



Number: X-KRŽ-05/24-2
Date: 9 November 2009

Before the Panel: Judge Tihomir Lukes, Presiding Judge
Judge Azra Miletić, Reporting Judge
Judge John Fields, Panel Member

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA

v.

STEVANOVIĆ MILADIN

APPEAL VERDICT

Office of the Prosecutor:

Mr. Bulić Ibro

Counsel for the Appellant Stevanović Miladin:

Mr. Vasić Stojan
Mr. Krunić Žiko

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Number: X-KRŽ-05/24-2
Sarajevo, 9 November 2009

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, the Panel of the Appellate Division, the Section I for War Crimes, composed of Judge Tihomir Lukes, as the Presiding Judge, and Judges Azra Miletić and John Fields as the Panel Members, with the participation of the Legal Officer Sanida Vahida-Ramić, as the Minutes Taker, in the criminal case against the Accused Miladin Stevanović, for the criminal offence of Genocide under Article 171 in conjunction with Article 29 and 180 (1) of the Criminal Code of Bosnia and Herzegovina, deciding on the Appeal of the Prosecutor's Office of Bosnia and Herzegovina, No. KT-RZ-10/05 of 19 February 2009, filed from the Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/24-2 of 29 July 2008, at the session held on 9 November 2009, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Ibro Bulić, Defense Counsels for the Accused, Attorney Stojan Vasić and Attorney Žiko Krunić, and the Accused Miladin Stevanović in person, delivered the following:

V E R D I C T

Dismissing as unfounded the Appeal of the Prosecutor of the Prosecutor's Office of BiH, No. KT-RZ-10/05 of 19 February 2009 and upholding the Verdict of this Court No. X-KR-05/24-2 of 29 July 2008.

R e a s o n i n g

I PROCEDURAL HISTORY

1. The Verdict of the Court of Bosnia and Herzegovina No. X-KR-05/24-2 of 29 July 2008, acquitted the Accused Miladin Stevanović of charges that he committed the criminal offence of Genocide under Article 171, in conjunction with Article 29 and 180 (1) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH).

2. Pursuant to Article 189(1) of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH) the Accused was relieved of the duty to reimburse the costs of the criminal proceedings, and they were covered from the Court Budget.
3. Pursuant to Article 198(2) of the CPC of BiH the aggrieved parties S1 and S2, and members of the Association the Movement of Mothers of Srebrenica and Žepa Enclaves were instructed to pursue their claims under property law in a civil action.
4. The Prosecutor of the Prosecutor's Office of BiH filed an Appeal from the Verdict, for the violation of the Criminal Code under Article 298(1) (a) and (d) of the CPC of BiH, for incorrectly established facts under Article 299(1) of the CPC BiH, and for the application of the acquitting provisions under Article 300 of the CPC of BiH, moving the Appellate Panel of Court of BiH (the Appellate Panel) to modify the contested Verdict, and to deliver the Verdict finding the Accused Miladin Stevanović guilty of the criminal offence of Crimes against Humanity under Article 172(1)(h) of the CC of BiH, in conjunction with subparagraph (d) of the same Article or to revoke the contested Verdict and pursuant to Article 315(1) of the CPC of BiH order a retrial at which the already presented evidence will be presented again. In his Appeal the Prosecutor also proposed that the Accused Stevanović Miladin be ordered into custody pursuant to Article 138(1), in conjunction with Article 132(1) (d) of the CPC of BiH.
5. The Defense Counsel for the Accused Miladin Stevanović, Attorney Stojan Vasić, submitted to the Court the response to the Appeal of the Prosecutor, moving the Court to dismiss it as unfounded and to uphold the Trial Verdict.
6. At the session of the Panel held on 9 November 2009, pursuant to Article 304 of the CPC of BiH, the Prosecutor presented his summarized appeal, and the Defense its response to it, both fully maintaining their written allegations and motions.
7. The Accused supported the arguments of his Defense Counsels.
8. Having considered the Trial Verdict within the limits of the appellate complaints, the Appellate Panel rendered the decision stated in the Operative Part of the Verdict for the reasons stated bellow.

II GENERAL CONSIDERATIONS

9. Prior to providing its explanation on each particular ground of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC BiH, the Appellant shall state in the appeal both the grounds for contesting the Verdict and the reasoning behind the appeal.
10. Since the Appellate Panel will review the Verdict only insofar as it is contested by the Appeal pursuant to Article 306 of the CPC BiH, the Appellant shall draft the appeal in such a manner that it can serve as the grounds for review of the Verdict.
11. To this end, the Appellant must specify each appellate ground for contesting the Verdict, exactly which part of the Verdict, evidence or action of the Court is challenged, and provide a clear explanation supported with arguments.
12. Mere general recitation of appellate grounds as well as pointing to alleged errors during the first instance proceedings without specifying the ground of appeal raised by the Appellant does not constitute a valid basis to review the Trial Verdict. Therefore, the Appellate Panel will *prima facie* refuse unsubstantiated or vague appellate allegations as unfounded.

**APPEAL OF THE PROSECUTOR OF THE PROSECUTOR'S OFFICE OF
BiH**

13. In the introduction of the reasoning of this Verdict the Court specified the appellate complaints of the Prosecutor, and it will not repeat them now but it will review the contested part of the Trial Verdict.

**I INCORRECTLY ESTABLISHED FACTS UNDER ARTICLE 299 OF THE
CPC OF BiH**

a) Standards of Review pursuant to Article 299 of the CPC of BiH

14. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness. In reviewing the allegedly erroneously established state of facts, the Appellate Panel will find such an error only if a reasonable trier of fact could not have established the contested state of facts.

15. In determining whether or not a Trial Panel's conclusion was such that a reasonable trier of facts could not have reached it, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at the main trial is left primarily to the discretion of the Trial Panel and that findings of fact reached by the Trial Panel must be given a margin of deference.

16. The Appellate Panel shall only revoke the first instance Verdict if the factual error has resulted a miscarriage of justice which has been defined as a grossly unfair outcome in the court proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the criminal offence.

17. In order to prove that a miscarriage of justice has occurred, an appellant must demonstrate that the alleged errors of fact made by the Trial Panel raise a reasonable doubt about the guilt of the Accused. In order for the Prosecutor to prove a miscarriage of justice, s/he must demonstrate that, considering the errors of fact made by the Trial Panel, any reasonable doubt of the Accused's guilt is eliminated.

18. Therefore, only where the Appellate Panel finds, first, that no reasonable trier of fact could have reached the contested findings and, second, that the error of fact caused a miscarriage of justice shall the Appellate Panel grant an appeal which is filed pursuant to Article 299(1) of the CPC of BiH and which claims that facts have been established erroneously and incompletely.

b) Grounds of appeal pertaining to the allegedly incorrectly established facts may be summarized in the following manner:

19. The Prosecutor submits that the Trial Panel incorrectly established the facts in the part related to the actions of the Accused and his participation in the incriminating incidents on 13 July 1995 from 12:00 hours to the evening hours as described under Count e) of the Amended Indictment.

20. Having analyzed the statements of the witness S4 which he gave on several occasions (the statement given as a suspect on 18 April 2008, the statement given as a witness on 22 May 2008 and the statement given as a witness- trial transcript of 29 May 2008), as well as the statement of the Accused Petar Mitrović which he gave as a suspect (21 June 2005), the statement of the Accused Stevanović which he gave in the investigation to the Prosecutor's Office (1 July 2005), and the trial testimonies of Petko and Radenka Petrović (uncle and aunt of the Accused), the Prosecutor believes that the criminal responsibility of the Accused was proven beyond a reasonable doubt in the commission of the criminal offence under Article 172 (1)(h) in conjunction with (d) of the CC of BiH.

21. The Prosecutor alleges that the statement of the Accused Stevanović was untrue when he claimed that he had stayed in front of hangar for a half an hour (until 16:30 hours) and subsequently left with the body of Krsto Dragičević, because the distance between Bratunac and Kravice is short. He also points out that his testimony was untrue when he spoke about the reason for the liquidation of prisoners in the Kravica Farming Cooperative Warehouse, claiming that it had been mentioned on Krsto's funeral that "the Officer" and Trifunović could have ordered the shooting and that they had most probably done so, and even if it had not been the case, that the reason for that the exasperation caused by Krsto's death.

22. The Prosecutor submits that based on the evidence presented regarding the presence of the Accused in the incident of execution of prisoners in the Kravica Farming Cooperative Warehouse on 13 July 1995 and the time he spent in front of the warehouse (minimum a half an hour), it can be inferred that the Accused Stevanović, as well as his fellow combatants (members of the Second Detachment), shared the same intent to kill the prisoners. After all, the Prosecutor concluded, when it is certain that the consequence is about to occur, and the Accused was aware of the plan and order to execute the prisoners as f the presented evidence show, it is

irrelevant for the existence of an intent whether the perpetrator wanted the consequence or not.

23. Based on the evidence in the case file, the Trial Panel inferred that the Prosecution proved beyond a reasonable doubt that the Accused Stevanović, together with other members of the Second Platoon on 13 July 1995, in the morning hours (according to the statement of the Accused Stevanović given in the investigation - by 12:30), was positioned along the route Konjević Polje-Bratunac. Within this ground of appeal, the Prosecutor contests the findings of the Trial Panel regarding the presence and criminal responsibility of the Accused Stevanović in the further course of events described in Count e) of the Amended Indictment.

24. Count e) of the Amended Indictment charges the Accused Stevanović that he as a special police officer of the Second Šekovići Detachment which was within the Third Skelani Platoon, acting within the joint criminal enterprise, together with other members of the same detachment escorted more than one thousand Bosniak male prisoners and detained them in the warehouse of the Farming Cooperative in Kravica, and together with other members of Detachment put to death the majority of them in the early evening hours, firing from his machine gun at the prisoners, while the Accused Džinić threw hand grenades at them, and the Accused Matić seized wrist watches, money and gold from the captured Bosniaks and was filling the ammunition clips used for the execution of prisoners.

25. The decisive evidence the Trial Panel relied on while delivering the contested Verdict were the following: the testimony and statements (18 April and 22 May 2008) of the Witness S4, the statement of the Accused given in the investigation (1 July 2005), and testimonies of witnesses Radenka and Petko Petrović. Having in mind that those witnesses were uncle and aunt of the Accused Stevanović, the Trial Panel gave credence to the testimonies of these witnesses with some reservations, however, as their testimonies in the part related to the alibi of the Accused for the time period around noon and afternoon (until 16:00 hours) of 13 July 1995, are consistent with the testimony of witness S4 and the statement of the Accused given in the investigation, the Trial Panel concluded that this evidence raise sufficient doubt as to the grounds for the charges against the Accused Stevanović. The Appellate Panel also agrees with this conclusion.

26. Namely, with regard to the presence of the Accused Stevanović in the incidents described under Count e) of the Amended Indictment, the Witness S4 in his statement as a suspect (given on 18 April 2008) stated that the word was that Stevanović went to Bratunac, and that he learned about that from the conversation with Stevanović upon his arrival in the detention unit. It is for this fact that the Prosecutor doubts the reliability of the information which the witness S4 gave regarding the presence of the Accused Stevanović. However, this Panel notes that in the same statement the witness S4 said that in the detention unit he spoke about the circumstances surrounding the incident in Kravica on 13 July 1995 also with

Branislav Medan and Petar Mitrović (now sentenced in the case tried before this Court under Nos. X-KR-05/24 and X-KR-05/24-1), meaning that he did not only speak with the Accused Stevanović.

27. Also, the witness S4 said that he did not see Stevanović when they started to Skelani, because he thought he had gone to Bratunac escorting the body of the late Krsto. The body was taken by an ambulance from Bratunac, and having in mind that Stevanović was in charge of the warehouses, he thought he accompanied Krsto's body. Until the ambulance arrived Krsto's body was in the same place, and they covered it with a groundsheet. More precisely, based on the statement of the Witness S4, the body of the late Krsto was lying for a while on the ground in front of the warehouse, until it was taken to Bratunac (according to the statement of the witness S4, for 20-40 minutes). These facts fully correspond with the testimony of the Accused Stevanović given in the investigation who said that he arrived in front of the warehouse of the Farming Cooperative Kravica after Krsto Dragičević had been killed.

28. In his witness statement given on 22 May 2008 the Witness S4 said that Stevanović came in front of the warehouse after, *'approximately half an hour after the shooting was over, to my recollection he did not participate in the shooting, Stevanović and Nenad Vasić "*. He testifies that he is sure that Stevanović drove Krsto's body away, but he cannot recall who else was with him. As to the knowledge of Stevanović's presence in front of the warehouse at the relevant time, the witness S4 said that his knowledge about that was not based only on what he learned from Stevanović in the detention unit, but was based on the fact that for a while Stevanović was with him beneath a tree in the place where they had been ordered to stand (the tree was on the left, looking from the hangar, near the house where Zoran was standing and calling for surrender). Then he added that Stevanović in general tended to *'avoid duties always, whenever possible and to keep the low profile..."*. Asked by the Prosecutor how he knew that Stevanović at one point disappeared, he stated that *'because another man would come, but I cannot recall who was with me"*. As for the further developments, at the hearing on 11 June 2008, he stated that Stevanović appeared when he was to drive Krsto's body, but that he did not know from what direction, and where Stevanović had come from.

29. In the statement given in the investigation the Accused Stevanović testified that on 13 July 1995 after 12:30 hours he left with Nenad Vasić to Bratunac, *...telling Nenad, then what I have already seen all this (bringing Muslims to Sandići in groups, loading of a group of captured Muslims in four buses and their transfer to Bratunac and Zvornik), let's escape from them, because we do not have any cigarettes and we stopped a small car, got on and started and then stopped in Bratunac. In Bratunac, Nenad and I stayed until 16:0 hours. We had lunch at my relatives', more specifically at the house of my uncle Petrović Petka and aunt Radenka. After 16:00 hours we decided to return to Kravica to check what was going on, and we also expected to be sought by our unit."* On the way back to

Kravica, they ran into a barricade (the road was blocked by a passenger vehicle) and in that place he saw two police officers whom he did not know before, and who most probably were from the Šekovići Detachment. The place where the barricade was located was around 100 meters from the turning to the Farming Cooperative Kravica. He learned from the police officers that Krsto Dragičević had been killed, that is, that there was a commotion at the Farming Cooperative. When he approached the building through the door he was able to see that on the left side of the hall there were around 150-200 people; some of them were standing and some were sitting, and behind them there was Milanović Mirko who was standing and who mounted a API M-84 (machine-gun) on the table, pointed to the group of prisoners. He saw the body of Krsto Dragičević lying on the road. In the other room which may hold around 400 people which is larger (the right side), he saw the dead and a guy who was throwing hand grenades into that room. Cries, screams and yelling were heard from that room. At that moment he did not see anybody shooting at the group of detainees.

30. Also, from the statement given by Petar Mitrović in the investigation (convicted by the final Verdict in the case No. X-KR-05/24-1) and the record of the crime scene investigation and reconstruction of the events, the only conclusion which can be made beyond a reasonable doubt is that the Accused Stevanović was positioned together with other members of the Detachment along the road from Sandići to Kravica, which, in the opinion of this Panel, does not constitute the decisive contribution to the later events in the Kravica warehouse (the liquidation of the prisoners). Furthermore, his mere presence does not have the character of an action aiding the perpetration of criminal offence he is charged with, as by leaving the scene in Sandići on 13 July, the Accused did not participate in further events.

31. The Prosecutor's complaint, which he additionally corroborated with a piece of evidence - the hospital log of Health Center in Bratunac (Exhibit of the Prosecutor's Office O-182), that the body of Krsto Dragičević was received at 18:00 hours, thus the credence cannot be given to the statement of the Accused when he said that he was in front of the hangar for about half an hour (until 16:30h), as the distance between Bratunac and Kravica was short, in the opinion of this Panel is not well founded. More specifically, the Witness S4 stated that Krsto's body was lying there for a while (20-40 minutes) covered with a groundsheet until it was taken to Bratunac, while the Accused himself stated in the investigation that he and Vasić Nenad were waiting for the doctor and the chapel keeper for a long time so that they stayed in Bratunac until 20:00 hours.

32. About this circumstance the Appellate Panel also referred to the evidence presented in the case No. X-KR-05/24 within which, by the time the case *Mitrović et al.* was severed into three separate cases, the evidence was presented - the testimony of the aggrieved witnesses-S1 and S2.

33. The witnesses S1 and S2, testified that a short break was made between the execution of prisoners on the left and the execution of prisoners on the right side of the hangar. The execution on the right side was done first and then, after the break, the execution on the left side of the hangar followed.

34. On this occasion the Panel reiterates that the Accused himself stated that after his arrival in front of the Farming Cooperative building he saw that there were some people who were still alive in *on the left part* of the building at whom Mirko Milanović pointed the machine gun, while he said that in the bigger room (according to the testimonies of the witness S1 and S2 it was *the right part* of the warehouse) the people were already dead.

35. The witness S4 too stated at the main trial that the shooting started first in the right and then in the left part. ¹

36. Therefore, having in mind the evidence presented pertaining to the presence of the Accused in the events described under Count e) of the Amended Indictment, the conclusion of the Appellate Panel about his criminal responsibility in the given incidents is the following:

- Stevanović did not participate in the first part of the killing given that he arrived in front of the Warehouse after "the first part of killing had been finished" (the right part of the hangar);
- Stevanović did not participate also in the second part of the killing (the left part of the hangar) as he was escorting the body of Krsto Dragičević to the Health Center in Bratunac.

37. Furthermore, the fact that the Accused was a warehouseman, more specifically, that his primary duty was to provide supplies, food to the soldiers and other similar duties, and that in line with that duty he was also obliged to drive Krsto's body to the Health Center, to prepare his funeral and to inform his family about his death and all this was connected to the fact that, in general, he avoided going to the front whenever possible as he did also on the given occasion. This apparently indicates that the intent of the Accused did not include the commission of the criminal offence which did happen at the Farming Cooperative warehouse in the afternoon hours.

38. Also, the actions of the Accused in the task of securing the road communication Konjević Polje-Bratunac, which were established beyond any reasonable doubt, do not rise to the level required to find the Accused guilty for any criminal offence on any ground of the criminal liability.

¹ Transcript of 29 May 2009, pg. 54.

39. Taking into account all the aforementioned the conclusion made by the Trial Panel on this issue is reasonable and logical, and the Appellate Panel believes that any reasonable Trier of fact would have drawn an identical conclusion.

40. On the basis of the aforementioned and the rule *in dubio pro reo*, the Court may consider a fact established based on the evaluation of evidence, when it ascertained its existence at the main trial and when it has no doubts in that regard, and that accordingly all facts detrimental to the Accused must be established with certainty, that is, proved, and if that cannot be done, those facts are considered nonexistent. All facts in favor of the Accused are considered as existing even when they are established with probability (not with certainty). It is this rule that the Trial Panel was guided by when deciding on the charges against Miladin Stevanović.

41. Based on all the aforementioned, the Prosecutor's complaints about the provision under Article 299 of the CPC of BiH were dismissed as ill-founded.

II VIOLATION OF THE CRIMINAL CODE UNDER ARTICLE 298 OF THE CPC OF BiH

Grounds of Appeal suggesting violations of criminal code may be summarized as follows:

42. The Prosecution considers unfounded the conclusion of the Panel that not a single piece of evidence was presented proving the participation of the Accused Stevanović in the acts charged (forcible transfer of population).

43. More precisely, the Prosecutor argues that the Trial Panel correctly established the facts regarding the assignment of the Skelani Platoon (including the Accused himself) to search the terrain in the area of Potočari on 12 July 1995, but it incorrectly applied the criminal code in deciding on the criminal responsibility of the Accused Stevanović.

44. The Prosecutor submits that it follows from the acts of the Accused which were established beyond any reasonable doubt that the Accused was aware that the transfer of the Bosniak population was forcible, and that the securing of the road was of extreme importance for the free passage of vehicles which were transporting the civilians out of the Srebrenica enclave, and in doing so the Accused knowingly took part in the joint plan intending to forcibly transfer the Bosniak population out of the Srebrenica enclave.

45. The Appellant sees in the conclusion of the Trial Panel that *the Accused knew at least roughly what would be expected of. him*, that the Accused knowingly acted in furtherance of the common purpose and plan (the forcible transfer).

46. The Prosecutor argues that the Accused, by his participation in the search of the terrain in the village of Budak and in the finding of the Bosniak population, acted with the intent, just like all other members of the Second Detachment, to capture and escort to the collection center in Potočari any Bosniak civilians found in the village, knowing that they would subsequently be unlawfully transferred to the BiH Army-controlled territory. While carrying out that task, the Accused was armed, which according to the Appellant satisfied the element of threat to commit the criminal offence of Crimes against Humanity through forcible transfer of population.

47. The Accused was aware that his acts were part of the task carried out by the members of the Second Detachment at the relevant time, that in its implementation he acted with discriminatory intent, and that the task was an important precondition for the full implementation of the plan of extermination of the Bosniak population from the UN safe area of Srebrenica.

48. According to the Prosecutor, the fact that the Accused did not find any civilians in the village of Budak does not relieve the Accused of the responsibility as even an attempt to commit this criminal offence is punishable.

49. The violation of the criminal code (*error iuris*) exists if the court fails to apply or erroneously applies any provision set forth by the CC of BiH or other BiH laws which need to be applied in the specific case.

50. In the case at hand the Prosecutor submits that based on the facts it correctly found the Trial Panel should have found the Accused Stevanović guilty of the criminal offence punishable under Article 172 (1) (h) as read with d) of the CC of BiH, and links this to the fact that the Court is not bound by the legal qualification, and that the Trial Panel was able to see the conclusion on the existence of essential elements of the criminal offence under Article 172 of the CC of BiH (paragraph 1, sub-paragraph (h) in conjunction with sub-paragraph (d)) in the Indictment.

51. In support of the above mentioned the Trial Verdict makes the following conclusion on the page 93-94:

With regard to the other events stated in the operative part of the Indictment, the Panel finds that the Prosecutor proved beyond reasonable doubt that the Accused had participated in securing the Bratunac-Milići road on 12 and 13 July 1995 up until about 12:30, specifically, in the area between the villages of Kravica and Sandići. However, the Panel notes that the mere presence of the Accused at that location does not constitute the act of co-perpetration or aiding and abetting in the perpetration of the criminal offence of forcible transfer (sub-count a) of the Indictment), since the acts of the Accused pertaining to the forcible transfer of the Bosniak population of Srebrenica are trivial and insignificant and they did not provide a measurable contribution to the commission of that criminal offense by others. Furthermore, the evidence did not establish that the Accused maintained the Bratunac-Milići road closed or open for traffic. Although the Panel finds that forcible transfer was committed, the Prosecutor did not present any evidence whatsoever to prove that the Accused participated in these actions or was otherwise criminally liable under any theory of liability.

The same is true with respect to the allegations in sub-count b) of the Indictment, as the Prosecutor did not prove the Accused's participation in reconnaissance and armed attacks by tanks, anti-aircraft guns, and other weapons employed against the Bosniak column above Kamenica.

With regard to sub-count c) of the Indictment, the Panel finds it proven that the VRS and MUP personnel, including some members of the 2nd Šekovići Detachment, participated in the actions described in this sub-count (ambushes, encouragement and false promises to induce surrender, seizure of money and other valuables). The Prosecutor, however, did not present any evidence whatsoever to establish that the Accused participated in these actions. Furthermore, the Prosecutor also failed to present any evidence that the Accused, by his actions, omissions or presence contributed to the perpetration of these acts by other persons, nor did he offer evidence that the Accused intended to aid and abet and that he actually aided and abetted the perpetration of these acts by others.

With regard to sub-count d) of the Indictment, the Panel notes that there is no evidence indicating that the Accused participated in singling out men and handing them over to unknown members of the VRS, or that he shot at least one young captive on that meadow, nor is there any evidence that he participated in having the prisoners transported to the locations planned for detention and execution.

In addition, in the Amended Indictment, its section dealing with legal qualification, the Prosecutor's Office qualifies the acts of the Accused also as the infliction of serious bodily injuries and mental pain on the population of Srebrenica, both men and women, inter alia, by separating able-bodied men from their families and forcibly transferring the population from their homes to the areas outside Republika Srpska. However, the factual substratum of the Indictment itself does not mention the circumstances that could lead to a reliable conclusion that serious bodily injuries and mental pain were inflicted on the Bosniaks from Srebrenica, nor was a single piece of evidence presented in the course of the evidentiary proceedings that would support this position taken by the Prosecutor's Office.

The criminal offense of Genocide is a specific criminal offense wherein it is necessary to prove the existence of a specific intent to destroy in whole or in part a national, ethnical, racial or religious group of people. The Panel finds that the Prosecutor's Office failed to present evidence indicating beyond reasonable doubt that Stevanović, during his stay at the referenced road in the vicinity of Sandići on 12 July and partly on 13 July until about 12:30, intended by his actions to participate in the deprivation of life of the captives in the Kravica warehouse, either as a co-perpetrator or as an accessory. The mere presence of the Accused at the time of the events in Sandići on 13 July until the time when the Accused left Sandići for Bratunac does not in any way whatsoever constitute a decisive contribution to the subsequent developments in the Kravica warehouse. Likewise, his mere presence is not characteristic of an act of aiding in the perpetration of the criminal offence as charged, since by leaving the Sandići area on 13 July the Accused did not participate in further events, which are the acts that constitute the essence of the incrimination. Also, the mere presence of the Accused in Sandići at the referenced period of time cannot indicate in itself the existence of his genocidal intent to destroy in whole or in part the captured Bosniaks in the Kravica warehouse, either as a co-perpetrator or as an accessory.

52. The Prosecutor rightly notes that the Court is not bound by the legal qualification of the offence (*Correspondence between the Verdict and Charges, Article 280 (2) of the CPC of BiH*). Even in the situation when the Court finds the legal qualification given by the

Prosecutor acceptable, the Court is still independent in applying the criminal code to the facts.

53. On the other hand, if the Court does not accept the legal qualification the Prosecutor proposed in the Indictment, it is obliged to examine if the acts of the Accused, as indicated in the Indictment, constitute the elements of some other criminal offence (in the case concerned from Chapter XVII of the CC of BiH). However, the eliminatory precondition for this action of the Court is surely *the existence of evidence* that suggests that the Accused by his actions entered the punishable zone, that is, that by his actions he satisfied the elements of any criminal offence under Chapter XVII of the CC of BiH (more specifically, that by his actions he satisfied the elements of the criminal offence which amount to the violation of the values protected by international law).

54. It is also incontestable for this Panel that the persecution and forcible transfer of the population took place in Srebrenica in 1995, however, in the given case, as correctly concluded by the Trial Panel, the actions of the Accused which were correctly established by the Trial Panel beyond any reasonable doubt (securing the Bratunac-Milići road on 12 and 13 July 1995, the search of the terrain in the village of Budak and escorting the found civilians to Potočari) do not constitute the elements of the criminal offence of Genocide with which the Prosecutor initially charged the Accused, or any other criminal offence to which he referred in his Appeal.

55. To prove the responsibility of the Accused for the criminal offence of Genocide, it is necessary to prove the special (genocidal) intent to eradicate in whole or in part a national, ethnic, racial or religious group of people which in the given case cannot be concluded on the basis of the presented evidence. Namely, from the evidence presented regarding the state of mind of the Accused in relation to the incriminating incident, the Trial Panel correctly found that it was not possible to conclude, beyond any reasonable doubt, that the Accused shared the special intent to eradicate in whole or in part the protected group of Bosniaks, nor that he gave any contribution to others in any way in the perpetration of the gravest criminal offence.

56. On the other hand, the mental attitude of the Accused towards the persecution and transfer of the population from the Srebrenica enclave and the pattern of his actions are irrelevant and minor in comparison to the degree of knowledge and pattern of actions of the actual perpetrators, which is not sufficient for the Accused Stevanović to be found guilty of the criminal offense of *Crimes against Humanity* under Article 172 (1) (h) in conjunction with (d) of the CC of BiH, as proposed by the Prosecutor in the Appeal.

57. Also, in order for the Accused to be found guilty of any charge the Prosecutor alleges within the joint criminal enterprise, it is not sufficient to establish, beyond any reasonable doubt his presence and the fact that by mere failure to act he became a (co)perpetrator in the incident concerned, but it is required that in the indictment the actions by which the Accused participated in the joint criminal enterprise be precisely described. Therefore, the Appellate Panel cannot be simply asked to draw a conclusion from the existing factual substratum that the responsibility of the Accused within the JCE is established without specifying actions of the Accused, without a risk that by doing so the objective identity of the Indictment might be violated.

58. According to the aforementioned, the appellate arguments of the Prosecutor claiming the contrary are refused as unfounded.

III APPLICATION OF ACQUITTING PROVISIONS (Article 300 of the CPC of BiH)

59. The Prosecutor stated only in the introductory part of the Appeal that he filed the appeal also because of the *application of the acquitting provisions* (Article 300 of the CPC of BiH), without referring to it further in the Reasoning. For that reason the Appeal could not be reviewed in that respect. Another reason for this is also because the Accused Stevanović was acquitted of charges (pursuant to Article 284 (c) of the CPC of ZKP BiH), and was not found guilty, thus it is not possible to appeal the decision as to the sanction.

60. Pursuant to substantive law, in order for the perpetrator to be relieved of punishment (and for him to utilize that statutory possibility), it is required that two conditions are cumulatively satisfied:

1. that he was found guilty,
2. that he was relieved of punishment pursuant to substantive law,

which is not the case here.

61. As this ground of appeal was not based on the law, it was dismissed as inadmissible.

IV MOTION OF THE APPELLANT TO ORDER THE ACCUSED INTO CUSTODY

62. Having in mind that the Appellate Panel upheld the Trial Verdict acquitting the Accused of charges, the Motion of the Prosecutor to order the Accused into custody pursuant to Article 138 (1) as read with Article 132(1) (a) of the CPC of BiH has become pointless.

63. Based on the aforementioned, and pursuant to Article 313 of the CPC of BiH, it was decided as stated in the Operative Part of the Verdict.

MINUTES TAKER
Vahida-Ramić Sanida

PRESIDENT OF THE PANEL
JUDGE
Lukes Tihomir

LEGAL REMEDY: No appeal lies from this Verdict.

