 1999, paragraph 189.

through the factual findings. The first instance Verdict does not state its position regarding this factual circumstance to which the defense pointed in the appeal and therefore, in addition to the violations stated in the introduction, the result is that it does not contain any reasons at all, that is, it does not cite reasons concerning the decisive facts. Understandably, this implied deficiency in the field of completely and correctly established state of the facts.

In that respect, the Appellate Panel finds that the first instance Verdict, in view of the evaluation of evidence on which the decision concerning the responsibility of the accused for the criminal offense of Crimes against Humanity is based, does not give valid and acceptable reasons as to why it takes certain decisive facts as proved or unproved and does not explain or reason in an appropriate manner how it evaluated certain discrepancies in the witness statements given prior to the main trial and during the main trial and contradictions in the testimonies of the prosecution witnesses among themselves and in relation to the testimonies of the defense witnesses.

It is evident that there was no conscientious and careful evaluation of evidence individually and collectively, and the first instance court focused its attention on the prosecution evidence, failing to evaluate with equal attention or failing to evaluate at all the defense evidence, that is, accepting it fragmentarily only to the extent to which and when it was necessary to corroborate some of the prosecution evidence. Instead of resolving the issue of whether it was proven who the perpetrator of the relevant offense is through an in-depth analysis as mandatorily stipulated under Article 290(7) of the CPC BiH, the first instance Verdict is satisfied with the assessment that it gives credibility to the witness Bajro Hukara and other prosecution witnesses, that is, that it does not give credibility to the defense witnesses if their testimonies are contrary to the testimonies of the prosecution witnesses. That essentially tautological position of the Trial Panel constitutes a superficial evaluation and, if the overall state of affairs is taken into account, an unconvincing evaluation.

By doing so, the first instance court obviously violated the methodological approach stipulated under Article 14 of the CPC BiH when studying decisive facts, although it formally invoked it, given that it did not study and establish with equal attention facts that are exculpatory as well as inculpatory for the accused. Bearing this in mind, the Appellate Panel notes that the contested Verdict does not provide reasonable factual corroboration for the assertion that after the event in the village of Potkolun the four mentioned persons went away in an unknown direction, although the prosecution witness Bajro Hukara himself (and not only he), whose testimony was given full credibility, specifically stated that they went towards the village of Utulovići. That is a significant subsequent factual circumstance to which the defense pointed in its appeal with good reason, exactly in order for the defense to have an opportunity to challenge through its evidence the prosecution thesis about the presence of the accused in the village of Potkolun.

This is particularly so bearing in mind that the first instance Verdict gave full credibility to the testimonies of the prosecution witnesses Bajro Hukara and Zahida Hukara, without adequately reasoning numerous contradictions between these and the testimonies of the remaining prosecution witnesses, as well as the defense witnesses, in particular Pašana Sejfić and Neđo Todorović, concerning the decisive facts. The Verdict did not resolve through adequate reasons the dilemmas which follow from the contradictory testimonies of these witnesses, depending on the time when they were given (prior to the investigation, in the course of the investigation or at the main trial), and contradictions between them and other testimonies, to which the defense pointed in detail in its appeal, that is, it failed to evaluate in its reasons with particular attention not only contradictions among the subjective evidence concerning the decisive facts but also the circumstance that the witnesses Bajro and Zahida Hukara are privileged witnesses (married

couple), which in itself implies the need to pay particular attention when evaluating their testimony and to present adequate arguments in that respect.

The evaluation of evidence, as an important element of the content of the Verdict, should contain the explanation as to why the Court established the existence (or non-existence) of essential elements of the criminal offense and in what manner it evaluated the contradictory evidence presented in that context, which the first instance Verdict failed to do with respect to all essential elements relating to the relevant event described under Section 1 of the convicting part of the Verdict.

The first instance court completely excluded some evidence from the body of evidence based on which the disputable issue relating to who the perpetrator of the relevant offense is should be resolved, while its evaluation of the evidence which it included was far from the manner stipulated under 290(7) of the CPC BiH. Therefore, the conclusion by which this issue was resolved is unconvincing (it cannot be recognized as correct) if only because of the quality of the grounds that were explicitly stated, while, on the other hand, those grounds are incomplete. That means that the factual basis of the Verdict, in this part, is incomplete and superficial, to which the appeal pointed in detail.

For example, the contested Verdict does not even attempt to link, on the one side, the testimony of Bajro Hukara regarding the identification of Serb soldiers after their return from the village of Potkolun before one of them deprived Mejra of her life with, on the other side, the testimonies of Pašana Sejfić and Zahida Hukara, who, according to their and Bajro's testimony, were also eye-witnesses to the entry of those soldiers into the village (in the way that Pašana precisely described their behavior and movement), and these female witnesses did not identify those soldiers, although Pašana knew well both accused Vukovićs, while Zahida, as she asserted in her testimony, knew one of them. When assessing the credibility of Pašana's testimony, the first instance court is satisfied with stating that she was on good terms with the Vukovićs, but at the same time it does not answer the question why she would then run away from them if they entered the village on that occasion.

With regard to the prosecution arguments stated in the appeal and relating to the acquitting part of the Verdict (Section 2 of the Verdict), which basically refer to the incorrectly established facts in terms of Article 299(1) of the CPC BiH and an essential violation of the criminal procedure referred to in Article 297(1)(k) of the CPC BiH, this Panel has concluded that they are unfounded and, therefore, upheld the contested Verdict in this part.

To wit, under Section 2 of the Verdict, the accused Ranko Vuković was acquitted of the charges that he had committed the acts and the offense brought against him under Count 2 of the amended Indictment, that is, that within a widespread and systematic attack he persecuted Bosniak civilians on ethnic and religious grounds wherein he committed an act of rape against another person using force and making threats, directly attacking upon her life and limb in the manner described in the operative part of the Verdict. The Panel rendered this decision because, based on the established state of facts, it could not establish beyond any doubt that it was exactly the accused who committed the criminal offense, that is, the acts described under this section of the operative part. Analyzing the testimonies of the witnesses who testified about this circumstance, the Appellate Panel, too, has found that it could not be established from them with certainty that the accused Ranko Vuković carried out the acts charged against him.

The Prosecutor's appeal basically refers to the thesis that the first instance court based its decision of acquittal of the accused Ranko Vuković in relation to the commission of the offense stated under Section 2 of the operative part of the Verdict on the fact that the injured party,

Witness *A*, changed her statement given in the course of the investigation at the main trial in the way that on that occasion she stated that, upon the order of the accused, she undressed herself, as opposed to what she had stated earlier, namely that the accused himself ripped her clothes off. This appeal reduces the quality of this fact, holding that it is not important. Also, the Prosecutor submits in his appeal that the first instance court could not base such a decision on the fact that this witness did not mention the name of the accused Ranko Vuković as the perpetrator of rape in her anonymous statement given to SFOR members.

Hence, this appeal finds several omissions in this part of the Verdict, which it summarizes as the lack of reasons concerning the decisive facts, consciously disregarding the entirety of the factual complex and instead dealing only with those facts which, taken out of context and serving the purpose of this appeal, suggest a different meaning than the one stated by the first instance Verdict in the contested part. This Panel finds that those assertions are unfounded and that they cannot be corroborated by the analysis of the content of the contested Verdict in relation to this section of its operative part, taking it in its entirety.
That analysis shows that the contested Verdict contains valid and acceptable reasons concerning all the decisive facts. In fact, it cites the reasons concerning all the decisions that were rendered, and that is sufficient for its sustainability in the mentioned part.

First of all, before it drew the final conclusion that the Prosecution did not prove beyond reasonable doubt the guilt of the accused Ranko Vuković, the contested Verdict presented all evidence relevant to this count of the Indictment (and with respect to the proposed evidence which it refused, it gave definite and clear reasons as to why it did not accept them) and thus the following witnesses were examined during the first instance proceedings regarding the circumstances from this section of the Verdict: injured party *A*, as a direct witness, while the following witnesses were examined as indirect witnesses: Nada Stanković, Lucija Govedarica, aka *Ranka*, and Stanojka Govedarica, neighbors and friends of the injured party who maintained daily contacts with her and thus had certain relevant information about the life of the injured party and her family and about what was happening to her during the relevant period, and the Trial Panel fully complied with Article 281(2) of the CPC BiH when evaluating their testimonies.

Furthermore, when rendering its decision, the first instance court also took into account and assessed the objectively significant evidence (Record of the examination of this witness by the Prosecutor's Office, number KT-405/04, dated 9 September 2004, Anonymous statement given by Witness *A* to the National Gendarmerie, Multinational Unit of Military Police Mostar, PGSI Unit Rajlovac, dated 18 November 2003, translated from French into B/C/S, Official Note made by the International Prosecutor Halbach in the Prosecutor's Office of BiH case No. KT 405/04, dated 2 August 2004, and Summons to Witness *A* to be examined in the investigation in the Prosecutor's Office of BiH case No. Kt 405/04, dated 3 August 2004).

Regarding the Prosecution's arguments stated in the appeal which suggest that the fact that this witness did not mention the accused Ranko Vuković as a person who had raped her, in the statement given to the SFOR international forces on the record dated 18 November 2003, as well as that at the main trial she stated that she undressed herself before being raped, while in the statement given during the investigation she stated that the accused had previously ripped her clothes off, cannot be decisive for rendering the verdict of acquittal, this Panel concludes that they are unfounded. When drawing this conclusion, the Appellate Panel bears in mind that the mentioned circumstances cannot be assessed independently, without being linked with the other evidence, and, besides that, the allegations stated in the appeal are unacceptable which belittle the facts referring to the description of the manner in which the offense was committed, given that they incorporate the elements of the relevant criminal offense. Furthermore, the

conclusion that Witness *A* did not mention the accused in the statement given to the SFOR international forces was not crucial in establishing decisive facts, as the Prosecutor wrongly pointed out, but it is only one in a series of factual circumstances brought into the context of creating a credible picture that the commission of the relevant acts by the accused is proven. In addition, the fact is valid that the witness herself confirmed the authenticity of that statement, that what she said in that anonymous statement was tested during the cross-examination at the main trial, and that, finally, the Prosecutor himself pointed out in the appeal that this statement served as a basis for her examination in the Prosecutor's Office of BiH, and therefore the significance of its relevance cannot be reduced if only for these reasons.

This Panel has treated in the same way the changing of the statement of this witness at the main trial with respect to the manner in which she was raped. The fact that the first time she stated that the accused himself ripped her clothes off and then at the main trial that she herself took her clothes off before the rape, could not be the only decisive fact on which the Court would base its assessment, but bearing in mind all other circumstances established in the first instance Verdict, out of which it is necessary to single out that, as the witness herself claims, it was the first in a series of rapes, and considering all discrepancies in the disputable parts of the testimony in their entirety, a reliable and clear conclusion that the accused committed the rape at issue could not be drawn.

With regard to the objections pointed out by the Prosecution in the appeal, the Appellate Panel points out on this occasion that the first instance Verdict correctly evaluated the testimony of the injured party *A* in its entirety, and not only its fragments, which is the only correct approach to this issue when evaluating evidence.

There is no validity in the allegations stated by the Prosecution in the appeal that the Court, while evaluating the testimony of this witness, played the role of an expert witness when it concluded that the act of rape is an experience which remains deeply etched on every woman's memory and can hardly be forgotten, especially because the Prosecutor himself, as a counter-argument to the foregoing, states a number of circumstances which are nothing else but elements of a psychological assessment from which he ultimately draws a conclusion "that it could not be reasonably expected from such a witness to interpret hundred percent precisely all the facts about the entire relevant event". By doing so, the Prosecutor himself, according to his reasoning, plays the role of an expert witness, that is, falls into the trap of his own arguments.

This Panel shares the opinion of the first-instance Court, finding it illogical that, if Witness A remembers that traumatic event from which everything else started more distinctly than other rapes that followed in succession, she lost from her perception the figure of the accused as the perpetrator when she gave her first statement to an SFOR representative, without providing the least convincing explanation. The Appellate Panel holds that the witness not only had an opportunity but also the obligation to say the whole truth about all circumstances of such, for her certainly, traumatic event, including the name of the culprit.

This is particularly so because the witness later mentioned and described other rapes, that is, she remembered them clearly and named the known perpetrators thereof, while she did not mention this rape at all up until 2004, which this Panel finds to be illogical, especially because, as she herself claims, she knew the accused well. It is expected that a victim of such a heinous act feels the need to label the perpetrator as a rapist as soon as possible, especially if she knows his identity, in order to bring him to justice, particularly at the time when he could pose no threat whatsoever to her (about which the first-instance Verdict presented its position in detail in the fourth paragraph on page 28 of its reasons).

The Trial Panel had a correct approach to solving the issue concerning Witness *A*'s fear to mention the rape in question to the mentioned friends, which this Panel also finds to be illogical, considering the fact that she did not show that fear in relation to other rapes about which she talked to Ranka Govedarica and identified the perpetrators on that occasion.

With respect to the mentioned circumstance, it is also necessary to assess the testimonies of the defense witnesses Nada Stanković, Lucija Govedarica and Stanojka Govedarica, from which follows the conclusion that all three of them consistently stated that during the relevant period, as neighbors and friends of the injured party, they did not notice any changes on her or that anything unpleasant happened to her, except that her husband was taken away in July, and Stanojka Govedarica pointed out that they were on good terms and talked often and that she did not notice on her, either mentally or physically, that she had been raped.

Based on all the foregoing, the Appellate Panel concludes that it is indisputable that the injured party, Witness *A*, was raped on several occasions, however, what the Trial Panel found to be disputable and what was to be established in this case is – whether the accused Ranko Vuković committed the rape at issue, which was not proved also according to the correct assessment of the first instance court.

To wit, linking all the mentioned circumstances and considering them in their entirety, this Panel, just like the first-instance Panel, could not get a convincing picture of the commission of the relevant acts by the accused Ranko Vuković, that is, it could not establish beyond any reasonable doubt that the rape at issue was committed exactly by the accused Ranko Vuković.

Therefore, in terms of the correctness and credibility of the conclusion, there is nothing to be added to the conclusion of the first-instance court that it could not establish with certainty that the relevant rape was committed by the accused Ranko Vuković, given that the testimony of Witness *A* was very imprecise and that it changed (because of which the Prosecutor had to change the factual description of the Indictment in the relevant part), so that the Trial Panel held that that testimony was not convincing to the extent necessary to base the verdict of guilty solely on that testimony.

In the present case, the first-instance court was rightly guided by the basic principle of the CPC BiH "in dubio pro reo", according to which "a doubt with respect to the existence of facts composing characteristics of a criminal offense or on which depends an application of certain provisions of criminal legislation shall be decided by the Court with a verdict and in a manner that is the most favorable for the accused", and this Panel, too, has found that it was not proved that the accused Ranko Vuković committed the criminal offense charged against him, and therefore the appeal filed by the Prosecutor was to be dismissed as unfounded and the first instance Verdict was to be upheld in that part in terms of Article 313 of the CPC BiH.

Regarding the convicting part of the Verdict, as already stated, given that the established essential violations of the criminal procedure provisions constitute absolutely essential violations which entail the mandatory revocation of the first-instance Verdict and that the mentioned omissions also challenge the correctness of the established state of facts, the Appellate Panel upheld the appeal filed by the defense and, pursuant to Article 315(1)(a) and (b) and (2) of the CPC BiH, revoked the first-instance Verdict in that part and ordered that the hearing be held before the Appellate Panel of the Court of BiH.

During the retrial, the essential violations of the criminal procedure provisions which were made will be remedied, the evidence which was already presented will be presented again and, assessing the remaining arguments in the appeal, other evidence will be presented if necessary.

Bearing in mind that the first-instance Verdict has been revoked, the Appellate Panel has not engaged in an in-depth analysis of the remaining objections stated by the defense in the appeal or the objection raised by the Prosecution regarding the decision on the sentence, so as not to prejudice the outcome of the retrial, but, in terms of Article 316 of the CPC BiH, it only cited brief reasons for revoking the Verdict.

Record-keeper **President of the Panel**

Medina Hababeh
/Signature affixed/

Judge

Azra Miletić
/Signature affixed/

LEGAL REMEDY:
No appeal from this Verdict is allowed.

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

Sarajevo, 27.10.2008
Tijana Mihić
Certified Court Interpreter for English