

**X-KRŽ-07/431****Sarajevo, 11 September 2009****IN THE NAME OF BOSNIA AND HERZEGOVINA**

The Court of Bosnia and Herzegovina, in the Panel of Judges of the Appellate Division of Section I for War Crimes, Dragomir Vukoje as the Presiding Judge, and John Fields and Hilmo Vučinić, as members of the Panel, with the participation of the Legal Officer Nevena Aličehajić as the record taker, in the criminal case against the Accused Suad Kapić, aka "Hodža", for the criminal offense of War Crimes against Prisoners of War in violation of 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, deciding upon the Amended Indictment of the BiH Prosecutor's Office number KT-RZ-225/07 dated 4 September 2009, after the main trial held before the Panel of the Appellate Division, on 11 September 2009 rendered and in the presence of the Prosecutor of the BiH Prosecutor's Office, Dubravko Čampara, the Accused Suad Kapić, and his Defense Counsel, Attorney Senad Kreho, publicly pronounced on the same day the following:

VERDICT**THE ACCUSED:**

Suad Kapić aka Hodža, son of Mujo and Rasima née Huskić, born on 31 July 1975 in Cazin, PIN 3107975112462, residing in Ćoralići, at the address Ćoralići bb (*no number*), Muslim – Bosniak, citizen of BiH, bee-farmer, literate, finished Two-Year College of Economics, married, with two underage children, served the army in 1994 in the RNC (*Recruit Training Centre*) Koprivna, corporal, no decoration, no previous criminal record, no other criminal proceedings underway, of average income.

IS GUILTY**Because:**

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 region of the Municipality of Sanski Most, as part of the military operation "Sana 95" in September 1995, acted in violation of the rules of international humanitarian law, Article 3 (1) and (2) (a), Articles 4, 5 and 13 of the III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 in as much as he:

On 20 September 1995, in the early morning hours, in the region of the village of Dabar, Municipality of Sanski Most, as a member of the 3rd Battalion of the 517th (Liberation) Cazin Brigade of the 5th Corps of the Army of RBiH, in combat with the members of the VRS (Army of Republika Srpska) which also included the 6th Sana Brigade and the civilian

Police of the SJB (Public Security Station) Sanski Most, after the members of the Army of RBiH captured Duško Čuković, son of Rajko, born on 12 April 1958 in D. Kozica – Municipality of Sanski Most, 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 – Municipality of Sanski Most, Goran Šućur, son of Mirko, born on 18 November 1971 in Prijedor, 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 Prijedor, 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, and soon afterwards, together with five to six unidentified soldiers, members of the 517th Brigade of the 5th Corps of the Army of RBiH, he came along and approached Slaviša Đukić, held a knife to his throat and he then put it back into its belt leather sheath saying: “According to the Qur’an, it is a sin to slit throat but not to kill” and then, together with several other members of the Army of RBiH, he took 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 a manner that they kneeled down being tied two by two at the distance of approximately one to two meters so that Stupar Dragan and Milovan Mastikosa were the last in the line and then an elderly soldier of about 50 years of age passed by them bringing bread and military food containers, the so called *manjirka* and told “Hodža” to feed the men and then “Hodža” put a piece of bread into the mouth of every captive and after that, there was silence which lasted for one to two minutes, and then Suad Kapić aka Hodža, being aware that those were war prisoners, with a view of depriving them of their lives, fired at them in rapid succession from an automatic rifle and then he fired a shot directly from a close distance which caused the following persons to fall down as they were shot to death: Šućur Goran, Slaviša Đukić and Duško Čuković, while the captives Dragan Stupar and Mastikosa Milovan remained kneeling, and Radovan Mudrinić being seriously wounded, was still kneeling and "moaning" showing signs of life, and then Suad Kapić aka Hodža said: “Stab that fat one, it seems that he had plenty of pork“, and then one of the present soldiers fired one more bullet into Radovan Mudrinić and afterwards Suad Kapić aka Hodža said via the radio station: “A small escape attempt, but it has been prevented” and shortly afterwards, Hasan Hadžalić aka Haro, Commander of the Reconnaissance-Sabotage Platoon (IDV) of the 517th Brigade of the 5th Corps of the Army of RBiH *Apači* arrived at the site together with other members of the IDV *Apači* and they took the surviving Stupar Dragan 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 deceased Goran Šućur, Slaviša Đukić, Duško Čuković and Radovan Mudrinić were found at the same location several days after the described event.

Therefore,

During the state of war in BiH, in violation of International Humanitarian Law, he killed four prisoners of war.

Thus,

He committed the criminal offense of War Crimes against Prisoners of War as in violation of **Article 175a) of the Criminal Code of Bosnia and Herzegovina** in conjunction with **Article 180(1)** of the same Code,

Therefore, the Panel of the Appellate Division of the Court of BiH, pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), applying Articles 39, 42 and 48 of the CC BiH

C O N V I C T S H I M

T O A S E N T E N C E O F I M P R I S O N M E N T F O R A T E R M O F 1 7 (S E V E N T E E N) Y E A R S

Pursuant to Article 56 of the CC BiH, the time the Accused spent in custody under the Decision of this Court, starting from 21 September 2007 until 7 March 2008, shall be credited to the sentence of imprisonment.

Pursuant to Article 188(4) of the CPC BiH, the Accused is relieved of the duty to compensate the costs of the criminal proceedings that will be paid from the Budget of the Court of BiH.

R e a s o n i n g

Indictment

[1] Under the Indictment of the BiH Prosecutor's Office, number KT-RZ-225 dated 16 October 2007 that was confirmed on 19 October 2007 and amended on 4 September 2009 Suad Kapić was charged with the actions described under Count I of the Indictment and that he committed the criminal offense of War Crimes against Prisoners of War in violation of Article 175(1)(a) of the CC BiH, in conjunction with Article 180(1) of the same Code.

Procedural History

[2] By the Verdict of the Court of BiH number X-KR-07/431 dated 29 April 2008, pursuant to Article 284c) of the CPC BiH, the Accused Suad Kapić was acquitted of the charges that by the actions described in the Operative Part of the related Verdict he committed the criminal offense of War Crimes against Prisoners of War in violation of Article 175(1)(a) of the CC BiH, in conjunction with Article 180(1) of the same Code.

[3] By the Decision of the Appellate Panel of the Court of BiH, number X-KRŽ-07/431 dated 2 October 2008, the Appeal of the BiH Prosecutor's Office was granted and on the grounds set forth in Article 299(1) of the CPC BiH (Incorrectly or Incompletely Established Facts), the Trial Verdict was revoked and a retrial ordered to be held before the Panel of the Appellate Division of the Court of BiH, Section I for War Crimes.

Evidentiary Proceedings before the Panel of the Appellate Division of the Court of BiH

[4] After the revocation of the Trial Verdict, pursuant to Article 317 of the CPC BiH, the main trial was held before the Panel of the Appellate Division. The motions of both the Prosecution and the Defense to present again the evidence already presented were granted and to this end, the audio-video recordings of the testimony of all the witnesses for both the Prosecution and the Defense were reviewed before the Panel of the Appellate Division. The Panel reviewed and accepted all the documentary evidence that had previously been admitted before the Trial Panel.

[5] In this manner, the Panel accepted the following subjective evidence for the Prosecution: - the testimony of the witnesses Izet Sović, Mesud Majetić, Haso Žunić, Ćazim Handanagić, Ale Rekić, Amir Hodžić, Ibrahim Nadarević, Hasan Hadžalić, Mile Šolaja, Ljiljana Mudrinić, Dragan Stupar, Milovan Mastikosa, the protected witness "S-1", the protected witness "S-2", Mirko Šućur and Rajko Čuković.

[6] Further, the Panel accepted the following documentary evidence of the Prosecution: Record on Examination of Witness Izet Sović No. KTN-RZ-66/07 of 10 September 2007, Record on Examination of Witness Mesud Majetić No. KTN-RZ-66/07 of 11 September 2007, Record on Examination of Witness Ćazim Handanagić No. KTN-RZ-66/07 of 7 September 2007, Scheme - 517th Brigade of the 5th Corps of the Army BiH, Record on Examination of Witness Ibrahim Nadarević No. KT-RZ-225/07 of 11 October 2007, Record on Examination of Witness Hasan Hadžalić No. KTN-RZ-66/07 of 10 September 2007, Record on Examination of Protected Witness "S1" No. KT-RZ-66/07 of 7 September 2007, Record on Examination of Protected Witness "S2" No. KTN-RZ-66/07 of 10 September 2007, Information and Documentation on killed soldiers of the VRS, of 1 October 2007, No. 789-1/2007, Document of the II PA Cazin of 26 September 2007 (excerpt from the criminal record), Document of the Cantonal Ministry for Issues of Veterans and Disabled Veterans of Una-Sana Canton, Cazin Section, No. 12/6-41-2967/07 of 28 September 2007, Decision recognizing the status of war participant to Suad Kapić, of 10 January 2007, No. UPI-12/6-41-21/07, Excerpt from the CIPS record, Order proclaiming the general mobilization in the RBiH territory, List of soldiers sent to perform the combat task, record No. 709/7, List of soldiers sent to perform the combat task, record No.1177/3, 517th Liberation Brigade, Order to attack No. 01-1/352-327 of 17 August 1995, Combat Order op. No. 02/271-12 of 12 September 1995, record No. 1177 of 12 September 1995, Analysis of the completion of the combat task from 8 September to 8 October 1995, Army BiH 517th Brigade, 3rd Liberation Battalion, Analysis of the *Sana* Operation of 3 December 1995, Excerpt from the Register of Deaths for Goran Šućur, Excerpt from the Register of Deaths for Duško Čuković, Excerpt from the Register of Deaths for Radovan Mudrinić and Excerpt from the Register of Deaths for Slaviša Đukić.

[7] In the proceedings before the Appellate Panel, the Prosecutor's Office had only one new evidentiary proposal that the Panel accepted. Thus, the exhumation and forensic analysis was made of the mortal remains of the four killed soldiers of the VRS (Radovan Mudrinić, Duško Čuković, Slaviša Đukić and Goran Šućur). After the exhumation, the experts who participated in it, forensic expert Dr. Željko Karan, and ballistic expert Milko Marić, were heard as experts at the Main Trial before the Appellate Division Panel upon the motion of the Prosecutor's Office of BiH. The Appellate Panel admitted the following documentary evidence of the Prosecutor's Office: Findings and opinion of the expert witnesses Dr Željko Karan and Milko Marić titled "Exhumation of mortal remains of Radovan Mudrinić, Duško

Čuković, Goran Šućur, Slaviša Đukić", Video recording of the exhumations of the body of Radovan Mudrinić of 8 June 2009 and Goran Šućur of 9 June 2009, Video recording of the exhumations of the bodies of Duško Čuković and Slaviša Đukić of 9 June 2009, Photo documentation of the State Investigation and Protection Agency (SIPA) No 17-12/1-7-04-1-PT-136-5/09 of 9 June.2009 (Slaviša Đukić-exhumation of mortal remains), Photo documentation SIPA No. 17-12/1-7-04-1-PT-136-4/09 of 9 June 2009 (Goran Šućur-exhumation of mortal remains), Photo documentation SIPA No. 17-12/1-7-04-1-PT-136-3/09 of 9 June 2009 (Duško Čuković- exhumation of mortal remains), Photo documentation SIPA No. 17-12/1-7-04-1-PT-136-2/09 of 8 June 2009 (Radovan Mudrinić- exhumation of mortal remains), On-site investigation record No. 17-12/3-1-04-2-KEU-22/09 of 9 June 2009, On-site investigation record No. 17-12/3-1-04-2-KEU-20/09 of 9 June 2009, On-site investigation record No. 17-12/3-1-04-2-KEU-19/09 of 8 June 2009, On-site investigation record No. 17-12/3-1-04-2-KEU-21/09 of 9 June 2009, Sketch of the crime scene MUP RS, CJB, Crime Police Sector, Forensic Department Banja Luka - Goran Šućur case, exhumation of 9 June 2009, Sketch of the crime scene MUP RS, CJB, Crime Police Sector, Forensics Department Banja Luka- Radovan Mudrinić case, exhumation of 9 June 2009, Crime Scene Sketch, Cantonal MUP Bihać, Crime Scene Sketch Sanski Most, No. 230/09 exhumation case Duško Čuković of 9 June 2009 and Crime Scene Sketch, Cantonal MUP Bihać, Crime Scene Sketch Sanski Most, No. 231/09 exhumation case Slaviša Đukić of 9 June 2009.

[8] The Appellate Panel of the Court of BiH also admitted the Defense subjective evidence presented and accepted during the first instance proceedings and reviewed the audio-video recordings of the testimony of the Defense witnesses, namely: Amir Dupanović, Arif Beganović, Firhad Porčić, Dragan Stupar and Safet Begić.

[9] Also admitted was the Defense documentary evidence presented and received by the Trial Panel, namely: Record on Examination of Amir Dupanović of 6 September 2007, No. KTN-RZ-66/07, Record on Examination of Witness Amir Hozdić of 18 September 2007, No. KTN-RZ-66/07, Record on Examination of Witness Ale Rekić of 18 September 2007, No. KTN-RZ-66/07, Record on Examination of Witness Haso Žunić of 6 September 2007, No. KTN-RZ-117/07 and KTN-RZ-66/07, Record on Examination of Witness Mile Šolaja of 16 October 2007, No. KT-RZ-225/07, Record on Examination of Witness Ljiljana Mundrić, of 10 October 2007, No. KT-RZ-225/07, Record on Examination of Witness Milovan Mastikosa of 17 April 2007, No. KT-RZ-117/07, Record on Statement taking from Dragan Stupar, Public Security Center Banja Luka of 11 November 2005, Record on Examination of Witness Dragan Stupar of 17 April 2007, No. KT-RZ-117/07 and No. KT-RZ-30/05, Record on Examination of Witness Mirko Šućur of 11 October 2007, No. KT-RZ-225/07, Record on Examination of Witness Rajko Čuković, No. KT-RZ-225/07 of 4 October 2007, 3 photos, Finding, Evaluation and Opinion of the First Instance Military Medical Commission of 28 November 1995, BIRN BiH – justice report, Cazin net archive, Review of changes in personal data printed on 3 January 2000.

[10] The Appellate Panel also admitted the only new evidentiary proposal of the Defense presented before this Panel, the Letter of the Criminal Justice Department sent on behalf of Attorney Senad Kreho to the Basic Court in Gradiška, No. OKO-1-200-180809 of 18 August 2009, which was presented and admitted into the evidentiary material.

[11] The Appellate Panel also admitted the evidence that the Court presented *ex officio* during the first instance proceedings including the examination of witness Hasan Hadžalić and the protected witness “S-1”. The audio-video recordings of their hearing from the first instance proceedings were reviewed by the Appellate Panel.

PROCEDURAL DECISIONS

Decision on Admission into Evidence of Exhumation Records and Experts' Reports

[12] After the revocation of the Trial Verdict, at a status conference held on 16 March 2009, the Panel of the Appellate Division decided to accept the motions of the Prosecution and the Defense and that the evidence previously presented before the Trial Panel be presented before this Panel by reviewing the audio-video recordings of the hearing of all the witnesses in the first instance proceedings and that this Panel review all the adduced documentary evidence. It was done in the stated manner and all pieces of evidence adduced before the Trial Panel were accepted by the Appellate Panel.

[13] By a Decision issued at a hearing held on 25 May 2009, the Panel accepted the only new proposal by the Prosecutor’s Office, namely, to carry out an exhumation and forensic analysis of the mortal remains of the four killed prisoners of war, namely: Radovan Mudrinić, Duško Čuković, Goran Šućur and Slaviša Đukić.

[14] On the same day, the Court of BiH issued an Order for Exhumation and directed the Prosecutor’s Office to select a forensic and a ballistic expert to participate in the execution of this procedural action and to determine the precise time of its execution. At the same hearing, by an oral order, the Court of BiH required the Prosecutor to inform the Court of BiH and the Defense about these data and also about the precise locations of graves of the persons at issue where the exhumation would be carried out, and after the exhumation, a forensic analysis to deliver their findings and opinion to the Defense at least 8 days before the expert witnesses’ hearing at the main trial, all in order to secure the right to an adequate defense.

[15] On 2 June 2009, the Court received from the Prosecutor’s Office a notice with all the requested information. After the exhumation was carried out, the expert witnesses were summoned to a hearing on 22 June 2009, but due to justified reasons they did attend. However, at the hearing, it was noted that the exhumations were carried out pursuant to the Order of the Court of BiH, No. X-KRŽ-07/431, dated 25 May 2009, that the expert witnesses Dr. Željko Karan and Milko Marić had made the Findings and Opinions that were previously delivered to the Defense and at the hearing delivered with all the accompanying documentation to the case file.

I. Arguments of the parties

[16] At a hearing held on 19 August 2009, the Defense objected to the admission into evidence of the exhumation records and the expert forensic and ballistic analyses.

[17] The Defense argued that the Prosecution failed to properly notify the Defense and the Accused about the exhumation proceedings in accordance with Article 168 of the CPC of BiH, effectively denying the Accused an opportunity to be present and to participate during the exhumation proceedings. As a result, the Defense argued that the right of the Accused to a fair trial was affected and they petitioned the Court to order a new exhumation and a new forensic analysis of the mortal remains.

[18] The Defense also sought to challenge the proposed expert witnesses, Dr Željko Karan and Milko Marić, due to the fact that both of the expert witnesses had been criminally charged with bribery related to their official duties in 1996. They were pardoned in 1999. The Defense argued that the experts' past criminal record undermined their credibility. However, following additional argument, the Defense stated that for purposes of judicial economy it did not object to the experts' testimony at the hearing on 19 August 2009.

[19] The Prosecution opposed the Defense's motion to perform a second exhumation and an additional forensic analysis of the mortal remains. The Prosecution argued that the notice of the exhumation proceedings was sent to the defense counsel via facsimile on 3 June 2009, a copy of which was presented to the Court. The Prosecutor also argued that the names of the experts were selected from a list of experts maintained by the Court of BiH. The Prosecutor argued that although the experts had been criminally charged in 1996 those charges never resulted in criminal convictions. Thus, their credibility on this basis should not be an issue. Alternatively, the Prosecution argued that it is up to the Court to resolve the issue of the experts' competence and credibility.

[20] After the Court initially ordered a second exhumation, the Prosecution stated that a video had been taken of the first exhumation and they requested the Court to view the video. The Prosecutor alleged that there were many practical and logistical problems in performing the initial exhumation, which was confirmed by expert witness, Željko Karan. Dr. Karan stated that, in addition to logistical problems such as getting to and excavating the graves and rebuilding the gravestones of the alleged victims, they also had to rebuild the surrounding gravestones which were damaged by the excavation heavy machinery. He also stated that it took about three to four hours of discussion with the family members of the alleged victims before they could start the exhumation of the remains and that it would be a serious safety issue for the experts and the police officers if a new exhumation was ordered.

[21] Mindful of its obligation to conduct an efficient and expedited trial while strictly adhering to the right of the Accused to a fair trial, the Court decided to view the exhumation video record in the presence of the parties and to make a further determination thereafter as to whether an additional exhumation was required.

[22] After viewing the video record of the initial exhumation, the Defense Counsel stated that it did not have an objection to the authenticity of the evidence.

II. Discussion/Findings of the Court

[23] Article 168 of the CPC of BiH requires delivery of all case related documents by regular post mail. The question before the Court was whether a defective service of notice

via facsimile of the exhumation proceedings to the Defense Counsel was an error which affected substantial rights of the Accused to a fair trial.

[24] The term "substantial rights" refers to rights which are essential to a fair trial. Error which affects the substantial rights of the parties is generally understood to refer to errors which affect the fairness of the trial *as a whole* by calling into question the reliability of the verdict.

[25] Not all procedural errors, however, affect the substantial rights of the Accused to a fair trial. Some procedural errors, though technical violations, are not of such significance as to have affected the rendering of a lawful and proper verdict.

[26] The Court emphasized that Article 6 (1) of the European Convention of Human Rights (ECHR) and Articles 6 and 7 CPC of BiH guarantee a *fair trial* rather than an error-free or perfect trial. The intrinsic aim is to ensure the fairness of the proceedings *as a whole*. The European Court of Human Rights has always highlighted that domestic courts are in the best position to assess the evidence before them and to decide what is relevant or admissible and that the Court will not interfere unless there is something unreasonable and arbitrary on the face of the decision.¹

[27] In analyzing the Defense's claim of prosecutorial procedural error, namely an improper service of notice of the exhumation proceedings in violation of Article 168 of CPC of BiH, the Court focused on an analysis of whether the procedural error unfairly prejudiced the substantial rights of the Accused. Accordingly, the cornerstone of that analysis was the fairness of the trial. The Court's review of the technical error focused on an overview of the entire trial to determine whether the totality of circumstances unfairly prejudiced the Accused and denied him a fair trial.

[28] Having considered the arguments of the parties, the Court concluded that the Accused suffered no unfair prejudice based on the following observations:

- a. The exhumation was conducted in the presence of the Prosecutor and local police authorities. The exhumation proceedings were extensively videotaped and the video was reviewed during the hearing on 19 August 2009. The forensic and ballistics examination was conducted in an official and specialized medical facility in accordance with Article 104 of the CPC of BiH and the expert witnesses created a detailed photo record of the mortal remains prior to and during the examination. All of the images were documented in the joint report of the expert witnesses.
- b. The video was reviewed by the Panel, the attorneys and the Accused during the hearing on 19 August 2009. The video did not reflect any improprieties in the exhumation that would lead the Court to conclude that the rights of the Accused were unfairly prejudiced. The Defense did not challenge the authenticity of the video. However, the Defense Counsel raised an objection that the artifacts, such as a ring or a fired bullet found during the forensic processing of the skeletal remains, looked new which, as can be concluded

¹ *Canela Santiago v. Spain*, 60350/00 (Dec.) 4 October 2001; *Van Kuck v. Germany*, 12 June 2003, para. 46.

from the Defense assertions, gave rise to questions and suspicion as to the finding of these artifacts during the exhumation. In the opinion of the Panel, any suspicion as to the finding of these artifacts is removed by the logical explanation of the expert witness, Dr. Karan, who stated that these items were found during the process of decay cleaning of the skeleton and after water splashing, and that these items themselves were washed in water, after which they were video-recorded. This explains the appearance of the items that seemed like new. There is no room for any suspicion in that respect since the Prosecutor's Office, as a State-level body, maintained continuous supervision of the evidence obtained during the exhumation.

- c. The Defense itself had no objection whatsoever as to the professional part of the Findings and Opinion. Even more so, in withdrawing its arguments *in favorem* of the Accused, the Defense to a significant extent used the results of the expert analysis provided by the expert witnesses, which suggests an objective and professional manner in which the expert witnesses gave their expert opinions.
- d. The Defense Counsel for the Accused examined the expert witnesses in detail at the hearing

[29] Following a full review of the circumstances, the Court determined that although service of notice of the exhumation proceedings by facsimile was a technical violation of Article 168 of the CPC of BiH, the procedural error did not prejudice the Accused's right to a defense, that is, a fair trial. Nor did it affect the rendering of a lawful and proper verdict.

[30] The Appellate Panel reached this conclusion since an exhumation, just like the examination and autopsy of a corpse, represents an action of proof that is carried out by the Prosecutor's Office during the investigation pursuant to Article 103 of the CPC BiH, provided that, pursuant to Article 222 of the same Code, the Prosecutor's Office shall request from the Court the Order for Exhumation. The presence of the Suspect or his Defense Counsel is not mandatory. The evidence obtained through this procedure is used at a later stage of the proceedings, that is, the main trial. The Prosecutor's Office did not carry out this procedure during the investigation, when exhumations are usually carried out but had it performed during the main trial before the Panel of the Appellate Division. The evidence obtained in this manner was presented at the main trial and the Appellate Panel is of the opinion that this did not result in a violation of the right to defense. The Appellate Panel notes the difference between carrying out this procedure by a Prosecutor and its being carried out at the main trial when it obtains its final form. The Defense attended the main trial, after having viewed DVD footage and photo-documentation of the executed exhumation and exercised the opportunity to cross-examine the expert witnesses and challenge the results of their analysis.

[31] The Court held that the arguments of the Defense that the expert witnesses were previously accused of having committed a Crime of Accepting a Bribe is relevant for assessment of their credibility rather than for admissibility of the testimonies of the expert witnesses and their reports, which shall be further discussed in the text below.

[32] Upon a full review, the Court rescinded the order for a second exhumation and allowed the entry into evidence of the initial exhumation proceedings and the testimony and admission of the report of the expert witnesses with respect to a ballistics and anthropological analysis.

Exceeding the 30-days deadline

[33] Article 251(2) of the CPC BiH prescribes: *“The main trial that has been adjourned must recommence from the beginning if the composition of the Panel has changed or if the adjournment lasted longer than 30 days but with consent of the parties and the defense attorney, the Panel may decide that in such a case the witnesses and experts shall not be examined again and that the new crime scene investigation shall not be conducted but the minutes of the crime scene investigation and testimony of the witnesses and experts given at the prior main trial shall be used”*.

[34] During the proceedings conducted in this case before the Appellate Panel, a time period longer than 30 days elapsed between the hearings held on 22 June 2009 and 19 August 2009. The Trial Panel planned to hold the main trial on 7 July 2009. The main trial was scheduled, and the expert witnesses summoned to the related hearing, but due to the inability of the Defense Counsel for the Accused, Attorney Senad Kreho to attend it because of health reasons, the hearing was postponed. Considering that due to the collective vacations period that followed, the time that the Defense Counsel had to spend under medical treatment, and also due to the busy schedule of the expert witnesses to be heard, it was not possible to schedule another hearing before the expiration of the 30-day statutory deadline. The Court requested the parties and the Defense Counsel for their respective positions on the possibility of scheduling the next main trial session for a date after the collective vacation, after the expiration of more than 30 days since the last hearing. The Prosecutor, the Accused and the Defense Counsel for the Accused waived any objection and stated they would not contest the decision to continue after the expiration of 30 day deadline nor would they request that the main trial start anew. Accordingly, the Panel decided to postpone the continuation of the main trial for the period after the collective vacation, and the date of 19 August 2009 was subsequently determined as the date on which the main trial was continued.

Amended Indictment

[35] At a hearing held on 4 September 2009 prior to the presentation of Closing Arguments, the BiH Prosecutor’s Office filed an Amended Indictment, No. KT-RZ-225/07, dated 4 September 2009 which was amended with regard to the date of commission of the criminal offense and which also contained additional minor changes of the factual description of the act of commission that resulted from the evidence adduced at the main trial. The Court accepted this Amended Indictment, and since the Defense stated that it would not need any additional time to prepare the defense, that is, to modify its Closing Arguments to the Amended Indictment, the presentation of the Closing Arguments of both the Prosecution and the Defense were continued on that day, as planned.

CLOSING ARGUMENTS

[36] After the completion of the evidentiary proceedings before the Appellate Panel of the Court of BiH, the Prosecution and the Defense presented their Closing Arguments.

Prosecutor's Office

[37] In its Closing Arguments, the Prosecution alleged the existence of the essential elements of the criminal offense of War Crimes against Prisoners of War in violation of Article 175 of the CC BiH claiming proof that Suad Kapić had committed the offense. It was claimed that it was proved that an armed conflict existed, that the Accused was a member of the 517th Liberation Brigade of the RBiH Army and that he was sent to the frontline in the Sanski Most surrounding area during the period when the four prisoners of war were killed. Also, it was claimed it was proved that the actions taken by this Accused undoubtedly constituted a violation of the international humanitarian law and that they were directed against the prisoners of war.

[38] The Prosecutor also emphasized within the Closing Arguments that both surviving prisoners, Dragan Stupar and Milovan Mastikosa, testified almost identically about the execution of the four prisoners of war. Both surviving witnesses stated that six members of the Sana civil and military police were captured by members of the 5th Corps of the RBiH Army and that after their capture they were tied two-by-two and in pairs escorted to the Mrežnica hill, where they were handed over to a soldier whom all others called Hodža. After certain threats and insults, Hodža took them to a forest valley where he ordered them to kneel down, their backs turned toward him and his soldiers, and upon the instruction of an older soldier who came by, he put a piece of bread in their mouth and thereafter a burst of fire was heard that killed 4 prisoners. Radovan Mudrinić survived, albeit severely wounded, a single shot was then heard after the burst of fire and then the other one which killed Radovan Mudrinić. Both witnesses recalled that they heard the sentence, "it seems that the fat one had a plenty of pork". Very similarly, both witnesses described the perpetrator of this criminal offense and identified the Accused in the courtroom as this person. Before the shooting, both witnesses had the opportunity to have a thorough look at the person who was "the master of life and death" in those moments.

[39] Other witnesses for the Prosecution, members of the 5th Corps, 517th Liberation Brigade tried to state as less as possible about the related incident, which in the Prosecution's opinion is understandable bearing in mind that these are the persons who could incriminate themselves while testifying about the capture of six and the killing of four war prisoners, because in addition to the responsibility of the direct perpetrators, this incident also includes the responsibility of a number of other persons. Notwithstanding this, during the investigation, protected witness "S-1" was the first person to describe the incident on the Mrežnica hill. Although this witness entirely changed his statement at the main trial, the Prosecutor claimed it would be erroneous to evaluate only his last statement and disregard the statement given during the investigation, particularly if one bears in mind that this witness was the first one who identified Suad Kapić to the Prosecutor as the perpetrator of this criminal offense.

[40] In the Closing Arguments, the Prosecutor further pointed to the unreliability of the testimony of Dr. Mile Šolaja that was entirely controverted by the Findings and Opinion of

the forensic and ballistic expert witnesses. The Prosecutor also addressed the attempts of the Defense to discredit the expert witnesses who made the Finding and the Opinion, Dr Željko Karan and Milko Marić as the persons who were prosecuted for the criminal offense of receiving a bribe. The Prosecutor stated that this is irrelevant because they are expert witnesses included on a list of permanent expert witnesses of Bosnia and Herzegovina and discrediting them on this basis would constitute a severe violation of human rights.

[41] The Prosecution also emphasized that the testimony of the Defense witnesses did not succeed in discrediting the testimony of the surviving witnesses and the findings of the expert witnesses from which it indisputably ensues that the incident took place in the manner described in the Indictment and that the Prosecutor's Office had proven beyond a reasonable doubt that the Accused Suad Kapić is the person with the nickname Hodža, and that he was the perpetrator of the crime concerned.

Defense

[42] In Closing Arguments, Defense Counsel for the Accused stated that during the evidentiary proceedings the Prosecution failed to prove beyond a reasonable doubt all the factual allegations referred to in the Indictment, in the manner described in the factual substrate and that, therefore, the conclusion cannot be drawn beyond any reasonable doubt as to the guilt of the Accused, because of which the Accused should be acquitted of the charges by applying the principle *in dubio pro reo*.

[43] In the Closing Arguments, the Defense analyzes the witnesses' statements in a very detailed manner and in doing so, claims the unlawful action of the BiH Prosecutor's Office regarding the presentation of the Accused's photo to the witnesses, contrary to Article 85(3) and (4) of the CPC BiH that prescribes the action of identification. According to the Defense, the Indictment of the BiH Prosecutor's Office is the only evidence on the identity of the Accused as the perpetrator of the criminal offense. The two surviving witnesses, Dragan Stupar and Milovan Mastikosa, are the only persons who during the main trial identified the Accused Suad Kapić as Hodža, the perpetrator of the criminal offense at issue. Contrary to their testimony, the other witnesses, members of the RBiH Army, stated that they did not know the Accused by the nickname of Hodža, while some of them even did not know him at all. In addition to this, they all state that each unit had a number of persons with the nickname Hodža, namely that all the persons who were more religious inclined during the war period were called by this nickname.

[44] The Defense further states that the exhumation carried out brought nothing new, and that this piece of evidence did not contest the testimony of the witness, Dr. Mile Šolaja, who testified before the Trial Panel about the examination of the bodies of the killed persons several days after their death. Dr. Šolaja described the dominant stabbing wounds and the injuries inflicted by cold weapons, that according to him occurred while the four prisoners were still alive. His testimony was also confirmed by members of the families of the killed prisoners, primarily the witness Ljiljana Mudrinić, wife of the killed Radovan Mudrinić, who stated at the main trial that her husband was massacred. Dr. Šolaja clearly stated that during the examination of the bodies of killed persons he found that their hands were tied behind their backs with a wire, which is contrary to the testimony of the surviving witnesses who asserted that their hands were tied with the rifle-cleaning rope.

[45] According to the Defense, the charges are exclusively based on the testimony of the two surviving witnesses, Dragan Stupar and Milovan Mastikosa, but no credibility can be given to their testimony because their testimony was full of inconsistencies and differ in essential elements, including both their mutual testimony, and the testimony of each of them in the different phases of the proceedings. In addition to this, a part of the testimony of Milovan Mastikosa, in which he stated that in the moment when Hodža fired a burst of fire, he turned around and saw the face of the person who shot, is illogical because it was physically impossible considering the position he was in.

[46] Finally, the Defense also contested the credibility of expert witnesses, Dr Željko Karan and Milko Marić, stating that they were charged with the criminal offense of bribery but that they were Pardoned by the decision of the then President of Republika Srpska, Nikola Poplašen. The stated information from the experts report brings suspicion to the truthfulness of their Findings and Opinion, considering that in the course of the forensic-ballistic analysis itself, that is, the cleaning and washing of the skeletal remains, and the moment of discovery of the bullet casing, were nowhere supported by any photo.

APPLICABLE LAW

1. Introduction

[47] The Indictment charges the Accused with committing the criminal offense of murder as a War Crime against Prisoners of War pursuant to Article 175a) CC of BiH and in violation of Article 3 common to the four Geneva Conventions of 12 August 1949 as well as Articles 4, 5 and 13 of the III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. The Accused is charged under the doctrine of individual criminal responsibility pursuant to Article 180(1) CC of BiH.

[48] Article 175a) in its relevant parts, states that "whoever, in violation of the rules of international law, orders or perpetrates in regard to the prisoners of war any of the following acts: a) Depriving another persons of their life (murders)... shall be punished by imprisonment for a term not less than ten years or long-term imprisonment".

[49] Common Article 3 of the Geneva Conventions, in its relevant parts, reads as follows: "In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions; (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms ... shall in all circumstances be treated humanely ... To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the abovementioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture..."

[50] For an offense to be justiciable before the Court of BiH under Article 175 of the CC of BiH, two preliminary jurisdictional requirements must be satisfied. First, there had to be an

armed conflict at the time material to the Indictment. Second, the acts of the Accused must be closely related to this armed conflict.

[51] Further, two additional conditions must be fulfilled for a crime to be prosecuted under common Article 3 of the Geneva Conventions and Article 175a) CC of BiH. Article 175 CC of BiH confers jurisdiction on the Court provided the violation constitutes an infringement of a rule of international law and that a victim of such infringement has the status of a prisoner of war or was a person taking no active part in the hostilities at the time the crime was committed (additional element of the Geneva Convention).

2. Chapeau Elements

A. Existence of armed conflict

[52] The Appellate Panel notes that although Article 175a) CC of BiH does not explicitly require existence of a war or an armed conflict, the Article only makes reference to the violations of applicable international rules. The international laws or customs of war are intimately attached to a state of armed conflict so that no war crime is possible in the absence of an armed conflict and the existence of a sufficient nexus between the acts of the accused and the conflict. Accordingly, the Court concludes that Article 175 requires the existence of an armed conflict.

[53] An armed conflict exists "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State."²

[54] In the present case, the Defense did not contest the claim that an armed conflict was in existence in BiH during the time period and geographical area pleaded in the Indictment. In addition, the Prosecution introduced the Decision of the Presidency of RBiH declaring a "state of war" and identifying the aggressors as "the Republic of Serbia, the Republic of Montenegro, the Yugoslav Army and the terrorists of the Serbian Democratic Party".³

[55] Further, the Court heard uncontested evidence of an armed conflict between the Army of Bosnia and Herzegovina (ARBiH) and the Army of Republika Srpska (VRS) that took place in September 1995. The evidence established that a military operation *Sana 95* took place in September 1995 in the area of Sanski Most between the military forces of Army of RBiH and the Army of Republika Srpska.

[56] Specifically, the evidence established that on 19 September 1995 the 5th Corps of the ARBiH launched a military operation *Sana 95* in the area of Sanski Most against the VRS. The objective of that military operation was to liberate the area of Sanski Most. In the morning hours, various Brigades of the 5th Corps of ARBiH spearheaded the attack, breaking through the VRS lines and pushing them back about 6-8 km in the direction of Sanski Most. By evening, the military units of the ARBiH successfully linked up their right

² *Prosecutor v. Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković*, Case No. IT-96-23 and IT-96-23/1-A, Judgment dated 12 June 2002 (*Kunarac et al.* Appeal Judgment), para. 56.

³ T-14.

and left flanks advancing their command post from Mijačića camp to Stanića Brdo. The operation continued for several days.

[57] Having reviewed witness testimony and the material evidence presented during the main trial, the Court concludes that an armed conflict occurred on the territory of BiH and, more specifically, in the Sanski Most municipality during the period of time alleged in the Indictment.

[58] Whether the armed conflict is either international or internal is relevant for proof of certain offenses proscribed by international humanitarian law. In this case, it is relevant to four alleged breaches of the Third Geneva Convention of 1949, namely Articles 3, 4, 5, and 13.

[59] Because provisions of the Common Article 3 of the Geneva Convention contain the core of fundamental standards, they are applicable at all times, in all circumstances and to all parties, and no derogation is permitted from them. Hence, when an accused is charged with violation of Article 175(a) CC of BiH based on a violation of common Article 3, as in the present case, it is immaterial whether the armed conflict was international or internal in nature.

[60] Whether the Accused *can* be convicted of breaching the remaining Articles depends upon whether these Articles apply in internal armed conflicts. The Third Geneva Convention Relative to the Treatment of Prisoners of War, with the exception of Article 3 common to the four conventions and the two additional protocols, applies to international armed conflicts.

[61] Some articles of this Convention, in addition to common Article 3, have attained customary law status and are now applicable in both internal and international armed conflicts.⁴ This is not, however, the current customary law status of Articles 4, 5, and 13 of Third Geneva Convention. The Prosecution has provided no submissions or evidence arguing otherwise, i.e. that Articles 4, 5, and 13 have obtained customary status applicable in internal armed conflicts, and/or how a breach of their provisions is criminalized in international humanitarian law. Based on the aforementioned it follows that it is possible to apply the abovementioned articles of the Third Geneva Convention, except the common Article 3, only in case an armed conflict of international character exists.

[62] The evidence of the Prosecutor's Office was not focused on determining the character of the armed conflict. Since the essential elements of the criminal offense charged against this Accused do not imply an international character of the armed conflict and since the Prosecutor's Office, as the authority which bears the burden of proof, did not focus its efforts to prove that, although it based the Indictment on the violations of the common Article 3, as well as on Articles 4, 5 and 13 of the Third Geneva Convention, the Panel was not obliged to consider the character of the armed conflict while deciding on the existence of the criminal offense and the criminal liability of the Accused.

[63] Bearing in mind the aforementioned and the fact that the Panel is bound to the factual substratum of the Indictment, whereas it is not bound to the legal qualification of the

⁴ ICRC Customary International Humanitarian Law Rules and Study 2005.

criminal offense which the Prosecutor noted in the Indictment, as well as the fact that the Panel had no basis to establish potential violations of Articles 4, 5 and 13 of the Third Geneva Convention, since the general requirement for their application, namely the existence of the international armed conflict was not under consideration, the Panel found that the criminal liability of the Accused is based on the fact that, by the actions charged against him, he violated the common Article 3 of the Geneva Conventions whereby he committed the criminal offense of War Crimes against Prisoners of War, in violation of Article 175a) of the CPC BiH, in conjunction with Article 180(1) of the same Code. For this reason the Panel omitted the provisions of Articles 4, 5 and 13 of the Third Geneva Convention from the legal description of the operative part of the Verdict, since the Panel was unable to reach any conclusions pertaining to any breaches of these Articles whatsoever.

B. Nexus between armed conflict and acts of the Accused

[64] In addition to the existence of an armed conflict, the Prosecution must establish a sufficient link between the alleged acts of the accused and the armed conflict.⁵ The armed conflict need not have been causal to the commission of the crime charged, but it must have played a substantial part in the perpetrator's ability to commit that crime.⁶

[65] In determining whether such nexus exists the Appellate Panel took into account, *inter alia*, whether the perpetrator was a combatant, whether the victims were members of the opposing military forces, and whether the crime was committed as part of or in the context of the perpetrator's official duties.⁷

[66] In the present case, the alleged acts of the Accused took place in September 1995 during a military operation conducted on behalf of the Government of Bosnia and Herzegovina and in the course of an armed conflict to which it was a party. The Accused is alleged to have been involved in a combat as a member of the 3rd Battalion of 517 Cazin Liberation Brigade of the 5th Corps⁸ and the acts for which he has been indicted are alleged to have been committed in the performance of his official duties as a member of the Bosnian armed forces during that military operation.

[67] More specifically, the evidence established that on 20 September 1995, members of the *Apači* unit of the 517 Cazin Liberation Brigade conducted reconnaissance activities in the area of Stanići and Mrežnica hill following the military offensive from the previous day. It is during that reconnaissance mission that the members of the *Apači* unit arrested six VRS soldiers from the 6th Sana Brigade of the Army of Republika Srpska who got cut off from their unit during the attack and sought refuge in the woods. Those six soldiers were Dragan Stupar, Milovan Mastikosa, Radovan Mudrinić, Duško Čuković, Goran Šučur, and Slaviša Đukić. At the time of the capture, the VRS soldiers were armed and uniformed.

⁵ *Čelebići* Trial Judgment, para. 193.

⁶ *Kunarac* Appeal Judgment, para. 58.

⁷ *Kunarac* Appeal Judgment, para. 59.

⁸ T-15, T-16, T-17

[68] Upon their capture, the VRS soldiers were disarmed, tied together in pairs and brought to the Mrežnica hill where they were handed over to the Accused. Four of the prisoners were executed shortly after they were surrendered to the Accused.

[69] Based on the evidence presented, the Appellate Panel concludes that the soldiers were apprehended for reasons closely connected with the armed conflict and that there is a clear nexus between the armed conflict and the acts of the Accused alleged in the Indictment.

C. Additional requirements under Article 175a) CC of BiH

[70] In addition to the two preliminary elements, Article 175 CC of BiH confers on the Court jurisdiction if a violation constitutes an infringement of a rule of international law and such infringement was perpetrated against prisoners of war or persons taking no part in hostilities (under Common Article 3 of the Geneva Convention)

Violation of international law

[71] The charge of murder of four prisoners as a violation of the laws and customs of war in the present case is based on common Article 3 of the Geneva Conventions, which sets forth a minimum core of mandatory rules and reflects the fundamental humanitarian principles upon which the Geneva Conventions in their entirety are based. It is also widely accepted that common Article 3 is a part of international customary law and that murder is a serious violation of international humanitarian law. As such, it entails individual criminal responsibility.

[72] Accordingly, the Appellate Panel concludes that the alleged criminal act constitutes a violation of the international law and falls within the jurisdiction of Article 175a) CC of BiH.

D. Additional requirement under common Article 3 of the Geneva Conventions

[73] For the application of any Article 175 charge based on Common Article 3, the Prosecution must prove that the victim was a person taking no active part in the hostilities at the time the crime was committed.

[74] "Persons taking no part in hostilities" include persons placed *hors de combat* by sickness, wounds, detention or any other cause. In other words, a group of protected individuals within the terms of common Article 3 also includes detained persons who, prior to detention, were members of the armed forces or were engaged in armed hostilities.⁹ Consequently, victims of murder placed *hors de combat* by their detention, are clearly protected persons within the meaning of Common Article 3.

⁹ *Prosecutor v. Mladen Naletilić, aka "Tuta" and Vinko Martinović, aka "Štela"*, Case No. IT-98-34-T, Judgment dated 31 March 2003 (*Naletilić and Martinović Trial Judgment*) par. 229. See also *Blaškić Trial Judgment*, para. 177, citing *Tadić Trial Judgment*, para. 615.

[75] In determining the status of the victims in the present case, the Court recalls its finding that a military operation *Sana 95* was conducted in September 1995 within the broader scope of an armed conflict between the Army of BiH and the Army of Republika Srpska and that it was due to that military operation that the four soldiers of the Army of Republika Srpska were captured, disarmed and brought to the hill of *Mrežnica*.

[76] Considering the specific situation of each victim at the time the crime was committed, i.e. that the prisoners were disarmed, tied in pairs and kneeling,¹⁰ the Court finds that none of the four prisoners were taking an active part in the hostilities at the time of their execution.

[77] Accordingly, the Court concludes that the soldiers were prisoners of war taking no part in ongoing hostilities entitled to protected status at the time the alleged crimes were committed.

STANDARDS OF PROVING

[78] In evaluating the evidence adduced during the main trial, the Appellate Panel was primarily led by the basic provisions of the Criminal Procedure Code of Bosnia and Herzegovina, having assessed all the evidence pursuant to the provisions prescribed by this Code especially the principle of legality set forth in Article 3 of the CPC BiH. In doing so, the Panel particularly took into account that the burden of proving the criminal offense and the responsibility of the accused lies on the Prosecutor and that the Prosecutor must prove their existence beyond a reasonable doubt.

Evaluation of the witnesses' testimony - generally

[79] In evaluating the testimony of the witnesses heard, this Panel evaluated their testimony as a whole, bearing in mind both the content of their testimony and their conduct, non verbal behavior, gestures and movements while they testified. The credibility of witnesses depends not only on the extent to which they have the knowledge about the event they testify about but also on the sincerity of witnesses, their reliability and awareness that by taking an oath before the court they obliged themselves to tell the truth.

[80] For a testimony of the witness, what is essential is not only its sincerity, but also its credibility. The Panel took into account that the credibility of testimony of a witness depends on their knowledge about the facts but that the lapse of time, the variability of human perception and the traumatic quality of the incident itself can to a large extent affect the credibility of testimony. Thus, when evaluating the evidence, the Panel took into account the lapse of time in relation to the relevant incident, because the witnesses testified after the elapse of over ten years since the incident referred to in the Indictment. The Appellate Panel also took into account that this incident was viewed by two or more persons, particularly in a state of stress, fear or trauma which can result in a series of different details which the Appellate Panel finds normal and not usual for such circumstances. Therefore, the Panel considers that the credibility of a witnesses is not affected if certain inconsistencies or differences existed in the testimony of two witnesses,

¹⁰ The Panel will discuss the circumstances of the execution in the following paragraphs of the Verdict.

or the testimony of one witness given in different phases of the proceedings (during the investigation and at the main trial), and also if certain inconsistencies existed with regard to the peripheral events, while the core of their testimony on the essential facts related to the critical incident was presented in the same manner.

[81] This was also the view of the Appeals Chamber in the *Čelebići* case where it was noted that *it was within the trial Chamber discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was.*¹¹ *The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable".*¹² In its final verdicts, the Court of BiH also adopted such view¹³. For example, in the Appellate Panel Verdict, No. X-KRŽ-05/04 in the *Boban Šimšić* case, as to the credibility of the testimony of the witness in whose testimony the Panel found certain inconsistencies regarding the earlier given statements, it was noted that *"the point here is not about the differences which would, in their essence, call into question the established state of facts nor do they call into question the truthfulness of the testimony from which it is evident that this witness did not say something which she had heard or learnt, but she said exactly what she had gone through and experienced"*¹⁴, therefore the Panel concluded that the truthfulness of her testimony was not brought under suspicion.

[82] The Panel was particularly cautious in evaluating the testimony of those witnesses who, at the main trial, modified the statements given during the investigation phase. The Panel viewed all the statements of a witness in their entirety and to bring them into relation with the other evidence adduced, and only based on such evaluation, conclude which of the given statements can be considered reliable and given credit. In doing so, regarding the statements of certain witnesses, the Panel found that they are credible and reliable as to one part, while as to their other part, regularly the one which directly concerned the events referred to in the Indictment that would directly incriminate the Accused, it is obviously deficient.. In such evaluation of their testimony, which will be further addressed in the reasoning, the Appellate Panel notes in the friendship between a majority of the heard witnesses – former members of the RBiH Army and the Accused, considering that they were war comrades, and thereby in the personal relationships specific for this particular population, or due to the fear from the Accused if they testified to his prejudice. Certain witnesses, such as the witnesses "S-1" and "S-2" were granted protective measures specifically because of their fear from the Accused or his comrades if they told the truth about the Accused as the participant in the critical event, which the witness "S-1" explicitly stated during the investigative procedure. It is certain that the testimony falling into this category of the Prosecution witnesses, with a noticeable "surprisingly limited perception" was calculated so as to achieve the result of the proceedings that would not be to the prejudice of the Accused. The Panel gives credit to such testimony in the parts that it found credible, and also provided the reasons for other parts of the testimony which were deemed unreliable.

¹¹ See the Appellate Judgment in the *Čelebići* case, par 485 and 496-498.

¹² Appellate Judgment in the *Čelebići* case, par 485 and 496-498.

¹³ See, for example, the Verdict No. X-KRŽ-05/04 in the *Boban Šimšić* case, No. X-KRŽ-05/107 in the *Damjanović et al.* case, No. X-KRŽ-06/275 in the *Rašević et al.* case.

¹⁴ Appellate Verdict, No. X-KRŽ-05/04 in the *Boban Šimšić* case dated 7 August 2007, p 21.

[83] Finally, it should be emphasized that in the part of the Verdict below, in which certain pieces of evidence will be evaluated, the Panel will not refer to the testimony of all the witnesses, especially not to the ones which would be legally irrelevant in view of the examination of the truthfulness of the averments in the Indictment, or to each documentary piece of evidence adduced into the case file. The Panel reviewed each document and evaluated the testimony of all the witnesses and in this manner determined their reliability and the probative strength. The Court will further refer to those pieces of evidence that were relevant for drawing the conclusion on the existence of the criminal offense and the guilt of the Accused.

[84] Pursuant to Article 15 of the CPC BiH, the Court is entitled to a free evaluation of evidence. There are no criteria according to which certain pieces of evidence would have a bigger or smaller evidentiary strength. The Court is not bound by any formal evidentiary rules. It is the obligation of the Court to conscientiously evaluate each piece of evidence, both individually and in relation to other pieces of evidence and to thereby establish whether a certain fact is proved. In evaluating the evidence in such manner, the Appellate Panel concluded that the Prosecution proved beyond a reasonable doubt that the criminal offense was committed in the manner as described in the Indictment.

[85] During the proceedings, a number of witnesses for both the Prosecution and the Defense were heard. The Panel concludes that all witnesses can be divided into three categories, namely: a) direct eye-witnesses of the incident – the injured parties Dragan Stupar and Milovan Mastikosa; b) members of the RBiH Army, war comrades of the Accused, within which a separate group would include the protected witnesses “S-1” and “S-2”; and, c) indirect witnesses - Dr. Mile Šolaja and members of the families of the killed prisoners of war.

[86] In addition to these witnesses, the Court heard Dr. Željko Karan and Milko Marić at the main trial in the capacity of expert witnesses.

[87] As to the testimony of two direct witnesses, the eye-witnesses to the incident at issue, Stupar and Mastikosa, the Panel took into account that the fact that they survived the execution most certainly left an indelible imprint upon them and that through their testimony they were forced to experience once again the traumatic incident of September 1995. Although at the moment it occurred on the Mrežnica hill they were next to each other, each of them perceived the events at issue in a specific manner, remembering and subsequently able to state the facts most significant to him. Due to the foregoing, there are certain differences in their testimony, but since they are consistent regarding the essential moments of the critical event, each particular testimony of theirs contains a series of details, picturesque descriptions and observations, the Panel concludes that the minor inconsistencies concerned contribute to the trust into their sincerity and truthfulness, while the differences enabled the Panel to gain an entire picture of the events at issue based on the different details perceived by each of the surviving witness.

[88] The testimony of the other group of witnesses, the Accused’s war comrades, including the Brigade Commander, Ibrahim Nadarević and the *Apači* Unit Commander, Hasan Hadžalić, and also other soldiers, Izet Sović, Mesud Majetić, Hase Žunić, Ćazim Handagić, Ale Rekić, Amir Hozdić are very clear with regard to the testimony on the circumstances

that are not directly related to the incident at issue such as the testimony on the brigade organization and structure, the encounter with an older Serb couple who were searching for their mentally retarded son, and the circumstances of subsequent events concerning the moving of their unit after the incident on the Mrežnica location (for example, when they spent the night near the Stanići forest farm). The testimonies of Firhat Porčić and Safet Begić, pertaining to formation-related assignments regarding the *Karl Gustav* hand-held launcher and so on, are also similar.

[89] However, with respect to the incident referred to in the Indictment, their testimony was not specific and left an impression with the Panel that these witnesses were trying to avoid the truth. For example, witness Ale Rekić did not remember at all that the military action was launched in September 1995. Witness Amir Hozdić, in relation to subsequent events that two prisoners were with them for two days and two nights, described in detail the moment when he awoke in the middle of the night and saw two prisoners who had not been tied during all that time but only disarmed standing while one of them explained that they could not sleep and therefore they were standing (which is in the opinion of this Panel a rather illogical situation if one bears in mind that they are war prisoners). This witness remembered that they gave stockings to the prisoners but he gave vague answers to the specific questions concerning the killing of the four prisoners of war and the *Sana 95* action itself. He mentioned that he had heard that there were six prisoners of whom four were killed, but unlike the subsequent events that he describes to the tiniest detail, he could not even remember the season of the year in which the *Sana 95* operation took place, in which he also participated.

[90] Although the witnesses from this group, former members of the 517th Brigade of the RBiH Army, tried not to mention in their statements anything that would be compromising either for themselves or for the Accused, parts of their statements, which are admissible for this Appellate Panel, when brought into connection with the statements of the eye-witnesses of the critical event, give them additional evidentiary strength and credibility.

[91] The fact that the Appellate Panel did not find credible the statements of these witnesses with respect to the decisive facts related to the incident itself and to the Accused as the person who was an active participant in it, does not mean that other parts of their statements are insufficient to be used in any manner. Parts of their testimony provide an important evidentiary source for establishing factual circumstances that structure the key moments of the event subject to the charges, among other things in terms of its time and space analyses. For example, witness Safet Begić noted that, as he was climbing up a huge and wooded hill towards the village of Stanići (the surviving witnesses also described the same characteristics of that hill), he met Suad Kapić and a soldier with the nickname “Tičar” who were going back to take some shells. Thereafter, on the hill he met Hara and 5 or 6 prisoners and he passed by them. This suggests that this happened before the Accused returned to the hill, that is, prior to the killing of the four prisoners, members of the Army of Republika Srpska. This also corroborates the testimony of Dragan Stupar who noted that, after the prisoners had been escorted to the top of the Mrežnica hill, he heard the words, “Come on, call Hodža” and that he came several minutes later accompanied by five or six soldiers.

[92] A special sub-group also includes two protected witnesses who recanted their statements given during the investigation phase, particularly the witness “S-1”¹⁵. In evaluating their statements, this Panel took into account the entirety of their testimony to establish to which extent credibility could be given to these witnesses. The Panel considered these witnesses’ testimony from a psychological aspect too, bearing in mind the difficulties that some of these witnesses had to face when testifying, with regard to their internal fight during the testimony as their conscience required them to tell the truth (particularly present with the witness “S-1”), and on the other hand, they feared from being judged by their environment if by their statements they incriminated the person with whom they fought side by side during the war.

[93] The statements of the third group of witnesses, including Dr. Šolaja and the representatives of the injured parties’ families (witnesses Ljiljana Mudrinić, Rajko Čuković, and Mirko Šučur), as indirect witnesses, who testified about the facts and the circumstances they had seen subsequently, sometime after the incident and based on their subsequent observations. The Panel especially considered their testimony with a view to completing the entire picture of the incident and determining whether the direct witnesses, the eye-witnesses to the events at issue, spoke the truth and whether credibility could be given to their testimony and to what extent.

[94] The testimony of the expert witnesses and their findings and opinion this Panel utilized as a verifying piece of evidence which is objective, free from the subjective human perception that certainly must be taken into account in evaluating testimony of any witness. The expert findings could confirm or deny the testimony of the surviving witnesses Mastikosa and Stupar. However, in relation to their testimony the expert findings are a corroborative, and a verifying piece of evidence in this case .

[95]After a thorough analysis of the testimony of all of the witnesses and the two expert witnesses, and after reviewing all the adduced documentary evidence individually and in their correlation, this Panel established a number of facts. Their meaning and the logic of the event they depict, indicate clear criteria for the evaluation of individual testimonies. The Panel found beyond a reasonable doubt that on 20 September 1995, after six captured members of the RS Army had been handed over to him, in the manner described in the Operative Part of this Verdict, the Accused Suad Kapić intentionally deprived the life of four of them, with the intent to deprive the lives of the remaining two prisoners, but owing to the circumstances and the effort of the witness “S-1” and Hasan Hadžalić, they stayed alive.

FACTUAL FINDINGS

[96] In order to find that the Accused could be the perpetrator of the criminal offense at issue it was necessary to prove his presence at the location where the four prisoners of war were killed.

¹⁵ Record of the BiH Prosecutor’s Office on Examination of Witness “S-1” number KTN-RZ-66/07 dated 7 September 2007 and Record of the BiH Prosecutor’s Office on Examination of Witness “S-2” number KTN-RZ-66/07 dated 10 September 2007.

[97] It was clearly established from the documentary evidence adduced by the Prosecutor's Office that the Accused Suad Kapić was a member of the 517th Liberation Brigade of the 3rd Battalion (Exhibit T-17 – List of members of the 517th Liberation Brigade), while Exhibits T-15 (List of members sent to perform the combat task dated 6 September 1995) and T-16 (List of soldiers sent to perform the combat task dated 10 September 1995), if brought into relation with Exhibits T-20 (Analysis of the completion of the combat tasks from 8 September 1995 to 8 October 1995) and T-21 (Analysis of the *Sana* Operation – Report, strict. conf. No. 02/3019-1 dated 3 December 1995), indisputably prove that the Accused, as a member of the 3rd Battalion, the 517th Liberation Brigade, on 20 September 1995 was in the Stanić hill area, because at the time the 517th Liberation Brigade was deployed at this location, and pursuant to the foregoing lists (Exhibits T-18 and T-19), the Accused was in a group of soldiers of the 517th Liberation Brigade who was sent to perform combat tasks during the stated period. This was also confirmed by the witnesses, the two injured parties Dragan Stupar and Milovan Mastikosa, and also the members of the 517th Liberation Brigade, the *Apači* platoon, namely: the witness "S-1" confirmed even in his testimony at the main trial that was entirely changed with regard to the statement given during the investigation, that he saw Suad Kapić on the Mrežnica hill at the time when the prisoners were also there, and the Defense witnesses Safet Begić and Firhat Porčić aka Tičar who was on that hill together with the Accused.

[98] The Defense did not contest the presence of the Accused at the location concerned and they confirmed that he was a member of the 517th Liberation Brigade and a crew member of the *Karl Gustav* hand held rocket launcher. However, the Defense contests the Accused's involvement in the related incident.

[99] A series of witnesses were heard with regard to the identification of the Accused Suad Kapić as Hodža, the perpetrator of the related criminal offense, including the two surviving prisoners of war. These two witnesses, Dragan Stupar and Milovan Mastikosa, were the only known, direct eye-witnesses and the injured parties in this incident. The Panel therefore closely considered their testimony and statements, analyzing all of their statements, both those given during the investigation and those given at the main trial, in their entirety, while considering them at the same time in relation with all other adduced evidence.

[100] In an almost identical manner, both witnesses spoke about the manner in which they were captured, escorted to the top of the Mrežnica hill and handed over to a soldier whom everyone called Hodža. Certain differences existed in the sense that the witness Stupar stated in his statements that one of soldiers called Hodža to come, while the witness Mastikosa stated that Hodža had already been on the Mrežnica hill and that he met them. However, the Panel finds it to be a minor issue as to whether Hodža was already on the hill or was called to come when compared with all of the other information presented in the same manner by the injured parties. Some other inconsistencies exist in their statements that will be addressed below. However, the Panel finds that these particular inconsistencies indicate truthfulness and credibility of their testimony, and also contribute to creating the whole picture of the event as each of the witnesses noticed and remembered the most impressive moments for each of them respectively.

[101] The testimony of witness Dragan Stupar that those soldiers present waited for Hodža's arrival, they whispered that his "name is Hodža" which in fact points to the conclusion that this person acted with authority. The fact that the Accused first argued with the Deputy Commander (the witness "S-1"), and then the *Apači* Commander to take away the two surviving prisoners suggests such conclusion. The conclusion that Hodža was the soldier who had the role of a leader also ensues from the testimony of both surviving witnesses. The fact that the Accused had Motorola, a communication device which ordinary soldiers generally did not have, but those with certain commanding positions *formally* or *de facto*, possessed also suggests the foregoing. It ensues from the testimony of the witnesses that Hasan Hadžalić, the *Apači* Commander had a Motorola who, although stating that the communication was poor due to a poor signal and weak batteries, does not entirely deny its use. Commander Nadarević had a Motorola or an access to the communication device, at the forward command post. These are the persons belonging to the command structure. The fact that Hodža also had a Motorola suggests that the witnesses' statements, that he was the soldiers' group leader, are correct. This was confirmed by both surviving witnesses, that these communication means were used in the communications among the members of the RBiH Army and points to the Panel's conclusion that Hasan Hadžalić, like other heard members of the *Apači* unit, although being aware of the obligation to tell the truth, avoided telling the truth in those segments in which he might incriminate himself.

[102] Both surviving witnesses stated that Hodža behaved violently and arrogantly, and that he made threats with a knife. The witness Mastikosa stated that Hodža threatened Slaviša Đukić. The witness Stupar also stated in the investigation that the person to whom Hodža made threats and held the knife to his throat was Slaviša Đukić. At the main trial, he stated that Hodža threatened Duško Čuković and Goran Šučur. The Panel finds it clear that Hodža threatened and held a knife to the prisoners' necks. This Panel finds credible the testimony of Milovan Mastikosa who stated in both of his statements that Hodža threatened Slaviša Đukić, vividly describing the incident by stating that after Hodža held the knife to the neck of Slaviša Đukić, that he put it back into the belt leather sheath, saying, "According to the Qur'an, it is a sin to slit one's throat, but not to kill". The testimony of Milovan Mastikosa is also supported by the statement of Dragan Stupar given during the investigation in which he stated that Slaviša Đukić was the person whom Hodža threatened. The Appellate Panel concludes that Hodža placed the knife below the neck of Slaviša Đukić and that he may have made threats with the knife to other prisoners.

[103] Further, in their statements, these two witnesses stated that the soldier, whom the other soldiers addressed as Hodža, escorted them while tied in pairs of two to the forest valley, some 20 meters further away where he ordered them to kneel down, their backs turned to them, that, after a short religious ritual, he put a piece of bread into the mouth of every captive after an elderly soldier who carried food containers passed by and told him it was a sin to kill them without feeding them, and that if he fed them, he could do with them whatever he liked. Both witnesses described the position in which they were, stating that they were tied in a pair to the utmost left and that the remaining four captives were tied two by two to the right of them. Previously, in his statements during the investigation, the witness Dragan Stupar stated that they were on a uneven and rocky terrain and the witness Mastikosa confirmed this at the main trial having stated that when Hodža put them into the kneeling position in a line, the witness and Stupar were tied to the utmost left and that they

were separated from the other four captives by a stone.¹⁶ This stone, by its position, separated the war prisoners into two groups. When the position of Hodža, at the moment of firing in relation to the position in which they were is analyzed, according to the surviving witnesses, this specific stone would represent a line of demarcation and it would create a circumstance in which the group of the persons who were killed was closer to the Accused, which could be the reason why the witnesses Dragan Stupar and Milovan Mastikosa were not killed by the first burst of fire, and in the end stayed alive.

[104] In describing the incident, both witnesses stated that Hodža passed from the left to the right, put the bread into the mouth of each of them, and having completed this action, stood behind them and after a couple of minutes a burst of fire was heard. The witness Milovan Mastikosa also testified that he saw Hodža shooting because he turned around at the moment of firing while Dragan Stupar explained that, although he did not see the pulling of trigger itself, considering the position in which the captives were lined up, the position where the other soldier were, and Hodža's position (namely, Hodža was standing between the prisoners who were turned backwards toward him and his soldiers)¹⁷, it was impossible that anybody else other than Hodža fired the shots.

[105] There is no doubt that an encounter with death leaves an indelible imprint on the lives of those who were faced with such situation. There is also no doubt that in the situations like this one, all senses are sharpened and, contrary to the Defense's allegations, a person can notice things that would not be the subject of his perception in normal circumstances. Dragan Stupar identified the Accused as a person who shot at the prisoners on that critical occasion. At no time did he speak about something that he did not see. He even stated that he could not affirm 100% that it was the Accused, but he stated that he affirmed this with a great extent of certainty. He emphasized that the picture of the Accused remained in his sub-consciousness and that at the moment when death is over one's head, this appearance cannot be forgotten. Milovan Mastikosa saw Hodža at the moment when the burst was fired. The Panel finds it proven beyond a reasonable doubt that Suad Kapić aka Hodža is the person who killed four prisoners of war.

[106] Although the surviving witnesses spoke about the specific locations of the killed soldiers with some inconsistency having put Radovan Mudrinić on the second or the third place of the remaining four prisoners, this inconsistency is not something that this Panel finds as unusual considering the traumatic situation of the prisoners. However, when their statements are considered in relation with the expert witnesses' findings, it is clear that at the moment of firing a burst of fire, Hodža stood at the place which was located somewhere between the first and the second pairs of prisoners, a couple of meters behind them. In that situation, the stone that separated Dragan Stupar and Milovan Mastikosa from the remaining four prisoners was thus a physical obstacle, the effect of which was that all six prisoners were not directly next to each other. Thus, a free zone was created and it prevented Hodža from executing with a burst of fire all six of them from the place where he stood. It appears

¹⁶ On page 11 of the transcript of the main trial dated 14 February 2008, the witness Mastikosa said the following: "I and Stupar were on the utmost left side, I was tied next to him and there was a stone between us, and next to us there were Đukić, Mudrinić, Šućur and Čuković ..."

¹⁷ On page 25 of the transcript of the main trial dated 31 January 2008, when asked by the President of the Panel if there was anyone else behind Hodža and himself, witness Stupar answered: "No, there was not. He was standing between us and the others."

that he ran out of ammunition. The subsequent events, the arrival of the RBiH Army soldiers, including the witness “S-1” and Hasan Hadžalić prevented Hodža from fulfilling his intent to kill Stupar and Mastikosa .

[107] As to the burst of fire and the cause of death of three prisoners and severe injuries of the fourth prisoner, the testimony of the surviving witnesses is mostly consistent. The fact that one of the witnesses speaks about a moment, or a minute or two of silence before the burst of fire was heard is not something that could be considered as an essential difference if the situation and the encounter of these persons with death are viewed in an entirety. Some inconsistencies in the testimony of two surviving witnesses appear with regard to the further course of the events. However; Dragan Stupar and Milovan Mastikosa are consistent in stating that Radovan Mudrinić was not killed by the first burst of fire. They both describe a shot that followed after, that was fired by Hodža. They are consistent in their statements that this single shot did not kill Radovan Mudrinić and that behind their back they heard some noise, laughter and the words “This one had a plenty of pork”. They are also consistent with regard to the fact that at the moment Hodža apparently ran out of ammunition another shot was heard which killed Radovan Mudrinić, and thereupon a Motorola radio sound and Hodža’s words, “A small escape attempt, but it has been prevented”.

[108] The Court reviewed this part of the statements of the surviving witnesses in connection with the testimony of Hasan Hadžalić, the *Apači* Commander, who stated at the main trial that he used the radio-device which had a poor signal, that following the shooting and after he made a call someone answered and after he asked the unknown person what was going on, the person answered that nothing was going on and that everything was fine. Therefore, it is clear that, with regard to this circumstance, the testimonies essentially corroborate each other and they give strength to the truthfulness of the statements of the surviving witnesses. From their testimonies, the conclusion stems that, after the killing of the four prisoners, only the Accused talked over the Motorola, namely with Commander Hadžalić. The meaning of the words spoken by the Accused, when he sought to minimize the entire event, were noted by the injured parties and by Hadžalić.

[109] The difference between the testimony of Dragan Stupar and Milovan Mastikosa is that Stupar stated that behind his back he heard a magazine filling up and then a single shot, while Mastikosa stated that he heard the words that Hodža said to a soldier: “Kill that fat one, it seems that he had plenty of pork, you cannot put him down”, and thereupon a shot was fired by other soldier that killed Radovan Mudrinić. This Panel notes that the testimony of Dragan Stupar and Milovan Mastikosa are consistent with regard to the key moments of the incident, the killing itself, that three prisoners were killed by a burst of fire, and the fourth prisoner only after the second single shot. Considering that, the Panel finds beyond a reasonable doubt that the burst of fire was fired from an automatic rifle by the soldier nicknamed Hodža, and that he fired the first single shot. It is clear that Hodža ran out of ammunition at that moment and that that a second shot was also fired that killed Radovan Mudrinić, but it is unclear whether Hodža himself also fired the second shot.

[110] While reviewing this issue, this Panel gave credence to the witness Milovan Mastikosa’s testimony, who stated that he heard Hodža’s order to the other soldier, as quoted, to kill Radovan Mudrinić, and after a shot was heard and the Mudrinić’s moaning finally ended, he heard a magazine filling up and felt a rifle barrel on his right shoulder.

This witness's testimony is also supported by the testimony of protected witness "S-1", who gave a statement during the investigation that Hodža killed the soldiers, but not alone. In addition to this, both Stupar and Mastikosa stated that they heard the magazine filling up, while Dragan Stupar connects the magazine filling up with the last bullet that killed Radovan Mudrinić. Considering the testimony of both witnesses this Panel found that the differences between them are not significant to the extent that the truthfulness of their testimony would be brought into question. With regard to this difference, the Panel gave credence to the testimony of Milovan Mastikosa regarding a rifle being put on his shoulder. Thus, Milovan Mastikosa was in more direct danger than Dragan Stupar, and in the opinion of this Panel, he could more precisely determine the sequence of events itself and the moment when the magazine filling up was heard.

[111] Both surviving witnesses stated in their testimony that the *Apači* Commander, Hasan Hadžalić aka Haro, arrived after the killing of four prisoners and requested Hodža to release two of them to go with him and his unit since the prisoners were familiar with the terrain and could help guide them. Hodža did not allow this. He wanted to give him only one prisoner. However, upon Haro's insistence and after a quarrel with Hodža, the rope between the surviving prisoners was cut and Haro took them with his unit. Both witnesses stated that in this manner Haro saved their lives. Witness Milovan Mastikosa mentioned a detail which this Panel finds very important. He stated that before Haro's arrival, at the moment when he felt the rifle's barrel leaned against his right shoulder blade, another soldier came up who asked Hodža not to kill him as he had a small child. Hodža wanted to kill Stupar, but this soldier would not let him do so. Haro appeared very soon after this event with the soldier, as the witness Mastikosa clarifies "it even cannot be said in minutes, perhaps in seconds" and took them away from that place.

[112] In his statement given during the investigation, the witness "S-1" stated that he spoke with the two surviving prisoners at the moment after the other four prisoners had been already killed and he stated that he felt sorry for them because one of them (Milovan Mastikosa) had a small child and, therefore, he asked Hodža not to kill them. This witness's statement given during the investigation, which the Panel believes, was given sincerely, confirms what the surviving witness Milovan Mastikosa also had stated. Also, Mastikosa's testimony was not inconsistent with the testimony of the other survivor witness, Dragan Stupar. Both witnesses Mastikosa and Stupar spoke about the arrival of Hasan Hadžalić, aka Haro, the *Apači* Commander, who took them away after his quarrel with Hodža. They also stated they spent the following day with Haro's unit before they were handed over to the Corps Police pursuant to the procedures concerning the war prisoners' treatment. Bearing in mind the words of Milovan Mastikosa, that the entire event after the execution of four prisoners lasted for a very short period of time, that the time between the arrival of the soldier who saved his life, whom the Court identified as the witness "S-1" having brought into relation the testimony of Mastikosa and the witness "S-1" and established to be entirely consistent as to this part, and subsequently Haro's arrival, can be measured in seconds, the Panel finds it possible that the witness Dragan Stupar, in the situation concerned, under undoubtedly enormous stress and fear, particularly being in the position he was in – on his knees and with the head bowed down, was not aware that two persons participated in the negotiations with Hodža behind his back, which lasted for only a few seconds, and not at the same time.

[113] At the main trial, the witness “S-1”, who was a member of the *Apači* Reconnaissance and Sabotage Platoon, entirely contradicted his statement given during the investigation phase. However, the Panel considered all his statements in their entirety and in relation to the other adduced evidence, and based on such evaluation, established to which extent they can be given credence.

[114] As to the witness “S-1”, the Panel finds that his statement given during the investigation phase is more reliable than his testimony given at the main trial. Witness S-1 was the first one within a wide investigation who gave to the Prosecutor an indication as to the perpetrator of the criminal offense committed at the Mrežnica hill. His statement was subsequently confirmed through the testimony of the surviving witnesses. At the main trial, S-1 not only contradicted his first statement, but the manner of his testifying largely differed. S-1’s testimony at the main trial was confused, it was very difficult to follow the thoughts of this witness and S-1 constantly avoided answering certain questions, while protecting Suad Kapić without being asked, stating that Suad Kapić could not have committed the killing concerned. Although not asked, this witness stated that Kapić would not hurt even a fly, whereby S-1 directly took the side of his defense and thereby S-1’s testimony given at the main trial is found to be biased. This witness did not offer any convincing explanation as to why his testimony given at the main trial was different from the statement given during the investigation. On the other hand, during the investigation, after he sought and was granted the possibility to testify under the identity protection measures due to the fear for both his life and the lives of his family members, this witness described with no doubt the incident at issue, his conversation with the two surviving witnesses emphasizing that four prisoners had been already killed, and his effort to keep the two alive because he felt sorry for one of them who had a small child, contrary to Hodža’s intention to kill them too. Without any doubt, this witness stated that Suad Kapić was a soldier with the nickname Hodža and it was Suad Kapić who killed the prisoners of war. In doing so, he described Hodža as the soldier who had a knife in a finely made belt leather sheath, while this detail concerning the knife quality was subsequently also confirmed by the witness “S-2”. Witness “S-1” stated that Hodža never used the knife, which is not questionable, because that detail in this specific case only contributed to the identification of the Accused.

[115] The witness “S-2”, who was also an *Apači* unit member during the critical period, in his testimony given at the main trial and during the investigation spoke about the existence of six prisoners of war, of whom two were taken away by members of his unit because they knew the terrain. After he was granted the protective measures, he stated that he heard a sort of quarrel between Hasan Hadžalić, the *Apači* Commander, and Ibrahim Nadarević, the Brigade Commander, in which they mentioned that someone had to be responsible for the execution of the war prisoners. In his testimony at the main trial, however, this witness denied that he heard about the fate of four war prisoners from anybody else except the Prosecutor.

[116] The Panel analyzed the testimony of both protected witnesses taking into account all the circumstances under which they testified. Both witnesses were the *Apači* unit members, and they directly (the witness “S-1”), or indirectly (the witness “S-2”) identified their war comrade Suad Kapić in connection with the killings at issue. Although he had earlier spoken about a number of persons with the nickname Hodža, at the main trial, the witness “S-2”

even denied that he knew Suad Kapić, his neighbor from the Ćoralčići village, by any nickname. In the statement given during the investigation, after he had sought and was granted the protective measures, S-2 stated that Suad Kapić had the nickname Hodža, and that he carried a knife in a recognizable sheath.

[117] The Appellate Panel finds that in spite of the granted protective measures, both protected witnesses were in a difficult position, because although their identity and the appearance remained unknown to the public, they had to confront their own conscience after they had incriminated their war comrade in their statements given during the investigation, which the Panel finds was the reason why they changed their statements at the main trial, in addition to fear they clearly felt and which was particularly noticeable with the witness “S-1”. After the evaluation of their statements, the conclusion is drawn that due to all the influences of both a subjective and objective nature, at the main trial they withdrew their statements given during the investigation thereby trying to avoid the truth and to avoid their own responsibility for both the incident itself, since the responsibility for the killing of these four prisoners does not rest only on one person, and the responsibility before themselves, for having incriminated with their statements a person from the unit with whom they used to fight side by side. Even though at the main trial they testified from a separate room, that is, physically separated from the Accused and without looking into his eyes, certainly it was not easy to repeat what they had stated during the investigation. This undoubtedly concerned the witnesses who had a significant burden on their back, but at one point they found the strength to act correctly, to tell the truth even once, no matter how difficult it was for them.

[118] Other members of the 517th Liberation Brigade, the Accused’s war comrades, who also testified in this case, mostly denied that they knew the Accused by the nickname Hodža. The prosecution witnesses, members of the IDV *Apači* unit Ćazim Handagić, Ale Rekić and Almir Hodžić, witness Mesud Majetić, a member of the 2nd Battalion of the 517th Brigade of the A RBiH, as well as the Defense witness Arif Beganović, who was also a member of the 517th Brigade, of the 3rd Liberation Battalion, denied that they even knew the Accused, while Hasan Hadžalić, the *Apači* Commander, although he knew Suad Kapić, denied that he saw him at the time of the critical incident on the Mrežnica hill. Contrary to this, from the statements of the surviving prisoners of war it is clear that Hasan Hadžalić argued with Hodža trying to keep them both alive, whereby he was directly responsible for the fact that they were saved although Hasan Hadžalić did not mention this in his statement. The Panel considered all the aforementioned as a clear attempt of the Accused’s war comrades to help him to be acquitted and to avoid criminal liability.

[119] Two leaders of the 517th Liberation Brigade and the *Apači* unit testified in these proceedings, namely the Brigade Commander Ibrahim Nadarević and the IDV *Apači* unit Commander, Hasan Hadžalić. Both witnesses, like the other heard witnesses, members of the RBiH Army, with the exception of the mentioned protected witnesses “S-1” and “S-2”, gave very poor statements in their verbal presentation from the aspect of the factual description referred to in the Indictment, that is, regarding the relevant incident itself, while being very detailed when speaking about the earlier and later factual circumstances that are less important but still helpful in creating an overall picture of the situation on the Mrežnica hill at the relevant time. It is not likely nor realistically possible, that persons in responsible positions of the military structure, at the post of a brigade commander and a unit

commander, although being aware of the existence of war prisoners, were not aware of the prisoners' fate. In addition to this, both surviving witnesses identified Hasan Hadžalić as the person who was at the scene where the four prisoners were killed, who quarreled with Hodža, and in the end took them away from that place and thereby saved them. Neither of the surviving witnesses had a dilemma whether Haro saw the prisoners at the place where they had been killed, specifically at the moment when they had been already killed while Dragan Stupar mentioned Haro with a dose of uncertainty as the person who was also present at the moment when they were captured. From the testimony of the witnesses it is clear that Hodža was the person who had certain powers over other soldiers, behaved and acted as the person who gave orders, was a person who held a superior position in relation to the soldiers who were with him. However, Hasan Hadžalić was the Commander of the unit of which Hodža was a member. If proved that he knew about the incident at issue when he was Suad Kapić's commander he undoubtedly would expose himself to the risk that he would be held liable pursuant to the principle of command responsibility. This can explain the fact that his testimony is incomplete in relation to the specific incident and its perpetrator. During the cross-examination by the Defense, when asked if he knew what happened with the four prisoners, witness Hadžalić – Haro answered that he never heard anything about it,¹⁸ although the statement of the witness "S-2" given during the investigation leads to a contrary conclusion, since S-2 witness claimed, in the part of the statement which is credible to the Panel that he had heard some kind of an argument between Hadžalić and Nadarević about the fact that someone would have to be held liable for the execution of the prisoners of war. When asked whether he knew the name of Suad Kapić before the Prosecutor showed him his photograph, witness Hadžalić answered no, and also stated that he did not know what he looked like at all.¹⁹

[120] This part of Haro's statement was considered in relation with the testimony of Stupar, Mastikosa, the witness "S-1" and "S-2" during the investigation, as well as with the statement of the Defense witness Safet Begić who decisively noted for the record at the main trial held on 6 March 2008 that Suad Kapić was the person he had met on his way towards the hill and that the Accused was carrying the *Karl Gustav* hand-held launcher, while his assistant "Tičar" was with him, and that as he was passing by he also saw Arif Beganović standing by the prisoners. It was also considered in relation with the objective evidence showing membership of the Accused in the same unit as Haro, the commander of the intervention platoon, and as it is manifestly contrary to these pieces of evidence, the Panel rejected that part of Haro's testimony as unconvincing and untrue.

[121] The situation is also identical with regard to Ibrahim Nadarević as the brigade Commander. Both Nadarević and Haro were cautioned when giving their statements during the investigation and in testifying at the main trial that they were not obliged to answer the questions by which they could incriminate themselves. Although both of them were obliged to tell the truth, the fear of their own responsibility could cause them to be silent about certain facts, or to present them in such manner so as to avoid their own involvement in the incident at issue. The foregoing manner of testifying, that is, a very precise and detailed memory and testimony about the events that are not directly related to the killing of four war prisoners, and a very poor testimony and almost the denial of their knowledge that the related four murders occurred at all, results in such a conclusion. The fact that Nadarević

¹⁸ Page 44 of the transcript of the main trial dated 31 January 2008.

¹⁹ *Ibidem*, p. 45 of the transcript.

mentioned only two killed war prisoners, while stating nothing at all about the four remaining war prisoners who were killed at the Mrežnica hill supports the conclusion that the foregoing conclusion is correct. It is not believable to the Panel that Ibrahim Nadarević, as the Brigade Commander, did not know about the existence of all 6 prisoners of war, among others, bearing in mind the statement of the witness “S-2” given during the investigation.²⁰

[122] Amir Hozdić, also a member of the IDV *Apači*, who was heard in the capacity of a witness, is one of the rare members of the R BiH Army who spoke about the existence of war prisoners. He, however, stated that he had heard about the existence of 6 prisoners, of whom he found 2 alive when his unit returned and that he knew nothing about the remaining four prisoners. His statement is rather deficient. He could not even specify the time at which the action of liberation of the Una-Sana Canton took place although he participated in it. He denied that Commander Haro was present, but this was contested both by the statements of the surviving war prisoners who identified Haro as at the crime scene, and the statement of Haro himself, who did not contest that he was at the crime scene. He stated that he did not know Suad Kapić. This witness attempts to avoid everything that could bring him or his war comrades into connection with the events on the Mrežnica hill.

[123] Through the witnesses heard at the main trial, the Defense tried to discredit the statements of the Prosecution witnesses, particularly of Dragan Stupar and Milovan Mastikosa. The Panel opines that the emphasizing and stressing of the presence of special units in black overalls, the so called *Crne laste* (Black Swallows) or *Crni labudovi* (Black Swans) was only an attempt to create confusion regarding the person who could appear as the perpetrator of the execution of four war prisoners. In view of this, the testimony of witness Hadžalić is indicative in the part in which he noted that several brigades were present during the *Sana* operation, including the 506th, the 502nd, as he said certain *Crni labudovi*, that there was a mass of people that all of them were mixed.²¹ So, it is indisputable that there were a number of units in the area at issue, but it is proved beyond a reasonable doubt that members of the 517th Brigade of the R BiH Army, 3rd Battalion, the IDV *Apači*, captured 6 Serb soldiers, of whom 4 were killed. The Prosecutor’s Office did not contest that Suad Kapić was a member of the crew of *Karl Gustav* hand held rocket launcher. This also arises from the Exhibit T-15. Through the statements of witnesses, Firhat Porčić and Safet Begić, who confirmed this piece of information, the Defense tried to remove from the Accused the responsibility for the killing stating that a gunner in the *Karl Gustav* crew did not carry an automatic rifle. However, in bringing into connection the mentioned Exhibit T-15 with the indicated names of Firhat Porčić and Suad Kapić as members of the *Karl Gustav* crew, with Suad Kapić on the second place, this leads to the conclusion that he was an assistant in the *Karl Gustav* crew, while Firhat Porčić was a gunner, because it is logical that in listing the crew members a gunner is placed in the first place as the leader. In addition to this, the witness Firhat Porčić himself stated that the assistant in the *Karl Gustav* crew carried an automatic rifle. Even the witness Nadarević, as the Brigade Commander, stated that as to personal weapons, Suad Kapić had to have at least an automatic gun. Nevertheless, even if the Accused Kapić was within the formation issued only with the hand-held launcher, it does mean that he could not have had an automatic rifle

²⁰ See paragraph No. 119.

²¹ See the transcript of the main trial dated 21 January 2009, page 35.

of his fellow-soldiers at his disposal at any moment, especially since he was a person with authority.

[124] Considering all of the evidence, the Panel concluded that the Prosecution witnesses, but also the Defense witnesses, such as Arif Beganović, who, when asked by the Prosecutor, stated for the record of the main trial held on 6 March 2008 (page 22 of the transcript) that he was sure that the Accused had not been a member of his company within the 517th Brigade of the A RBiH, although the objective Prosecution evidence marked as exhibit T-16 shows quite the contrary (The soldiers sent to carry out the combat task, 517, Obr., the 3rd Battalion, the 2 Liberation Company) and this list contains the names of both Arif Beganović and Suad Kapić as well, tried through their testimony to provide an alibi for the Accused, but considering that sufficient evidence was adduced from which the participation of Suad Kapić in the incriminating events could be established with certainty, the Panel could not give credence to the testimony of the mentioned witnesses.

[125] The Defense also tried to contest the credibility of the testimony of Dragan Stupar, and at the same time bring into question the identity of the soldier called “Hodža” referring to the statements of Dragan Stupar given both during the investigation and his testimony at the main trial. In those statements, Stupar stated that after he and Mastikosa had been brought by Haro and his soldiers to the house of Mićo Ćatić, he spoke with a soldier, a member of the R BiH Army wearing a cowboy hat, and asked him who was the soldier who executed the war prisoners. The soldier told him it was Hodžić, aka Hodža, from Bužim, and not Suad Kapić. The Panel does not find it unusual for such a statement to be made by a soldier, a member of the R BiH Army. It is quite logical, as already addressed on the part concerning the probative value of the Prosecution witnesses testimony, that war comrades of Suad Kapić, members of the 517th Brigade, at a time directly after the critical event, at the main trial or during the questioning by the Prosecutor are trying to conceal the identity of the Accused as the perpetrator of the crime and thereby to help him in avoiding criminal responsibility. This is also similar to the testimony of witnesses Handagić and Rekić who stated that they did not know Suad Kapić, although they all belonged to the same unit.

[126] Through the testimony of Dr. Šolaja, the Defense tried to contest the credibility of the two injured parties, Dragan Stupar and Milovan Mastikosa. Dr. Mile Šolaja, a witness who examined the bodies of the deceased persons in the Health Center Sanski Most, several days after their death, testified about substantial stabbing wounds and injuries inflicted by cold steel, occurring while the persons were alive, which is contrary to the statements of two surviving witnesses who explicitly stated that no injury of such kind was inflicted. The witness also stated that the hands of the killed persons were tied with wire, while the surviving witnesses both stated that they were tied with a rifle-cleaning rope. The Panel will explain the issue of the stabbing wounds existence in the part of the Verdict addressing the expert witnesses findings, while at this point, regarding the analysis of the testimony of Dr. Šolaja, it will refer only to the kind of ligature with which the prisoners were tied.

[127] There is no doubt that as to the type of ligature, the testimony of the surviving witnesses is the most reliable because they are the ones who were tied. However, there is no reason why the Doctor, who examined the bodies of the killed persons, would assert with a hundred percent certainty that the hands of the killed persons were tied with the wire. The fact itself concerning the item with which the hands of the captured soldiers were tied is not

of decisive importance for the issue of existence of the criminal offense and the responsibility of the perpetrator but it is important in terms of evaluation of the credibility of the witnesses' testimony. Having evaluated the witnesses' testimony, the Panel concludes as follows: the surviving witnesses spoke about the fact that two of them were tied with the rifle-cleaning rope, and that two of them were tied in a pair. Their testimony was confirmed by the statement of the witness "S-1" given during the investigation²² in which he clearly stated that he untied the prisoners Stupar and Mastikosa, and that although he did not know with what they were tied, it was not a wire, because he would have remembered the wire. In the circumstances of this specific incident, quite certainly the witnesses were not able to see with what the remaining four prisoners of war were tied with (according to their statements, at the moment when their hands were tied on the back, they were laying face down and nowhere in their testimony did they explicitly stated that the remaining four prisoners were tied with the same type of ligature. On the other hand, Dr. Šolaja examined the bodies of the killed persons and could establish that their hands were tied with wire. However, considering that he had no connection with the two surviving witnesses, he could not know that they were not tied in an identical manner. In the opinion of this Panel, the credibility of the testimony of the surviving witnesses was not brought into question. That is, there is a possibility that the prisoners were tied in a different manner and different means of tying is not excluded.

[128] The aforementioned leads to the conclusion that the Panel gave full credence to the statements of Stupar and Mastikosa, as well as the statements of two protected witnesses "S-1" and "S-2" given during the investigation, since these statements are fulfilling and supportive of each other. The Panel was mindful of the fact that Stupar and Mastikosa are the persons who survived the execution, namely the witnesses who had direct knowledge of the crime itself and the perpetrator, which represents decisive facts which the Court particularly bore in mind while evaluating their statements. The Panel did not find any reason whatsoever that would suggest that the surviving witnesses falsely incriminated the Accused. On the contrary, their statements demonstrated their certainty about what they were saying, that their statements were free of hostility and only reflected their wish that justice be served and that the person who committed the crime be held liable. The Panel gave credence to the statements of other witnesses in the parts which it found credible, and the reasoning part of the Verdict includes the reasoning of why the Panel did not find some parts of those statements reliable and credible.

Identification of Hodža

[129] The two surviving witnesses, Dragan Stupar and Milovan Mastikosa, described a soldier nicknamed Hodža whom they saw on the day concerned at the site of the execution of the four prisoners of war to which site they had also been brought in the same group.

[130] Neither Dragan Stupar nor Milovan Mastikosa had any doubt when identifying the Accused Suad Kapić as the Hodža who committed the murders. Although 14 years have elapsed from the day of the murder of the four prisoners of war to the witnesses' examination when they had an opportunity to see Suad Kapić, both stated that the Accused was the person who killed the four prisoners of war on 20 September 1995.

²² Witness Examination Record, No. KTN-RZ-66/07 dated 7 September 2007.

[131] They described Hodža during the investigation and at the main trial as a black-haired young man with beard wearing a camouflage uniform and a visor cap and carrying an automatic rifle and a knife in a calfskin case. It is concluded from the aforesaid that they gave almost identical descriptions of Hodža with respect to the features that any observer could objectively notice. However, these witnesses' different estimates of Hodža's age and height represent their respective subjective perceptions of that person. Such perception differs not only from one person to another but also with one person depending on the situation. That is why a person's age or height, in the circumstances marked by enormous tension and fear for one's life, can be perceived to be far above what they are in reality. An example in the present case is when Dragan Stupar states that Hodža was around 185-cm tall and that he was a young man of 27-30. If a person is the holder of life and death over another, if he acts and behaves as if outranking others, then other persons, especially those who are in mortal danger may likely perceive that person as physically bigger and taller. It should not be forgotten in this case that the witnesses spent the majority of the time in Hodža's presence bowing and kneeling, that is, closer to earth, and, as Dragan Stupar stated, they were on an uneven forest terrain, which could undoubtedly lead to a wrong estimation of Hodža's height. The same goes for the age. The war, continuous life threat and the previous wounding, all are the circumstances that add to the seriousness of the faces of individuals in such situations. Also, spending time outdoors exposed to the elements, which is an unavoidable companion of war, gives sharpness to everyone's facial features, including the Accused, and can lead to a person looking much older than he really is.

[132] Witness Mastikosa and witness Stupar's statements are also supported by the statements of the Defense witnesses Firhat Porčić and Safet Begić. Namely, Firhat Porčić talked about Suad Kapić as a youngish person who had "short" beard, "like a man who did not shave for a week perhaps, or two"²³, and the Defense witness Safet Begić, while describing Suad Kapić, noted that he was wearing a camouflage uniform²⁴ and that he had a beret on his head.²⁵ In their statements given during the investigation, the protected witnesses "S-1" and "S-2", as they described Hodža, confirmed that that person was actually Suad Kapić and they described the knife in the recognizable sheath in the identical manner as the surviving witnesses, which in this specific case is an important detail that contributed to the identification of the Accused. The Panel certainly could not base its conclusion regarding the identity of the perpetrator of the criminal offense on the description of Suad Kapić that was provided by the abovementioned witnesses. However, by bringing these statements into correlation with the statements of the surviving witnesses who in detail, in an almost identical manner, described the appearance of the soldier called Hodža at the time of the commission of the criminal offense, who recognized him as the Accused in the courtroom with no doubt whatsoever, and which statements are in some parts confirmed by the statements of the Defense witnesses and the protected witnesses, as well as bearing in mind the differences in the description of Hodža provided by the

²³ Transcript dated 6 March 2009 in the *Suad Kapić* case numebr X-KR-07/431, hearing of witness Firhat Porčić.

²⁴ Witness Dragan Stupar, at the main trial dated 6 March 2008, also noted that Hodža was wearing trousers of a camouflage uniform.

²⁵ From the statement of witness Safet Begić it indisputably follows that Suad Kapić had some kind of headgear, while the Panel finds it irrelevant if it was a cap, which was mentioned by the surviving witnesses, or a beret, which was mentioned by this witness, because it would not be realistic to expect the witnesses to remember in detail the type of headgear 14 years after the referenced event.

surviving witnesses and their subjective perception of this person that is undoubtedly influenced by fear, tension and discomfort, this Panel has no doubt that the Accused was the person who carried out the execution of the prisoners of war on the hill of Mrežnica.

[133] The objection raised by the Defense, that the action by the Prosecutor's Office which consisted of presenting a photograph of Suad Kapić to the witnesses during their statements²⁶ was unlawful in violation of Article 85(3) and (4) of the CPC BiH, is in the opinion of the Panel unfounded. It is indisputable that during the statements of the abovementioned witnesses the Prosecutor showed them the photograph of the Accused and that this action was not carried out pursuant to Article 85(3) of the CPC BiH. However, in the case at hand, this was not a special procedural act of proving prescribed by the CPC in the abovementioned Article but the identification of the Accused by these witnesses, which is a part of their testimonies, while the Court is to evaluate the credibility and persuasiveness of the witnesses' statements in the manner prescribed by the law. Further, the Panel's decision regarding the establishment of the identity of the perpetrator of the referenced criminal offense was not based on the statements of the witnesses (Sović and Majetić) who were shown the Suad Kapić's photograph at the Prosecutor's Office during the examination while the investigation was ongoing.

[134] The witnesses who are aggrieved parties, Stupar and Mastikosa, stated when they gave their statements during the investigation at the Prosecutor's Office as well as at the main trial that the perpetrator of the referenced criminal offenses was Suad Kapić, aka Hodža. They described him at the Prosecutor's Office and they provided an identical general description at the main trial as well when they confirmed their statements regarding the identity of the perpetrator of the criminal offense and they recognized the Accused as the perpetrator. Witness Stupar stated that he did not have an opportunity to see the photograph of the Accused before he met him face to face at the main trial.²⁷ During his testimony at the main trial witness, Stupar stated that he was shown an amateur video footage of a troop review which was paused at one moment and he was told that the *Apachi* unit can be seen in that part of the footage and he was asked if he could recognize Hodža but the witness could not do that probably due, as he noted, to the poor quality of the footage, which the Panel finds to be a proof of his credibility.

[135] Therefore, since this was not the special act of identification set forth in the CPC BiH, this act by the Prosecutor cannot be treated as unlawful. However, the Defense's objection that in the records on the examination of these witnesses during the investigation it should have been noted that the witnesses were shown a photograph of the Accused, the Suspect at the time, is well founded. Nevertheless, this omission by the Prosecutor was removed at the

²⁶ See the transcript of the main trial in the case number X-KR-07/431 dated 18 January 2009, hearing of witness Izet Sović, p. 19 and the transcript of the main trial dated 24 January 2008, hearing on witness Mesud Majetić, p. 20-22.

²⁷ See the transcript of the main trial in the X-KR-07/431 case dated 7 February 2009 p. 22, the hearing of witness Stupar who, when asked by a member of the Panel if he saw photographs of the Accused in the newspapers in which he read about the case, answered: "There were no photographs. Those were short articles. Namely that Suad Kapić was arrested for this..., the criminal offense, the prisoners of war..., and then the list of names of the people who were killed there, who were together with me, I knew that that was it", and he further added: "I did not see his photograph anywhere. There was no article in the newspapers. The newspaper, I mean..., it was *Focus* newspaper and *Nezavisne* newspaper. That can be checked too, I think that no article was published, I did not..., this photograph of his..."

main trial through the direct examination of the witnesses before the Trial Panel in that the record reflected that they were shown a photograph of Suad Kapić at the Prosecutor's Office during the examination at the stage of the investigation, which the Prosecutor did not deny. Since the statements of the witnesses who were shown the photograph of the Accused which the Defense Counsel pointed out (Sović and Majetić), did not contribute to the identification of the Accused as the perpetrator of the criminal offense the witnesses who were not shown the photograph, the injured parties Stupar and Mastikosa, had no dilemma about the identification of the Accused as the person who killed the prisoners, the Panel had no need to engage in the causes of the abovementioned omission in detail. The Panel's decision on the Accused's culpability for the criminal offense is not exclusively based on the fact that the injured parties recognized the Accused in the courtroom but also upon the detail and exhaustive analysis of the statements of all of the witnesses (which is also noted in the reasoning part of the Verdict) the Panel has found in them the parts that corroborate the statements of the two eye-witnesses who strengthened the conviction of the Court to the extent of "beyond any reasonable doubt" that precisely the Accused committed the referenced criminal offense.

Standards for Identification of the Accused

[136] The issue of identification of an Accused by an eye-witness to the incident, that is, the credibility of eye-witness statements is always a complex matter that courts must pay great attention to. In the *Kupreškić et al*, different courts' practices concerning eye-witness identification was reviewed and it was noted that, given the importance of the matter, "where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a 'reasoned opinion'".²⁸ Also, the Chamber in the same case²⁹ stated that courts have identified the following factors as relevant to a determination of whether a decision to rely upon identification evidence was reasonable:

- a) identification of an accused by witnesses who had only a fleeting glance or an obstructed view of the accused;
- b) identification occurring in the dark and as a result of a traumatic event experienced by the witness;
- c) inconsistent or inaccurate testimony about the accused's physical characteristics at the time of the event;
- d) misidentification or denial of the ability to identify followed by later identification of the accused by a witness;
- e) the existence of irreconcilable witness testimonies; and

²⁸ Judgment, IT-95-16-A, *Kupreškić et al.*, para. 39.

²⁹ Judgment, IT-95-16-A, *Kupreškić et al.*, para. 39.

f) a witness' delayed assertion of memory regarding the accused coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.

[137] The referenced factors may be treated as standards to assess the reliability and credibility of eye-witness identification of an accused. Having reviewed these standards in the present case, the Appellate Panel made the following conclusions about the facts.

- a) In the present case, both eye-witnesses had an opportunity to observe the Accused for a rather long period of time. That is to say, the event itself did not happen in one moment but the execution of the four prisoners of war was preceded by a certain period of time that the prisoners spent in the presence of Hodža and his soldiers. The eye-witnesses must have had an opportunity to observe him well at the moment when he was putting a knife against Slaviša Đukić's neck and insulting and threatening the prisoners. Also, Hodža took the prisoners some 20 meters to a forest valley. Thus, they had his image before their eyes during that movement, too. Also, after the order that they should kneel in line in the valley, Hodža, who was standing behind them up to that point, passed in front of them putting a piece of bread into each of the prisoners' mouth, and on that occasion they could observe him well. Finally, at the moment the burst was fired, witness Mastikosa turned around his shoulder and recognized the person holding an automatic rifle and firing as Hodža. The key moments of the incident took place in a forest valley. Hodža approached the prisoners from the front, so close as to put a piece of bread each in their mouths, so they could undoubtedly observe him well. Neither witness had any mental or physical impairment that would have posed an obstacle to his objective perception.
- b) According to the eye-witnesses, the complete incident took place before noon, between 10.30 and 12.00 hrs, according to the witnesses, in cloudy but not rainy or foggy weather. Although the whole incident, from the moment of capture onward, was undoubtedly an exceptionally traumatic experience for the eye-witnesses, the most traumatic moments were likely when the four prisoners were killed and, at which time, the fate of the remaining two prisoners was uncertain. However, the eye-witnesses had an opportunity to observe Hodža well before the very act of execution, and, given the fact that they spent a certain period, minutes or perhaps even an hour, in his presence, his image was undoubtedly engraved in their memory and this cannot be regarded as "identification occurring as a result of a traumatic event" which, as one of the standards, would cast a doubt in the accuracy of such identification.
- c) Both during the investigation and at the main trial, the eye-witnesses gave a physical description of a soldier nicknamed Hodža as they remembered him. The finding of this Panel is that both witnesses gave a description of the soldier named Hodža in a nearly identical manner with respect to objective features, whereas the Panel explained the discrepancies in their respective personal perceptions of the said person in paragraph No. 131 of the Verdict. In order to

avoid unnecessary repetition, the Panel will not analyze at this place the inconsistencies in the description of Hodža.³⁰

- d) In the present case, both eye-witnesses survivors to the referenced incident identified, without any doubt or uncertainty, the Accused Suad Kapić as Hodža, the soldier who carried out the execution of the four prisoners of war on the Mrežnica hill in September 1995. Another indicator of their credibility is the fact that they did not identify Hodža when a VHS footage was played in the Prosecutor's Office. Thus, they did not speculate and point at anyone just for the sake of accusing someone of the crimes that happened and of which they were direct victims. However, in the courtroom, where they were face to face with the Accused they both said without any dilemma that the Accused was the very Hodža who killed the prisoners. The surviving witnesses said that the Accused had changed due to the lapse of time but the image of the person they had in their memory as of 19 September 1995 was mirrored in reality in the courtroom. In the opinion of the Panel, when assessing the evidentiary strength of the witnesses' statements regarding the identification of a person, although important, it is not enough only to consider the physical characteristics of the person but also his expression, as witness Dragan Stupar indicates in his testimony.³¹
- e) The statements of the two eye-witnesses describe the event concerned in a nearly identical manner and the certain differences therein add to the trust in their credibility and accuracy. By evaluating their respective statements in combination, the Panel gets a complete picture of the events on the hill of Mrežnica.
- f) In the present case, there is not a situation of witnesses claiming for a certain period of time during the proceedings that they could not remember the face of the perpetrator of the crime and then "suddenly" recognizing the Accused to be that person. On the contrary, from their first statements until the evidence given at the main trial, these witnesses gave an almost identical description of the perpetrator (which is not incompatible with the present-day looks of the Accused), whereupon both of them identified the Accused in the courtroom without any doubt as the perpetrator of the relevant crime.

[138] In addition to reviewing the Judgment in the *Kupreškić et al.* case and identifying the factors relevant to trust eye-witness identification of an Accused, and determining that they do not apply to the identification of Suad Kapić by Dragan Stupar and Milovan Mastikosa, this Panel also reviewed the jurisprudence of other court panels and identified the criteria that these panels established in their jurisprudence that could serve as guidance when assessing whether an identification of a person based solely on recognition by another person may be reliable and to what extent.

³⁰ See paragraph No. 131.

³¹ See the transcript of the main trial in the X-KR-07/431 case dated 7 February 2008, p. 18 – the examination of witness Dragan Stupar by the President of the Panel.

[139] In the *Neil v. Biggers*³² case, the Supreme Court of the United States identified five criteria to be assessed in judging the reliability of identification in the context of objective circumstances. These criteria are as follows:

1. opportunity for a witness to view the accused at the time of the perpetration,
2. the degree of witness' attention,
3. the accuracy of witness' prior description or identification of the accused,
4. the witness' certainty, demonstrated during the identification at the main trial and the amount of time that elapsed between the perpetration and the identification.

[140] Other courts have also dealt with the issue of reliability of eye-witness identification. A similar approach was taken in *Utah v. Longa*³³ in which the Supreme Court of Utah also established five criteria to judge the reliability of identification.

The criteria are as follows:

1. opportunity for a witness to view the perpetrator during the event,
2. the degree of attention the witness paid to the perpetrator at the time of the event,
3. the witness' capacity to see the event, including his physical and mental accuracy,
4. whether the witness made the identification spontaneously and adhered to it consistently afterward, that is, whether the identification is a result of suggestion from others,
5. the nature of the event considered and a probability that the witness will accurately perceive, memorize and re-tell the event (the latest factor has to do with whether the event was ordinary or not).

[141] In principle, most of these standards have already been considered in the analysis of the standards in the *Kupreškić et al.* case, but this Panel wants to discuss here another one, cited in the referenced judgments. It is the standard regarding the degree of attention the witness paid to the perpetrator during the event. That is to say, this Panel considered that the witnesses, who under immediate life threat, focused their senses and complete attention to the person who was deciding their fate during these moments. The event took place in a forest, in the presence of Hodža and his soldiers and the six prisoners of war, and, although it was a time of ongoing armed combat, and shooting and shell explosions could be heard from the distance, it was silent before the burst of fire and the witnesses must have been focused on the main protagonist of the event, the soldier called Hodža. Precisely due to the undoubtedly present tension and fear, it is hardly likely that there was anything else at these moments to divert the attention of Dragan Stupar and Milovan Mastikosa from the soldier in whose hands their fate lay. The fact that such conclusion is true can be seen in the detail that has a certain weight from the psychological point of view, namely both the witnesses noted that a silence fell before the burst of fire was heard.

[142] The Defense Counsel attempted to contest the identification of the Accused by the witnesses-survivors. To that aim, during his closing argument³⁴ the Defense Counsel offered his version of the event in which the results of his analysis, in accordance with the interest of the Defense, denies the credibility of the testimony of Milovan Mastikosa who said that he saw Hodža at the moment the burst was fired. However, in the opinion of this

³² *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed.2d 401,93 S.Ct. 375 (1972).

³³ *Utah v. Longa*, 721 P.2d 493 (Utah 1986).

³⁴ See the Defense's closing argument, p. 15 and 16.

Panel, the Defense overlooks the fact that any event in life, including this one of the execution of prisoners of war, has its own course, especially in terms of body movements, the extremities and the head in particular, about which Dr. Karan also testified in a similar context.³⁵ Contrary to the Defense that views the conduct of the witnesses-survivors during the relevant event as rather static the Appellate Panel takes a totality of the circumstances approach to the event as it starts from the admitted evidence and views the totality of the event. Therefore, even from the viewpoint of ordinary life and lay reasoning it is not possible to rule out a possibility that on the given occasion witness Mastikosa was moving his body and head, albeit to the limited extent, irrespective of the fact that he touched shoulders with Dragan Stupar. Therefore, in the opinion of the Panel, he could see the Accused at the moment the burst was fired, as he stated during his evidence. The Panel, therefore, believes his statement, which is also corroborated by the report of expert witnesses, as a piece of evidence of objective nature, since the report actually refers to the extensive mobility of the head as a part of body.

[143] Given the referenced standards of identification, the Panel affirmatively answered the question of possibility of identification of the Accused by the two surviving prisoners of war, Dragan Stupar and Milovan Mastikosa.

Expert Witnesses' Report

[144] Expert witnesses in forensic medicine and ballistics were examined before the Panel of the Appellate Division. Following the exhumation and forensic-anthropological and ballistic analysis of the skeletal remains of Radovan Mudrinić, Duško Čuković, Slaviša Đukić and Goran Šučur, the experts drafted a written report and opinion that was admitted into the case file. This evidence could be defined as control evidence, since with its presentation the subjective evidence, such as the statements of witnesses Dragan Stupar and Milovan Mastikosa, was corroborated as objective evidence.

[145] In other words, the forensic-anthropological analysis confirmed the existence of traces of wounds inflicted by small arms projectiles on the bodies of the victims, each of which might have been lethal, according to expert witness Dr Željko Karan, specialist in forensic medicine and a standing court expert for this field. Since the referenced procedure was carried out slightly less than 14 years after the four prisoners were killed and buried, it was not possible to perform an autopsy because all soft tissue was decomposed due to the passage of time. However, as part of the forensic-anthropological analysis of mortal remains, the expert witnesses made their report as completely as possible given the degree of decomposition of the remains.

[146] The Panel deems that the expert witnesses' report is of such significant probative value when assessed in combination with other pieces of evidence that the verdict could largely rely upon it. As explained earlier, this piece of evidence is of an objective nature that cannot be affected by some subjective circumstances, unlike witness statements where human factors must always be borne in mind. The fact that the expert witnesses did not provide answers to many questions, since the condition of the skeletal remains after the

³⁵ See transcript of the main trial in the X-KRŽ-07/431 case of 18 September 2009, examination of Dr Željko Karan and Milko Marić, p. 35.

exhumation did not allow them to do so, adds, in the opinion of the Panel, to the trust in their statement and the report they made. The expert witnesses did not draw conclusions on the basis of assumptions but based their report on the determinations that could be established.

[147] What the forensic-anthropological analysis confirms is that wounds that were caused by at least two and probably even more projectiles of small arms, each of which could be lethal, were found on the skeletal remains of all four deceased prisoners of war. With two exceptions, the expert witnesses could not give any opinion with respect to the trajectory of the projectiles or the distance from which the fire was opened because, as stated earlier, the soft tissue and clothing were decomposed and because the forensic-anthropological analysis was not conducted at the site of the killing but almost 14 years after the death, following the exhumation from marked grave sites.

[148] With respect to determining the trajectory of the projectiles, two of the established wounds are an exception. One is the wound to the pelvis bone of Radovan Mudrinić, that the expert witness established with certainty was caused by a small arms projectile moving from behind forward with the left side of the body and the left pelvic bone being turned toward the muzzle. The other is the wound to Slaviša Đukić's head, whose established projectile trajectory was from above downward and from the left rightward. Given the fact that also found among the mortal remains of Goran Šučur was a jacket of a 7.62x39 mm bullet which ballistics expert Milko Marić stated was fired from an automatic rifle, semi-automatic rifle or a sub-machine gun, although the expert witnesses leave a theoretical possibility that not all wounds were necessarily caused by one and the same kind of firearms since the facts are insufficient to establish that, the found bullet jacket corroborates the surviving witnesses' statements that they were fired upon and that the four prisoners were shot by an automatic rifle burst. Both expert witnesses agreed that, given the distribution of the wounds on the bodies of the killed persons, these wounds were most probably caused by a short burst but it is also possible that they were inflicted as part of a long burst. The expert witnesses did not rule out a possibility that the wounds were caused by fire from a pistol or a revolver or some other kind of firearms but they did rule out, beyond any reasonable doubt, a possibility that the wounds were caused by bomb or shell shrapnel or that they were a result of a subsequent transfer or transportation of the bodies or skeletal remains.

[149] Given the fact that there was no soft tissue on the skeletal remains that would have been sufficient for an analysis, the expert witnesses did not rule out a possibility that wounds caused by cold steel might have existed on the bodies, such as stab wounds, incisions and lacerations that the Prosecution witnesses, Dr Mile Šolaja and members of the families of the killed testified about. However, Dr Karan stressed that the tangential wounds caused by firearms can look very ugly, especially due to the factors of time, decay, and decomposition of tissue caused by worms and bacteria, to which humid weather also contributes and such was the weather at the time of the killings (both witnesses-survivors, as well as the examined members of the Army of the Republic of B-H testified that it rained for a few days in that period and that it also rained the night after the murder that the survivors spent together with members of the *Apachi* unit). All this can confuse a lay person and appear as if the wounds were not caused by firearms but by something completely different.

[150] Dr Šolaja, who conducted the external examination of the dead bodies in September 1995, a few days after the death, and who said in his evidence at the main trial that he found on the bodies stab wounds and incisions, a seal by a small caliber bullet in the head and traces of firearms wounds only on the body of Radovan Mudrinić, cannot be considered an expert in this matter although he is a medical doctor by profession. In other words, a medical doctor who is a specialist in forensic medicine is the one who conducts autopsy and external examinations of corpses, and one such as was assigned by the Court and the Prosecutor's Office to conduct the subsequent forensic-anthropological analysis, whereas a medical doctor of some other specialty, including a specialist in emergency medicine, as is Dr Šolaja, may pronounce death but cannot establish its cause with certainty. Also since Dr Šolaja is not a specialist in ballistics, he could not give a qualified opinion about the characteristics of the fired projectile (whether it was a small caliber or another kind of bullet).

[151] Even if this Panel were to accept the position that a witness who has certain special knowledge and experience can be allowed in his statement to present conclusions which would represent material for further questions about the noticed facts, while his conclusions cannot represent evidence in the proceedings since he is a witness in the proceedings and not an expert witness³⁶, the abovementioned conclusions of Dr Šolaja pertaining to the type of wounds and the characteristics of the fired projectile cannot be the evidence upon which the Verdict would be based.

[152] Dr Šolaja's statement, which is contrary to the survivors' statements, was also discredited by the report of expert witnesses Dr Željko Karan and Milko Marić, as they found wounds caused by firearms on the bodies of all the killed. A bullet jacket was found together with the mortal remains of Goran Šučur, which means that he was targeted by firearms beyond doubt. Dr Šolaja's testimony was also contested by the fact that traces of small caliber bullets were not found among the mortal remains of the killed at all, although Dr Šolaja stressed that on the parietal-occipital part of the head of all the killed he found "a seal by a small caliber bullet" in the form of an entry wound only, without any exit wound. This brings about a conclusion that a small caliber bullet must have stayed in the bodies of the victims however, it was not found during the exhumation conducted as part of the forensic-anthropological analysis.

[153] The expert witnesses did not rule out a possibility that there might have been wounds caused by cold steel on the bodies of the killed prisoners of war as they might have been inflicted and might have left traces on the soft tissues only, due to which they may not be visible after death. The expert witnesses left room for a possibility that wounds of that kind might have been inflicted during life or post-mortem and before or after the shooting from firearms. However, in the evidence of witnesses Dragan Stupar and Milovan Mastikosa it is confirmed that there was no assault on the killed prisoners with any kind of cold steel prior to the execution except for the threats with a knife that did not leave traces on any of the prisoners' bodies. Therefore, the expert witnesses said that the wounds caused by firearms were lethal, that they could cause the death of the four prisoners and the aforesaid is actually a corroboration of the statements of the two surviving witnesses. The Panel, therefore, concludes beyond a reasonable doubt that the four prisoners of war were killed in the

³⁶ See Vodelnić, *Procedural and Criminalistic Problems with Courts and Conclusions Contained in Witnesses' Testimonies*, p. 82.

manner described above, whereas potential wounds caused by cold steel, that Dr Mile Šolaja and members of the families of the killed prisoners, Radovan Mudrinić's wife, witness Ljiljana Mudrinić, and Duško Čuković's father, Rajko Čuković, testified about, might have been inflicted subsequently, *post mortem*.³⁷

[154] In view of the objection by the Defense Counsel, one thing appeared contestable in an analysis of the report by the expert witnesses, Dr Željko Karan and Milko Marić. That is to say, a question arises as to the bullet jacket found in the body of Goran Šućur and how it stayed in the body, given the fact that it is a highly destructive projectile which perforates an 84-cm-thick fir tree when fired from a distance of 100 meters, while the perforation power of a bullet of this caliber through soft tissue can be calculated simply by multiplication with the coefficient 2 or 2.5. In the specific case, fire was opened from a distance of a couple of meters. Given the aforementioned parameters, the bullet could not have possibly stayed in Goran Šućur's body. However, the ballistics expert gave an explanation in his report that such possibility exists, too, if old ammunition or moist gun-powder were used or if the bullet previously passed through some obstacle. Given the fact that the expert said that it was a bullet of the caliber used by the JNA, inherited and used in the war, that is, an ammunition at least a few years old, and given the humid weather in the relevant period, and given the fact that the terrain of the murder site was rocky, which offers a possibility that the bullet hit a stone or another obstacle and bounced, that is, ricocheted, hitting Goran Šućur and staying in his body, we therefore find a reasonable explanation for the found bullet jacket.

[155] With regard to the assessment of the findings and opinion of expert witnesses Karan and Marić, and mindful of the Defense objections, this Panel holds that the credibility of the hired expert witnesses need to be addressed. The Defense raised its concern as to the credibility of the witnesses both at the hearing when the expert witnesses were heard and in their closing arguments due to the fact that both of them were subject of criminal proceedings and that they were held in custody on account of taking bribe and were eventually pardoned by the then President of Republika Srpska. The Panel considered the arguments of the Defense and found them to be without merits. To wit, both expert witnesses are on the list of certified court expert witnesses, and the Panel considers that their names would have been taken off the list had there been any reasons for that. The Defense did not object to the professional quality of the findings and opinion and the Panel has already explained why it gave credence to these expert witnesses.

[156] This Panel finds that the Accused Kapić acted with direct intent while undertaking the consequential actions factually described more precisely in the operative part of the Verdict. Therefore, he was aware of the fact that, by firing from a firearm in the direction of the injured parties Goran Šućur, Duško Čuković, Radovan Mudrinić, Slaviša Đukić, he could inflict deadly injuries upon them, which was the case with four deceased parties and that he had previously chosen them as targets. In doing so he demonstrated a particular persistence,

³⁷ Milovan Mastikosa stated in his evidence at the main trial that the soldier who was called Hodža said while making the afore-described knife threats to Slaviša Đukić: "To slaughter one is a sin by the Qur'an, but to kill one is not." This intrinsically leads to the conclusion that cold steel wounds were not inflicted on the prisoners while they were alive, that is, that Hodža did not have such intention, because he considered such "conduct" to be a sin.

because, following the first burst by which he killed three prisoners, he fired another bullet in the fourth prisoner, who was wounded, whereupon he ordered the soldier next to him to finish the prisoner off. His cruelty did not end there. On the contrary, he aimed at killing the remaining two prisoners, Dragan Stupar and Milovan Mastikosa, as well. However, the arrival of Witness "S-1" and Hasan Hadžalić, who showed how the prisoners of war should be treated, their effort and perseverance to get them both alive, prevented Hodža from carrying out his intention.

[157] Therefore, the Panel finds that in the case at hand the element of intent and will have been fulfilled with regard to the Accused for the commission of the referenced criminal offense (deprivation of life, in violation of Article 175a) of the CC BiH). Also, the Accused Kapić knew that by doing so he violated the rules of international law. The Appellate Panel has based such conclusion on the established fact related to the statement of witness Nadarević, the Commander of the 517th Brigade of the A RBiH, of which the Accused was indisputably a member too, who noted decisively at the main trial that all the soldiers, members of the unit, were informed about the order pertaining to the treatment of the prisoners of war. In addition, this conclusion of the Court is also based on the contents of the conversation the Accused had over the Motorola after the killing of the four prisoners of war, in which he noted that there was a small escape attempt which was prevented, whereby he did not say anything about the manner in which it was done, that is, he knowingly deceived the person with whom he talked, who was, in the opinion of the Panel, undoubtedly the Commander of the *Apaići*³⁸ unit Haro, and that there was no escape attempt at all. Therefore, by covering up the truth, the Accused showed that he was completely aware of the fact that his actions were unlawful, if not pursuant to international convention law³⁹, then pursuant to customary law, considering the fact that prisoners of war were absolutely protected, which must have been known to him.

[158] Based on the aforementioned, having thoroughly evaluated the pieces of evidence individually and in combination, the Panel found the factual allegations from the Amended Indictment entirely proven. Therefore, the Panel reaches the conclusion on the criminal liability of the Accused and pronounced him guilty of the criminal offense of War Crimes against Prisoners of War, in violation of Article 175a), in conjunction with Article 180(1) of the CC BiH.

APPLICATION OF SUBSTANTIVE LAW

[159] With respect to the application of substantive law, it is necessary to note that the Criminal Code of the Socialist Federal Republic of Yugoslavia (CC SFRY) does not apply in the present case although it was the law in effect at the time of the perpetration.

[160] The criminal offense that the Accused is charged with was committed in 1995, the time when the CC SFRY was in effect in Bosnia and Herzegovina as an adopted law. The criminal offense of War Crimes against Prisoners of War, set forth in Article 175 of the CC

³⁸ See the transcript of the main trial dated 31 January 2008, p. 37, when asked by the Prosecutor if he communicated with anyone after the shooting, the witness answered: "Yes, I did, but I do not know with whom, all I know is that someone answered my call, I just asked him what was going on, he said: nothing."

³⁹ See the Common Article 3 (1) of the Geneva Conventions.

B-H, corresponds to the same criminal offense set forth in Article 144 of the CC SFRY, the law that was in effect at the time of the perpetration.

[161] This criminal offense also constitutes a grave breach of the general rules of customary international law, as all war crimes also constitute crimes under international law.

[162] In rendering the Verdict, this Panel is primarily guided by one of the basic principles of the Criminal Code, set forth in Article 3 of the CC B-H, reading: "*Criminal offenses and criminal sanctions shall be prescribed only by law. No punishment or other criminal sanction 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.*" The principle of legality is also regulated by Article 7(1) of the European Convention on Human Rights (ECHR), which, in accordance with Article II (2) of the Constitution of B-H, shall apply directly and shall have priority over all other law.

[163] Article 4 of the CC B-H sets forth time constraints regarding applicability of the Criminal Code and reads: "*The law that was in effect at the time when the criminal offense was perpetrated shall apply to the perpetrator of the criminal offense. 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.*"

[164] Therefore, the principle of time constraints regarding applicability lays down application of the law that was in effect at the time of the perpetration, but allows that, if the law is amended after the perpetration, a new law is applied if it is more lenient to the perpetrator. For this reason, in a situation when the law has changed once or several times after the perpetration, it is necessary to establish which law is more lenient in each individual case.

[165] However, Article 4a, which was subsequently added to the Criminal Code of B-H and which corresponds to Article 7(2) of the ECHR, reads: "*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.*"

[166] It stems from the aforesaid that Article 4a allows that the perpetrators of war crimes, which are certainly criminal according to the general principles of international law, be tried under the CC B-H, although the CC B-H was not in effect at the time of the perpetration, that is, although application of the CC B-H would be contrary to the principles of time constraints regarding applicability.

[167] However, in the present case, when we have a criminal offense prescribed by both the previous and the new Code, this Article is not applicable. That is to say, application of the CC SFRY in this case would not prevent trial nor would it lead to the perpetrator evading the punishment if his guilt is proven. That is why this Panel thinks that the application of the CC B-H in this case is not based on Article 4a of the CC B-H, but on the Panel's determination that this law is more lenient to the perpetrator in this case.

[168] The matter of gradation of laws, that is, determining which law should be considered more lenient is not questionable in a situation where certain conduct, which was considered criminal in the previous law, is not regarded as such in a new law. In that case, it is the new law that is undoubtedly more lenient.

[169] However, when there is a situation, as in the present case, that both laws prescribe certain criminal offense, in order to determine which law should be considered more lenient, it is necessary to apply additional criteria that are not set forth in the law but have been established by jurisprudence. It is necessary to stress that the issue of application of a more lenient law is not resolved *in abstracto*, but *in concreto*, that is, not by generally comparing the old and new law (or laws), but by comparing them in a given, specific case.

[170] When assessing which law is to be considered more lenient, it is necessary to bear in mind all of the provisions on punishing, especially provisions on sentences, on meting out or reducing the sentence, measures of warning, possible accessory punishments, new measures that substitute the punishment (community service, for example), security measures, legal consequences of the conviction, provisions pertaining to criminal prosecution, and whether the new law envisages certain circumstances as the basis for excluding unlawfulness or expanding punishability.

[171] This Panel is mindful that, under the CC BiH, the criminal offense that the Accused has been found guilty of carries the sentence of imprisonment for a term of not less than 10 years or life-long imprisonment, whereas under the CC SFRY, it carries a sentence of imprisonment for a term of not less than five years or the death penalty.

[172] Therefore, the special sentence minimum for this criminal offense is set lower in the CC SFRY, so, the CC SFRY should be considered a more lenient law in that respect. However, the Panel had in mind the fact that the Accused was sentenced with imprisonment for the term of 17 (seventeen) years. When meting out the punishment, this Panel is not inclined toward the lower limit of the sanction prescribed for the referenced criminal offense. Hence, it would be erroneous to make a determination as to which law is more lenient based on the lower limit, that is, the special statutory minimum for punishment.

[173] When determining which law is to be considered more lenient, this Panel was guided by another criterion, that is, by resolving which law provides a possibility to pronounce a more stringent punishment on the Accused. Since the CC B-H sets forth that the Accused may be punished for the referenced criminal offense with imprisonment for the term not less than 10 years or long-term imprisonment (maximum of 45 years of imprisonment, which is the general statutory maximum of the long-term imprisonment sentence), while the CC SFRY sets forth a possibility of death sentence, it is beyond doubt that death penalty is a more stringent sanction than any sentence of imprisonment or long-term imprisonment, hence this Panel determined that a law which is more lenient to the perpetrator in the case at hand is the CC B-H.

[174] The Constitutional Court of B-H also dealt with the issue of determining a more lenient law and in the case against A. Maktouf took the following position: *"In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often*

done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstic, Galic, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law."⁴⁰ "In this context, the Constitutional Court holds that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."⁴¹

[175] For the reasons stated earlier, this Panel reaches a conclusion that in the case at hand the CC B-H should be considered a more lenient law, which is in accordance with the quoted view of the Constitutional Court of B-H, and it decided to apply that law in the present case.

SENTENCING

[176] When meting out the punishment of the Accused, the Panel primarily considers Article 2 of the CC B-H which provides that the type and the range of criminal sanctions shall be based upon the necessity for criminal justice compulsion and their proportionality with the degree of the threat to personal liberties, human rights and other basic values protected by law.

[177] Also, the principle guiding this Panel when meting out the punishment for the Accused is Article 48 of the CC B-H which states that the Court shall impose the punishment within the limits provided by law for that particular offense, having in mind the purpose of punishment and taking into account all of the circumstances bearing on the length of punishment (extenuating and aggravating circumstances), and, in particular: the degree of criminal liability, the motives for perpetrating the offense, the degree of threat or injury to the protected value, the circumstances in which the offense was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offense, as well as other circumstances related to the personality of the perpetrator.

[178] With respect to the type and range of the criminal sanction, these are the parameters prescribed by the statute and, pursuant to the Article 48 of the CC B-H which requires that the Court mete out a sanction within the statutory range. This Panel, after rendering a decision on the liability of the Accused, had two alternatives available regarding the type and range when deciding on the sentence, namely, a sentence of imprisonment of not less than 10 years or long-term imprisonment. The difference between these two types of punishment is not reflected in the duration only, but primarily in the consequences for the convicted person (greater restrictions to freedoms and rights in prison system, greater restrictions to correspondence and telephone contacts, longer period of mandatory serving before consideration of possible release on probation, etc.)

⁴⁰ Decision of the Constitutional Court of B-H, No. AP-1785/06, 30 March 2007, para. 68.

⁴¹ Ibid., para. 69.

[179] When deciding between the two alternatives the Panel considers the suffering of the direct and indirect victims of the criminal offense, which follows from Article 48 of the CC B-H. In addition to the four killed prisoners of war, the other direct victims of the offense are undoubtedly the two surviving prisoners, eyewitnesses in this case, Dragan Stupar and Milovan Mastikosa. The incident to which they were eyewitnesses was undoubtedly an exceptionally traumatic experience for them and, as such, is deeply engraved in their memory, while its psychological consequences are indelible. A proof of it is the fact that even after a great number of years since the incident, these witnesses remember the tiniest details, all the words, threats and insults made by the soldier nicknamed Hodža, it is clear that they have relived the events. In addition to the mental suffering and trauma caused by the threats and fear for life, for a certain period these persons were also tied by two with their hands at their backs and the bind was so short that they had to touch shoulders, kneel on an uneven rocky terrain and keep their heads bowed looking down to the ground which undoubtedly caused some physical suffering. Additionally, the other direct victims of the incident are members of the families of the four killed prisoners of war as they lost their nearest kin (son, father or husband), which is undoubtedly a permanent cause of anguish and an immeasurable and irremediable loss for them. The indirect victims of this criminal offense are all prisoners of war as their guaranteed rights were grossly violated in this way.

[180] In addition to being necessary and proportionate to the gravity of the offense and proportionate to the suffering of the victims, the punishment must also reflect the requirements of special and general deterrence (Articles 6 and 39 of the CC B-H). Pursuant to Article 48 of the CC B-H, when meting out a punishment the Court must have in mind the purpose of punishment.

[181] The purpose of the criminal sanction set forth in Article 6 of the CC B-H includes a preventive influence on others to honor the legal system and not to perpetrate a criminal offense, as well as preventing perpetrators from again perpetrating criminal offenses and also to encourage their rehabilitation.

[182] The purpose of punishment, as the strictest form of criminal sanction, is set forth in Article 39 of the CC B-H and includes the following:

- a) To express the community's condemnation of a perpetrated criminal offense;
- b) To deter the perpetrator from perpetrating criminal offenses in the future;
- c) To deter others from perpetrating criminal offenses; and
- d) To increase the awareness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators.

[183] War crimes constitute a special group of criminal offenses that can be perpetrated only at the time of an armed conflict, a war. However, trials for criminal offenses of this kind are most often conducted several years following the end of the conflict when perpetration of such criminal offense is no longer possible. However, even with punishments pronounced at a time of peace for crimes committed in war the purpose of both the special and the general deterrence is achieved. With respect to general deterrence, that

is, deterring others from perpetrating criminal offenses (Article 6(1)(a) and Article 39(1)(c) of the CC B-H), the purpose of punishment for war crimes is to generate awareness with potential perpetrators that if they find themselves in a situation to be able to perpetrate crimes of this kind, it will not go unpunished. In other words, with adequate punishment for the perpetrators of these offenses others are also provided notice that in a situation of conflict and hostilities there is an obligation to adhere to laws in effect and that for contrary conduct an individual will have to pay the price at a foreseeable time.

[184] With respect to special deterrence (Article 6(1)(b) and Article 39(1)(b) of the CC B-H), the punishment must be such so as to deter the perpetrator from repeating the crime he has been punished for if he finds himself in a situation able to repeat it, that is, to encourage his rehabilitation and re-socialization. Article 10(3) of the International Covenant on Civil and Political Rights reads: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."

[185] The punishment must also express community's condemnation of the perpetrated offense, that is, of the conduct of an accused (Article 39(1)(a) of the CC B-H). In the case at hand, the Accused committed the criminal offense against Prisoners of War, a category that enjoys protection under both international and national laws. The community whose condemnation the punishment should reflect is represented by the people of Bosnia and Herzegovina, that is, the complete international community, which, in line with the valid provisions of the national and international law, defined the referenced conduct as a criminal offense. The definition itself does not sufficiently express the community's condemnation of such conduct. In order for the definition of criminal offenses and prescribing of criminal sanctions to remain meaningful, it is necessary to punish perpetrators, whereby the community demonstrates that such conduct, irrespective of the place and time of the perpetration and who the perpetrator is, represents an act deserving condemnation and that it will not go unpunished.

[186] Punishment must also serve to increase the awareness of citizens of the danger of criminal offenses and of the fairness of punishing perpetrators (Article 39(a)(d) of the CC B-H). This represents the educational purpose of punishment set out in the statute. Punishment has two basic dimensions: deterrence and retribution. Deterrence is regarded as a priority aspect of punishment and other criminal sanctions. The deterring aim of a verdict is to point at the worthlessness of the offense and thus raise citizens' awareness of the need to honor the law. However, punishment also retains the element of retribution, that is, paying back for the wrong that has been done. Punishment is a means aimed at preventing private vengeance, because, although a court cannot mandate reconciliation, by adequately punishing individuals, perpetrators of crimes, with punishment proportionate to the gravity of the crimes, an attempt is made to achieve justice. The punishment proportionate to the gravity of the perpetrated war crime in that way indicates that such conduct will not be tolerated and also that only the punishment, as a statutory sanction for particular criminal offense, can help justice be achieved.

[187] In addition to the foregoing, another obligation that the Court has when meting out punishment, pursuant to Article 48 of the CC B-H, is to take into account all the circumstances bearing on the magnitude of punishment (extenuating and aggravating circumstances). The law lists some of them, such as the degree of criminal liability, the

motives for perpetrating the offense, the degree of threat or injury to the protected value, the circumstances under which the offense was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offense, as well as other circumstances related to the personality of the perpetrator. However, it does not state which of these circumstances are to be considered extenuating and which aggravating. Determining the character of the circumstances in each specific case is left for court to do, with a possibility that each of the circumstances cited in the law may represent an extenuating or an aggravating circumstance, depending on the facts in a specific case.

[188] In that regard, when meting out the punishment for the Accused, the Panel considered all the circumstances of the case at hand and found certain extenuating and aggravating circumstances for the Accused Suad Kapić, which will be discussed below, and it had all these circumstances in mind when meting out the pronounced punishment.

The Degree of Criminal Liability

[189] The Panel considered that the Accused is directly responsible for the committed crime. That is to say, in the events on the Mrežnica hill, he was the one who controlled the situation. He had before him six prisoners of war placed *hors de combat*. The prisoners of war, although without a possibility of choice as they found themselves in that situation, did not offer resistance; they were disarmed and they had the rights guaranteed by the Geneva Convention Relative to the Treatment of Prisoners of War. The Accused had an obligation to honor these rights. However, the Accused chose the forbidden way, violating all rights that prisoners of war are entitled to, and he killed them cruelly, thus violating the supreme value protected by statute -- human life. The Accused was aware that his conduct was not allowed, yet he acted in a prohibited way nevertheless.

Conduct and Personal Circumstances of the Accused Before, During and After the Perpetration

[190] The Panel reviewed both the extenuating and aggravating circumstances in the case at hand and they will be discussed one by one.

Circumstances Before the Offense

[191] When the war started, the Accused was very young, he was only 17. During the war, following the completion of training in a recruitment center, he was sent to the frontline. The Panel does not have any information that the Accused had any prior conviction before the perpetration of the offense. The Panel found the aforesaid circumstances to be an extenuating factor.

Circumstances Surrounding the Offense

[192] The Panel considered the manner of the perpetration of this criminal offense to be an aggravating factor. It was a cold-blood murder committed from behind several persons who

were placed *hors de combat*, who did not offer resistance and did not attempt to escape. The Accused demonstrated a pronounced resolve and persistence to kill the prisoners of war, which follows from the fact that after the first burst of fire which did not kill Radovan Mudrinić, he fired another bullet at him, and as he did not manage to kill him in that way, he ordered another soldier to do it. The Accused's persistence is also demonstrated in the intent he showed to kill the remaining two prisoners of war, too, and the argument he had with Witness "S-1" and Haro, as he did not want to hand over Dragan Stupar and Milovan Mastikosa alive to them, and also in the threats and gross insults previously hurled at the prisoners.

Circumstances after the Offense

[193] The Panel considered as an extenuating factor that the Accused is married with two minor children and that he is still rather young as well as the fact that he has not had any record as a perpetrator of other criminal offenses and that he has not had any conviction after the war.

Conduct during the Case

[194] Throughout the trial, the Accused behaved with the proper decorum and respect for both the First Instance Panel (visible from the audio-video recordings of the trial that this Panel reviewed) and the Appellate Panel, and appeared to have good rapport with his Defense Counsel. After release from custody on 7 March 2008, the Accused responded to all summonses of the Court and attended the trial on a regular basis. However, this conduct met the Panel's expectations and is, therefore, neither an extenuating nor an aggravating factor.

Personality of the Accused

[195] The Panel has no evidence regarding the personality of the Accused other than that revealed by his actions in committing the crime and that which could be observed from his behavior in the courtroom, both of which have been discussed above.

Other Circumstances

[196] The Panel considered as an aggravating factor the fact that some of the prisoners of war had children and families and that they were young or rather young. Also, the stance of the families of the killed, that is, their joining the criminal prosecution and interest in having the perpetrator of this heinous crime punished, was considered an aggravating factor.

DETERRENCE AND REHABILITATION

[197] The length of a sentence and the time spent in prison as punishment for the crime are legitimate means for preventing criminal offenses. These are legitimate deterrents from crimes which provide the offender with an opportunity for rehabilitation, that is, an opportunity to become aware of the damage his conduct caused, to consider the effects of

his actions on victims, to learn a lesson from his past mistakes, to make amends for his actions and to improve his behavior in order to be an equal member of the society after he serves his sentence.

[198] Given the established state of the facts and the consequences thereof and their causal link, the Court found the Accused guilty of the criminal offense of War Crimes against Prisoners of War, in violation of Article 175(1)(a) of the CC B-H, as read with Article 180(1) of the same Code, and sentenced him to imprisonment for a term of 17 (seventeen) years as it deemed that this criminal sanction is adequate and proportionate to the gravity of the offense and that it will help achieve the purpose of sanctioning.

[199] Pursuant to Article 56 of the CC B-H, the time the Accused spent in custody from 21 September 2007 to 7 March 2008, pursuant to this Court's Decision, shall be credited toward the pronounced sentence.

DECISION ON COSTS OF CRIMINAL PROCEEDINGS

[200] Pursuant to Article 188(4) of the CPC B-H, the Accused is relieved of the duty to pay the costs of criminal proceedings and the scheduled amount as, in the opinion of the Panel, that would jeopardize the sustenance of his family, that is, the persons the Accused is to provide for (a wife and two minor children). Therefore, the costs referred to in Article 185(2)(a)-(h) of the CPC B-H, shall be borne by the Court.

RECORD TAKER
Nevena Aličehajić

PRESIDENT OF THE PANEL
Judge Dragomir Vukoje

LEGAL REMEDY: Pursuant to Article 317a (1)(b) of the CPC B-H, this Verdict may be appealed with the Third Instance Panel of the Court of B-H within 15 (fifteen) days as of the receipt of its written copy.

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

Sarajevo, 2 December 2009
Edina Neretljak
Certified Court Interpreter for the English Language