



COURT OF BOSNIA AND HERZEGOVINA

Case No.: X-KR-07/394

Date: Delivered on 12 June 2009
Published on 14 September 2009

Before: Judge Darko Samardžić, Presiding
Judge Davorin Jukić
Judge Patricia Whalen

PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA
v.
NOVAK ĐUKIĆ

FIRST INSTANCE VERDICT

Counsel for the Prosecutor's Office of Bosnia and Herzegovina:

Mirsad Strika

Counsel for the Accused:

Nebojša Pantić

Milenko Ljubojević

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IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Panel comprised of Judges Darko Samardžić, as the President of the Panel, and Davorin Jukić and Patricia Whalen as members of the Panel, with the participation of the Legal Officer Emira Hodžić, as the record-taker, in the criminal case against the Accused Novak Đukić, charged with the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of BiH), in conjunction with Article 180(1) of the CC BiH, deciding upon the Indictment of the Prosecutor's Office of Bosnia and Herzegovina number KT-RZ 169/07 of 27 December 2007, confirmed on 4 January 2008, amended on 31 March 2009, after the main trial was held in the presence of the Accused Novak Đukić and his Defense Counsels, Attorneys Nebojša Pantić and Milenko Ljubojević, and the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Mirsad Strika, on 10 June 2009 delivered and on 12 June 2009 publicly announced the following:

V E R D I C T

THE ACCUSED:

NOVAK ĐUKIĆ, son of Đurađ and Bjelica, née Ćurković, born on 10 April 1955 in the place of Donja Kola, the Municipality of Banja Luka, residing at 6 Voždovačka St. in Banja Luka, Serb, citizen of BiH and SRY, PIN 1004955500694, retired general, married, father of two adult children, literate, graduated from the Military Academy, did not do his military service since he was a professional serviceman, decorated with the Karađorđe Star of the Third Order, currently in the Detention Unit of the Penal and Correctional Institution Kula, Istočno Sarajevo, pursuant to the Decision ordering custody issued by the Court of BiH number X-KRN-07/394 of 8 November 2007,

Pursuant to Article 285(1) of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC BiH)

IS FOUND GUILTY

because:

During the state of war and the armed conflict in Bosnia and Herzegovina, contrary to the rules of international humanitarian law, namely Article 3 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and Article 51 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and Article 13 of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, in his capacity as the Commander of the Ozren Tactical Group of the Army of Republika Srpska (hereinafter: Ozren Tactical Group):

1. On 25 May 1995, he ordered the artillery platoon which was subordinated to him and located on Ozren Mountain, Petrovo Municipality – the wider area of the Panjik village, to shell with 130 mm caliber M 46 guns the town of Tuzla, which was declared a United Nations safe area by the United Nations Resolution 824 of 6 May 1993, and the artillery platoon members executed that order by firing several artillery projectiles on the town of Tuzla, out of which one artillery projectile type OF-482 at 20:55 hours hit a location in the immediate town centre called *Kapija*, in the square where Majevička, Božidara Adžije, Dr. Mujbegovića, Partizanska, Maršala Tita and Nikole Tesle streets intersect, its explosion causing the death of the following persons:

1. Suzan Abo Ismail (DOB: 3 May 1980),
2. Edina Ahmetašević (DOB: 11 December 1974),
3. Elvis Alagić (DOB: 1 September 1977),
4. Admir Alispahić (DOB: 15 March 1971),
5. Lejla Atiković (DOB: 9 June 1980),
6. Asmir Bakalović (DOB 4 August 1975),
7. Adnan Beganović (DOB 21 May 1979),
8. Damir Bojkić (DOB: 1 June 1967),
9. Indira Borić (DOB: 6 September 1958),
10. Ilvana Bošnjaković (DOB: 18 June 1977),
11. Elma Brguljak (DOB: 25 July 1975),
12. Lejla Bučuk (DOB: 4 June 1978),
13. Sanja Čajić (DOB: 1 August 1977),
14. Selma Čaušević (DOB: 19 June 1977),
15. Amir Čekić (17 January 1974),
16. Almasa Čerimović (DOB: 19 November 1975),
17. Samir Čirak (DOB: 20 January 1977),

18. Zada Dedić (DOB: 17 December 1974),
19. Razija Djedović (DOB: 12 July 1975),
20. Amir Đapo (DOB: 22 March 1975),
21. Suzana Đušić (DOB: 12 February 1981),
22. Amir Đuzel (DOB: 20 January 1968),
23. Muris Fatušić (DOB: 30 April 1980),
24. Ago Hadžić (DOB: 26 June 1975),
25. Hamdija Hakić (DOB: 2 February 1947),
26. Senad Hasanović (DOB: 9 March 1969),
27. Šemsa Hasičić (DOB: 14 May 1975),
28. Alem Hidanović (DOB: 13 December 1975),
29. Nedim Hodžić (DOB: 9 October 1964),
30. Hasan Hrustanović (DOB: 20 January 1970),
31. Adnan Hujdurović (DOB: 6 April 1977),
32. Elvira Hurić (DOB: 31 December 1978),
33. Almir Jahić (DOB: 2 April 1977),
34. Jelena Jezidžić - Stojčić (DOB: 18 May 1951),
35. Azur Jogunčić (DOB: 29 October 1973),
36. Sandro Kalesić (DOB: 26 December 1992),
37. Franc Kantor (DOB: 25 April 1971),
38. Damir Kurbašić (DOB: 10 February 1975),
39. Vanja Kurbegović (DOB: 5 November 1977),
40. Vesna Kurtalić (DOB: 27 December 1979),
41. Pera Marinović (DOB: 22 March 1958),
42. Nenad Marković (DOB: 2 May 1976),
43. Sulejman Mehanović (DOB: 20 May 1967),
44. Amira Mehinović (DOB: 4 February 1974),
45. Edin Mehmedović (DOB: 26 September 1975),
46. Edisa Memić (DOB: 29 June 1976),
47. Adrijana Milić (DOB: 3 March 1978),
48. Edin Mujabašić (DOB: 25 July 1973),
49. Nešet Mujanović (DOB: 27 November 1974),
50. Samir Mujić (DOB: 5 August 1966),
51. Elvir Murselović (DOB: 20 January 1972),
52. Šaban Mustačević (DOB: 25 March 1966),
53. Dijana Ninić (DOB: 10 August 1975),
54. Selma Nuhanović (DOB: 13 September 1977),
55. Indira Okanović (DOB: 11 March 1980),
56. Rusmir Ponjavić (DOB: 17 August 1974),
57. Raif Rahmani (DOB: 1 August 1972),
58. Fahrudin Ramić (DOB: 2 April 1961),
59. Nedim Rekić (DOB: 10 June 1967),
60. Jasminko Rosić (DOB: 14 September 1962),
61. Senahid Salamović (DOB: 16 November 1969),
62. Edhem Sarajlić (DOB: 6 January 1975),
63. Jasminka Sarajlić (DOB: 29 June 1971),
64. Asim Slijepčević (DOB: 23 May 1975),
65. Savo Stjepanović (DOB: 23 March 1970),
66. Armin Šišić (DOB: 19 November 1975),
67. Nihad Šišić (DOB: 26 June 1975),

68. Ilinka Tadić (DOB: 17 June 1942),
69. Azur Vantić (DOB: 13 November 1975),
70. Mustafa Vuković (DOB: 1 May 1972),
71. Adnan Zaimović (DOB: 7 September 1967),

while the following persons suffered serious bodily injuries: Zijad Aljukić, Nedžad Aljić, Alma Avdić, Nihad Alić, Nihad Babajić, Muhamed Baraković, Demir Behlulović, Almir Borogovac, Edin Buzaljko, Sead Cipurković, Samir Čorsulić, Mirza Ćilimković, Almir Delić, Enes Dedić, Samir Đapo, Edin Gulamović, Ljubiša Glogovac, Bahrudin Hadžiefendić, Ajla Hadžimehmedović, Jasmin Hadžimehmedović, Asim Hadžiselimović, Mirsad Hajdarević, Jasmin Hajdarević, Ademir Halilčević, Safeta Hasanović, Edin Hodžić, Mehmed Husarčić, Edin Hurić, Elsa Hurić, Damir Husejnović, Samir Husejnefendić, Jasmina Ibraković, Admir Ikinić, Miralem Imamović, Muhamed Isić, Almir Jahijagić, Zoran Jakubec, Nevres Jašarević, Azra Kapetanović, Alen Ljaljić, Šejla Ljaljić, Alis Mahmutović, Nedim Malhodžić, Šimo Marijanović, Nedžad Mašić, Omer Medić, Samir Mehmedović, Omer Mekić, Fikret Memić, Mirko Mišković, Adnan Mujačić, Zlatan Mujčinović, Damir Mujkanović, Senada Mujkić, Senad Mulajusufović, Selma Mustajbašić, Davor Nečemer, Edin Nukić, Hajrija Nurkić, Adisa Oprešić, Damir Osmanović, Ramiz Pašalić, Ivo Petrović, Adnan Pirić, Selma Pirić, Nenad Radojčić, Osman Ramadanović, Almir Ramić, Zijad Ravančić, Jasmin Razić, Jasmina Sahitović, Edin Sakić, Esad Salkić, Enver Smajić, Semir Smajić, Tihomir Stojanović, Entaz Suljetović, Zlatan Suljetović, Sanja Šečić, Sejfidin Šehmehmedović, Ivo Tadić, Melita Talić, Idriz Teparić, Krunoslav Tokić, Damir Tucaković, Jasmina Zaimović, Adnan Zoletić, Sanela Ahmetović, Denis Altumbabić, Alen baraković, Hafija Baraković, Almir Brkić, Suada Čačković, Jasmin Dajanović, Zoran Divjan, Goran Đulabić, Estin Habibović, Jasenko Imširović, Semir Kusturica, Amel Mehmedović, Alma Muratović, Admir Nakić, Nedim Omerović, Amra Ponjavić, Alema Sadiković, Fahreta Zonić,

And the following persons suffered minor bodily injuries: Almir Alić, Merima Alić, Safeta Baraković, Anes Begić, Nedžad Begunić, Enes Berbić, Majda Borić, Almir Bulić, Emir Čehajić, Feđa Čustendil, Azra Dajanović, Mirel Duraković, Mirza Fazlović, Ana Gavrić, Benjamin Hadžiefendić, Adnan Hajdarhodžić, Eldar Hamzić, Majda Hamzić, Mensur Hasanović, Amir Hodžić, Mensur Hodžić, Nadir Huremović, Amir Ikanović, Mirsad Imamović, Ahmed Isić, Nermina Islamović, Admir Jahić, Radenko Jovičić, Irmela Junuzagić, Dino Kalesić, Irena Kalesić, Emin Kodžaga, Edin Kofrc, Jasmin Konić, Nahid Kulenović, Hasan Kurtić, Fahrudin Međedović, Borislav Marić, Mevlida Mehinagić, Adnan Mešković, Asmir Mujanović, Emin Musemić, Mirza Musić, Admir Nakić, Almir Nuhanović, Asmir Numanović, Mirza Omerović, Damir Pirić, Amir Rahmanović, Fahrudin Rahmanović, Sadik salkić, Alema Sadiković, Enes Samardžić, Muhamed Sejdanić, Mirsad Simić, Anželika Stojčević, Elisa Suljendić, Selma Šećerbegović, Admir Šehić, Admir Šuvalić, Edin Tvica, Jasmina Zahirović, Zijada Hasinović, Alma Hurić, Davor Mariček, Admir Ikanović and Hatidža Zonić.

Whereby he committed the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina.

Therefore, pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina and by the application of Articles 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina, the Panel of the Court of Bosnia and Herzegovina,

SENTENCES HIM

TO A LONG TERM IMPRISONMENT
OF 25 (TWENTY FIVE) YEARS

Pursuant to Article 56(1) of the Criminal Code of Bosnia and Herzegovina, the time the Accused spent in custody based on the Decision of this Panel shall be credited towards the imposed sentence starting from 8 November 2007.

Pursuant to Article 188(4) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused shall be relieved of the duty to reimburse the costs of criminal proceedings and the scheduled amount.

Pursuant to Article 198(2) of the Criminal Procedure Code of Bosnia and Herzegovina, all the injured parties shall be instructed that they may take civil action to pursue their claims under property law.

II

Pursuant to Article 284(c) of the Criminal Procedure Code of Bosnia and Herzegovina, the Accused Novak Đukić:

IS ACQUITTED OF THE CHARGES

That:

On 28 May 1995, from 07:30 to 17:37 hours, he ordered the artillery platoon subordinate to him, which was located on Ozren Mountain in the wider area of the Panjik village, Petrovo

Municipality, to shell with the 130 mm caliber M 46 guns the town of Tuzla, and the artillery platoon members executed the order by firing nine artillery projectiles on the town of Tuzla, out of which:

- a) the projectile fired at 07:30 hours hit the bus stop in Moše Pijade Street next to number 6, and Pejo Pekić from Tuzla was killed in its explosion, while material damage amounting to 7,033.00 KM was caused to the *Univerzal promet* Tuzla tobacco store located at the bus stop,
- b) the projectile fired at 07:35 hours exploded at 16. Muslimanske brigade Street, and Safet Telarević and Anto Martinović suffered minor bodily injuries in its explosion,
- c) the projectile fired at 07:37 hours exploded at Muje Smajlovića Street next to number 7, and its explosion caused material damage amounting to 15,384.00 KM to the warehouse of the private enterprise *La Campanela*, owned by Nijaz Imamović from Donje Vukovije, and material damage amounting to 24,397.00 KM to the Municipal hut facility in the compound of the Tuzla Aero Club,
- d) the projectile fired at 07:38 hours exploded at 3 Rudolfa Vikića Street, on the sidewalk on the south side of the garage owned by Vehid Ordagić, on which occasion Almedina Hurahović suffered a minor bodily injury, while material damage was caused to the garage,
- e) the projectile fired at 08:30 hours exploded at II Krajiške brigade Street on the soil, so that material damage was not caused,
- f) the projectile fired at 11:50 hours exploded at 57 Meme Suljetovića Street, on the roof of a facility ancillary to the house owned by Rifat Bakalović, causing substantial material damage,
- g) projectiles fired from 12:00 to 17:37 hours exploded in the Tuzla Steel Foundry compound, causing material damage which amounted to 158,090.00 KM to the Foundry facilities.

Pursuant to Article 189(1) CPC BiH, the costs of the criminal proceedings and the scheduled amount concerning the acquitting part of the Verdict shall be paid from the budget funds of the Court.

Pursuant to Article 198(3) of the CPC BiH, all the injured parties shall be instructed to pursue their claims under property law in civil proceedings.

Translator's note: done in Bosnian-Croatian-Serbian and English on 14 September 2009, the Bosnian-Croatian-Serbian version being authoritative.

Reasoning

I. PROCEDURAL HISTORY

A. CHARGES; CONFIRMATION OF THE INDICTMENT; PLEA HEARING

1. By the Indictment of the Prosecutor's Office of Bosnia and Herzegovina, No. KT - RZ 169/07 of 27 December 2007, amended on 31 March 2009, due to the existence of grounded suspicion the Accused Novak Đukić was charged with the commission of the criminal offense of War Crimes against Civilians in violation of Article 173(1)(a) and (b), in conjunction with Article 180(1) of the CC of BiH.

2. The Indictment was confirmed on 4 January 2008. On 14 January 2008, the Accused Novak Đukić pled not guilty to the criminal offense as charged under the Indictment, after which the case was delivered to the Trial Panel.

3. The main trial in this case started on 11 March 2008 and was completed on 5 May 2009. Evidence for the Prosecution, the Defense and the Court was adduced during the evidentiary proceedings.

B. ADDUCED EVIDENCE

1. Evidence for the Prosecution

4. The following witnesses were directly examined: Nedžad Vejzagić, Dragan Jovanović, Dragan Vasiljević, Brano Marjanović, Zoran Lazarević, Mile Savić, Vladimir Vavan, Goran Mijatović, Nenad Čolić, Goran Mrzić, Milan Đurić, Slavko Stojanović, Dragan Babić, Ljubiša Čorsović, Amel Mehmedović, Charlef Brantz, Amra Ponjević, Pirić Adnan, Anes Dedić, Samir Đapo, Damir Tucaković, Azra Kapetanović, Azra Mitrović, Ahmet Isić, Bahrudin Hadžiefendić, Edin Buzaljko, Asim Hadžiselimović, Dino Kalesić, Fahrudin Rahmanović, Adnan Mujačić, Marica Grandić, Nadir Huremović, Vildana Isić, Edin Altumbabić, Adnan Aliefendić, Andrejaš Robert, Adis Nišić, Salih Brkić and Nijaz Vrabac, and also the expert witnesses, Prof. Dr. Berko Zečević – ballistics expert witness, and Dr. Vedo Tuco – forensic expert.

5. In addition to the direct examination of the witnesses and the expert witnesses, the Prosecution adduced the following documentary evidence:

Witness Examination Record for Dragan Jovanović made in the BiH Prosecutor's Office dated 19 November 2007 (T-1); Witness Examination Record for Brana Marjanović made by the State Investigation and Protection Agency dated 25 October 2007 (T-2); Witness Examination Record for Zoran Lazarević made by the State Investigation and Protection Agency dated 26 October 2007 (T-3); Witness Examination Record for Mile Savić made by the State Investigation and Protection Agency dated 19 November 2007 (T-4); Witness Examination Record for Vladimir Vavan made by the State Investigation and Protection Agency dated 19 November 2007 (T-5); Written Finding and Opinion of the expert witness Prof. Dr. Berko Zečević- Analysis of the circumstances which lead to the massacre of the people in Kapija square at 20:55 hours on 25 May 1995 (T-6); Witness Examination Record for Goran Mijatović made by the State Investigation and Protection Agency dated 21 November 2007 (T-7); Witness Examination Record for Nenad Čolić made by the State Investigation and Protection Agency dated 22 November 2007 (T-8); Witness Examination Record for Milan Đurić made by the State Investigation and Protection Agency dated 22 November 2007 (T-9); Witness Examination Record for Goran Mrzić made by the State Investigation and Protection Agency dated 27 November 2007 (T-10); Witness Examination Record for Slavko Stojanović made by the State Investigation and Protection Agency dated 28 November 2007 (T-11); Witness Examination Record for Dragan Babić made by the State Investigation and Protection Agency dated 28 November 2007 (T-12); Witness Examination Record for Ljubiša Čorsović made by the State Investigation and Protection Agency dated 29 November 2007 (T-13); Investigation Report made by the UNPROFOR dated 27 May 1995 (English version) (T-14); Official letter sent to General-Major Rupert Smith, the UNPROFOR Commander dated 28 May 1995 (T-15); Annex A-Sketch of the crime scene (shelling of Tuzla „Kapija“ 25/26 May 1995) made by the CSB Tuzla (T-16); Annex B-List of the Tuzla shelling victims of 25 May 1995 made by the UN /Sector G5 Assistant Commander Guy Sands-Pingot dated 27 May 1995 (T-17); Annex F-Report of the mixed commission regarding the shelling of Tuzla – 25 May 1995 made on 26 May 1995 (T-18); The facts concerning the shelling of Tuzla on 25 May 1995 (T-19); Annex F2 – Projectile 130 graphic overview (T-20); Annex F3 – review of the gun M-46 caliber 130 mm (T-21); Annex F4 – drawing of the projectile drop angle (T-22); Annex F5 – Map of the town of Tuzla showing the projectile drop angle (T-23); Annex C – Report of the eye-witness on the Tuzla center shelling on 25 May 1995 made on 26 May 1995 by Major Guy Sands (T-24); Explanation of the photo-documentation of the Security Services Center Tuzla number: 20-1/02-3-9 dated 28 May 1995 (T-25); Witness Examination Record for Charlef Brantz made in the Prosecutor's Office of Bosnia and Herzegovina dated 5 December 2007 (T-26); CD – recordings of the crime scene after the shelling of Tuzla „Kapija“ (the hospital and the mortuary) (T-27); Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Samir Đapo stood at the moment of explosion (T-28); Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Damir Tucaković stood at the moment of explosion (T-29); Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Azra Kapetanović stood at the

moment of explosion **(T-30)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Azra Mitrović stood at the moment of explosion **(T-31)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Ahmed Isić stood at the moment of explosion **(T-32)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Bahrudin Hadžiefendić stood at the moment of explosion **(T-33)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Edin Buzaljko stood at the moment of explosion **(T-34)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Asim Hadžiselimović stood at the moment of explosion **(T-35)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Dino Kalesić stood at the moment of explosion **(T-36)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Fahrudin Rahmanović stood at the moment of explosion **(T-37)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Adnan Mujičić stood at the moment of explosion **(T-38)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Marica Grandić stood at the moment of explosion **(T-39)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Nadir Huremović stood at the moment of explosion **(T-40)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Vildana Isić stood at the moment of explosion **(T-41)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Edin Altumbabić stood at the moment of explosion **(T-42)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Adnan Aliefendić stood at the moment of explosion **(T-43)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Adis Nišić stood at the moment of explosion **(T-44)**; Analysis of the massacre of young people caused by the artillery projectile firing on 25 May 1995 at 20:55 hrs at the Tuzlanska kapija with the marked place where the witness Salih Brkić stood at the moment of explosion **(T-45)**; CD – video recordings made after Ozren was taken over by the BiH Army **(T-46)**; Record of external examination and identification of the persons killed in the massacre in Tuzla on 25 May 1995 with the attached photodocumentation number 20-1/02-3-9-7-175/95 **(T-47)**; Documentation for the killed persons **(T-48)**; List of the severely injured persons in the shelling of Tuzla on 25 May 1995 at the Kapija location that were kept for medical treatment in the KMC Tuzla made by the Investigative Judge of the Higher Court in Tuzla number Kri 29/95 dated 26 May 1995 **(T-49)**; List of the persons killed in the Tuzla shelling on 25 May 1995 made by the Investigative Judge of the Higher Court in Tuzla number Kri 29/95 dated 26 May 1995 **(T-50)**; List of the persons injured in the Tuzla shelling on 25 May 1995 at the „Kapija“ location who

were released after receiving the medical treatment in the KMC made by the Investigative Judge of the Higher Court in Tuzla number Kri 29/95 dated 26 May 1995 (T-51); List of the medical documentation for the injured persons dated 14 October 2008 with a copy of discharge lists for the injured persons (T-52); Decree declaring the imminent threat of war dated 8 April 1992 (T-53); Decision declaring the state of war dated 20 June 1992 (T-54); Agreement between the representatives of the peoples in BiH regarding the obligatory application of the rules of international humanitarian law in Bosnia and Herzegovina dated 22 May 1992 (T-55); Official Letter of the Security Services Center dated 1 June 1995 (T-56); Sketch of the crime-scene/sketch of the crater dated 25/26 May 1995 number 20-1/02-3-9-7-175/95 made by the Security Services Center Tuzla; (T-57); Photo-documentation dated 27 May 1995 number 20-1/02-3-9-7-175/95 made by the Security Services Center Tuzla (T-58); Photo-documentation dated 30 May 1995 number 20-1/02-3-9-7-175/95 made by the Security Services Center Tuzla (T-59); Photo-documentation dated 25/26 May 1995 number 20-1/02-3-9-7-175/95 made by the Security Services Center Tuzla (T-60); Photo-documentation dated 25/26 May 1995 number 20-1/02-3-9-7-175/95 made by the Security Services Center Tuzla (T-61); Record of crime-scene investigation made on 25 May 1995 by the Higher Court in Tuzla number Kri 29/95 (T-62); UNPROFOR Investigation Report dated 25 May 1995 signed by the Deputy Commander Brantz C.L. (B/C/S) version (T-63); List of cameramen and journalists who took part in documenting events after the shelling of the town on 25 May 1995 dated 30 May 1995 made by the SJB Tuzla (T-64); Report on the shelling of Tuzla on 25 May 1995 dated 2 June 1995 made by the SJB Tuzla (T-65); Official Note dated 26 May 1995 made by the employees of the First Police Station Tuzla (T-66); Official Note dated 26 May 1995 made by the employees of the First Police Station Tuzla (T-67); Official Note dated 27 May 1995 made by the employees of the First Police Station Tuzla (T-68); data on the events during the period from 30 April 1995 to 2 June 1995 (T-69); Official Letter of the Police Station Tuzla number 08-02/4-3-1613 dated 10 December 2007 with the attached copies of the records of the on-site investigations by the First Police Station Tuzla for months April-May 1995 (T-70); UN Resolution number 824 (1993) dated 6 May 1993 (T-71); UN Resolution number 836 (1993) dated 4 June 1993 (T-72); Assessment of the amount of damage caused to facilities at the location *Kapija* in Tuzla, Public Enterprise Directorate of Reconstruction and Construction Tuzla, dated 10 July 1995 (T-73); Report on war damage, Tuzla Municipal commission for the registration and assessment of war damage, dated 10 July 1995 (T-74); Photo documentation – the shelling of Tuzla, Moše Pijade Street next to number 6, MUP /Ministry of the Interior/ Tuzla, number 20-1/02-3-9-174/95, dated 28 May 1995 (T-75); Photo documentation – the shelling of Tuzla, 2. Krajiške Street next to number 17, MUP Tuzla, number 20-1/02-3-9-175/95, dated 28 May 1995 (T-76); Photo documentation – the shelling of Tuzla, 57 M. Suljetovića Street, MUP Tuzla, number 20-1/02-3-9-197/95, dated 14 June 1995 (T-77); Photo documentation – the shelling of Tuzla, 3 Rudolfa Vikića Street, MUP Tuzla, number 20-1/02-3-9-176/95, dated 28 May 1995 (T-78); Photo documentation – the shelling of Tuzla, 16. Muslimanske brigade Street, MUP Tuzla, number 20-1/02-3-9-177/95, dated 28 May 1995 (T-79); On-site investigation report, SJB Crime Police Department Tuzla, number 20-PU-I/15-02, dated 28 May 1995 (T-80); Record on the shelling of the house of Rifat Bakalović – 57 Meme Suljetovića Street, Tuzla Municipality, Local community Solana, number 48/95, dated 1 June 1995 (T-81); Record on the external examination of the corpse of Pero Pekić, JZU Clinical Centre in Tuzla, Institute for Forensic Medicine, 29 May 1995 (T-82); Official note on the interview held with Muhamed Hajrić, Crime Police Department Tuzla, 21 August 1997 (T-83); Official note on the interview held with Nijaz Imamović, Crime Police Department Tuzla,

21 August 1997 **(T-84)**; Assessment of war damage, Joint stock company Foundry Tuzla, number 715, dated 7 September 2005, with records dated 9 September 1992, 15 May 1995 and 28 May 1995 **(T-85)**; Official letter sent from the Federal Ministry of Defense – Security and Intelligence Sector to the Cantonal Prosecutor’s Office Tuzla, number 06-03719-4.4-839-2/04, dated 23 August 2004 **(T-86)**; Response to the request to the RBiH Ministry of the Interior, Command of the 2nd Corps Tuzla, Commander Sead Delić, number 08/426-1, dated 7 July 1995 **(T-87)**; Intelligence about persons in the Ozren Tactical Group, FBiH Army, number 4238, dated 16 December 1998 **(T-88)**; Daily intelligence report, Army of RBiH, cryptographic data protection department, dated 26 May 1995 **(T-89)**; Information and documentation about the shelling of Tuzla, Federation Army - Military Security Service Administration, number 7-1/07.1-94-3, dated 7 October 1997 **(T-90)**; Information and documentation about the shelling of Tuzla, Army of RBiH –Security Department, number SP. 06-1/07.1-27, dated 13 August 1997 **(T-91)**; Information and documentation about the shelling of Tuzla, BiH Federation Army - Military Security Service Administration, number 7-1/07.1-94-1, dated 29 July 1997 **(T-92)**; Official letter sent to the Military Security Service Administration requesting documentation, Federal Ministry of the Interior Sarajevo, number 03/2-51, dated 11 July 1997 **(T-93)**; List of documents of the aggressor army seized on the Ozren battlefield during 1995, Army of RBiH **(T-94)**; Artillery working map, approved by the Commander of the 2nd Ozren Light Infantry Brigade, dated 29 April 1994 **(T-95)**; Order for taking artillery firing positions, 1st Krajina Corps Command, Momir Talić, strictly confidential number 366-1793, dated 14 June 1993 **(T-96)**; Regular combat report, 1st Krajina Corps Command, Commander Momir Talić, strictly confidential number 4471-297, dated 12 July 1993 **(T-97)**; Reporting to the Commander of the 1st Krajina Corps, Commander of the 1st Mixed Artillery Regiment Mile Savić, strictly confidential number 133-2, dated 17 May 1993 **(T-98)**; Reporting to the Commander of the 1st Krajina Corps, Commander of the 1st Mixed Artillery Regiment Mile Savić, strictly confidential number 595-4, dated 3 September 1993 **(T-99)**; Overview of manpower and materiel and technical equipment in the artillery rocket units in the Doboj Operations Group and units which are attached, dated 4 October 1994 **(T-100)**; Order to establish the Ozren TG /Tactical Group/, 1st Krajina Corps Command, Momir Talić, strictly confidential number 498-1793, dated 1 October 1993 **(T-101)**; Purpose of the further existence of the Ozren TG Command and review of its work, Ozren TG Command, Milovan Stanković, strictly confidential number 01/198-1, dated 9 May 1994 **(T-102)**; Delivery of information that was requested, 1st Krajina Corps Command, Commander Momir Talić, strictly confidential number 1-53, dated 15 May 1994 **(T-103)**; Regular combat report of the 1st Mixed Artillery Regiment Command, Commander Mile Savić, strictly confidential number 4-321, dated 3 December 1994 **(T-104)**; Order for artillery support, 1st Krajina Corps Command, Momir Talić, strictly confidential number 179-1795, dated 17 May 1995 **(T-105)**; Official letter on addition of artillery pieces, Ozren TG Command, Commander Milovan Stanković, number 03713-10/94, dated 26 May 1994 **(T-106)**; Order to regain lost positions, Ozren TG Command, Commander Milovan Stanković, strictly confidential number 01-11-183, dated 8 June 1994 **(T-107)**; Reporting on the condition and capabilities of the 1st Krajina Corps for further operations, 1st Krajina Corps Command, military secret, strictly confidential, June 1994 **(T-108)**; Order for attack issued by the Ozren TG Commander, Milovan Stanković, Ozren TG Command, strictly confidential number 01-11-398, dated 14 November 1994 **(T-109)**; Regular combat report, 1st Mixed Artillery Regiment Command, strictly confidential number 4-321, dated 2 December 1994 **(T-110)**; Regular combat report, 1st Mixed Artillery Regiment Command, strictly confidential number 4-321, dated 3 December 1994 **(T-111)**; Regular combat report, 1st

Mixed Artillery Regiment Command, strictly confidential number 4-344, dated 26 December 1994 (T-112); Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995 (T-113); Order for attack issued by the Ozren TG Commander, Novak Đukić, strictly confidential number 01-128-1, dated 28 March 1995 (T-114) Order for defense, Ozren TG Command, Commander Novak Đukić, number 01/175-1, dated 25 April 1995 (T-115); Combat order for 11 May 1995, Ozren TG Command, Commander Novak Đukić, dated 6 May 1995 (T-116); Combat order for defense and attack, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/272-1, dated 2 June 1995 (T-118); Order for attack, Ozren TG Command, Commander Novak Đukić, number 02-669/4, dated 23 July 1995 (T-119); Analysis of combat operation - attack on Bradin, 4th Ozren Light Infantry Brigade Command, number 27-415-1, dated 19 June 1995 (T-120); Order for deployment and attack, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/378-6, dated 25 July 1995 (T-121); Order to carry out combat operations, TG "O" Command, Commander Novak Đukić, number 01/378-622, dated 24 August 1995 (T-122); Report about Novak Đukić, dated 2 September 2004 (T-123); Order for the appointment of Novak Đukić, Commander of the 1st Krajina Corps, Momir Talić, number 32-38, dated 17 April 1994 (T-124); Order for the appointment of Novak Đukić, Commander of the 1st Krajina Corps, Momir Talić, number 40-42 (T-125); Article from the newspaper "Ozrenski vidici" which deals with Novak Đukić's exceptional promotion (T-126); Roster for January 1995, Ozren TG Command, Commander Novak Đukić, number 06/10-3, dated 21 January 1995 (T-127); Official letter regarding the delivery of a document of the Command with an attachment, Ozren TG Command, number 06/10-5, dated 26 January 1995 (T-128); Order for a meeting of senior officers, Ozren TG Command, Commander Novak Đukić, number 01/139-1, dated 4 April 1995 (T-129); Delivery of information regarding exceptional promotion, 9th Operations Group Command, Commander Vladimir Arsić, confidential number 03-872/95, dated 16 May 1995 (T-130); Order to commanders to report, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/231-1, without a date (T-131); Order to units to provide information, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/232-3, dated 24 May 1995 (T-132); Order to increase vigilance, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/235-1, dated 24 May 1995 (T-133); Requesting a report on the condition of artillery weapons and ammunition, Ozren TG Command, Commander Novak Đukić, strictly confidential number 02/12-15/95, dated 9 July 1995 (T-134); Order to send forces, Ozren TG Command, strictly confidential number 1/378-722, dated 2 September 1995 (T-135); Combat order, Ozren TG Command, Novak Đukić, strictly confidential number 01/378-723, dated 2 September 1995 (T-136); Official letter sent to the presidents of the War Presidencies, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01-01-110-1/95, dated 5 September 1995 (T-137); Order to all units for full combat readiness measures, Ozren TG Command –Commander Novak Đukić, number strictly confidential 01/378-784/95, dated 7 September 1995 (handwritten) (T-138); Regular combat report delivered to the Ozren TG, 4th Ozren Light Infantry Brigade, Radovan Pantelić, strictly confidential number 31-115-1/95, dated 5 August 1995 (T-139); Order for artillery support, 1st Krajina Corps Command, Commander Momir Talić, strictly confidential number 179-1/95, dated 17 May 1995 (T-140); Intelligence data, 1st Krajina Corps Command – Intelligence Department, strictly confidential number 10/1-225, dated 26 May 1995 (T-141); Intelligence data, Ozren TG Command – Intelligence Organ, strictly confidential number 20-1236/95, dated 26 May 1995 (T-

142); Intelligence report with the situation until 17:00 hours, 1st Krajina Corps Command - Intelligence Department, strictly confidential number 10/1-235, dated 30 May 1995 (**T-143**); Intelligence report with the situation until 07:00 hours, 1st Krajina Corps Command - Intelligence Department, strictly confidential number 10/1-236, dated 31 May 1995 (**T-144**); Order issued by the 1st Krajina Corps, Commander Momir Talić, strictly confidential number 193-1/95, dated 28 May 1995 (**T-145**); Order to the 9th Operations Group Command, 1st Krajina Corps Command, Commander Momir Talić, strictly confidential number 195-1/95, dated 28 May 1995 (**T-146**); Report to the RS President on the situation on the battlefield, Main Staff of the RS Army – Chief of Staff Manojlo Milovanović, strictly confidential number 03/3-141, dated 21 May 1995 (**T-147**); Scheme of Pob /Translator's note: unknown abbreviation/ of the 1st Krajina Corps of the RS Army extract, approved by the Commander Momir Talić, attachment number 13-v (**T-148**); Official letter from the RS Ministry of labor and veterans and disability protection about the delivery of certified copies of documentation that was separated, Radomir Graonić-Assistant Minister, number 16-56-7085/07, dated 7 November 2007 (**T-149**); Record on the handover of certified photocopies of documents from the Archive of the RS Army to investigators of the Prosecutor's Office of BiH, RS Army General Staff, number 16-17-6/4-171, dated 13 November 2007 (**T-150**); Record on the handover of certified photocopies of documents from the Archive of the RS Army to investigators of the Prosecutor's Office of BiH, RS Army General Staff, number 16-17-6/4-157, dated 5 October 2007 (**T-151**); Law on the Army of the Serb Republic of BiH, official gazette of the Serb people in BiH number 7/92 (on CD) (**T-152**); Artillery firing rule, JNA, 1981, (on CD) (**T-153**); ICTY judgment in the case (IT-94-1) *Prosecutor v. Duško Tadić* (on CD) (**T-154**); ICTY judgment in the case (IT-98-29) *Prosecutor v. Stanislav Galić* (on CD) (**T-155**); Order concerning the implementation of the rules of the international law of war in the Army of the Serb Republic of BiH, President of the Presidency Radovan Karadžić, number 01-53/92, dated 13 June 1992 (**T-156**); CD of the crime-scene, Hospital and morgue (**T-157**); Forensic analysis of the expert witness Vedo Tuco dated 24 December 2008 (**T-158**); Official note dated 17 January 2008 by the Sector for War Veterans-Disabled Persons Protection (**T-159**); Official Letter of the Support Command OC BiH number 16-15-05-04-1-1-2/08 dated 10 January 2008 (**T-160**); Order of the Main Staff of the RS Army dated 25 May 1995 (**T-161**); Report on the combat readiness status, July 1995 (**T-162**); Report for annual analysis, unit 1KK (**T-163**); Intelligence Security Plan for the Main Staff of the RS Army for conducting the „Sadejstvo – 95“ operation dated 29 March to 31 May 1995(**T-164**); Order of the Main Staff of the RS Army to the Drina Corps Command dated 4 April 1995; Order of the Main Staff of the RS Army to the 1. Krajina Corps Command dated 4 April 1995; Order of the Main Staff of the RS Army to the East-Bosnian Corps Command dated 4 April 1995 (**T-165**); Table of keys for coding topographic maps number 03/4-735-1 (**T-166**); Security Plan for the „Sadejstvo – 95“ operation from 29 March to 31 May 1995 (**T-167**); Text–table portion of the plan for the attack operation upon the order number 7/1 “Sadejstvo – 95” (**T-168**); Order for providing engineering security with the Directive 07/1 (**T-169**); Order for general documents dated 24 April 1995 (**T-170**); Instruction for work with general documents of crypto-protection (**T-171**); List of general documents for crypto-protection of the VRS Main Staff dated 24 April 1995 (**T-172**); General list of code signals VRS 03/4-735-2 (**T-173**); Table of signals number 03/4-735-3 (**T-174**); Review of secret names number 03-4-735-5 (**T-175**); Review of secret names for a) coded map, b) list of code signals, c) table of signals (**T-176**); Review of numbers for identification of superiors dated 6 November 1994 (**T-177**); Composition and relations of the army dated 4 December 2007 (**T-178**); Grouping of forces, direction of attacks of deployed forces, dated 4 December

2007 (T-179); CD- Maps of the Operations “Sadejstvo 95” and Map of the operation “Štit 94/95” (T-180).

2. Evidence for the Defense

6. The following witnesses were directly examined: Mile Savić, Milan Đurić, Ljubiša Čorsović and Mladen Dostanić, while also examined was the weapons and ballistics expert witness Vlada Kostić, mechanic engineer.

7. The Panel reviewed the following evidence which was admitted as documentary evidence:

Report and opinion of the expert witness Vlada Kostić dated 21 January 2009 (O-1); War Logbook of the 2nd Ozren Light Infantry Brigade from 11 September 1994 to 16 September 1995 (O-2); Request to conduct investigation number Kt 196/96 of 22 December 1998 (O-3); Motion to take over the case number KT-RZ-169/07 dated 8 June 2007 (O-4); Decision to take over the case number X-KRN 07/394 dated 18 July 2007 (O-5); Order to carry out an expert analysis number KT-RZ – 169/07 dated 27 November 2007 (O-6).

3. Evidence for the Court

8. Following the Court’s order, witness Manojlo Milovanović was directly examined, and the expert witness for the Prosecution, Professor Dr. Berko Zečević, and the Defense expert witness, Mechanic Engineer Vlado Kostić, were jointly examined pursuant to Article 85(2) of the CPC of BiH.

C. PROCEDURAL DECISION OF THE PANEL: DECISION ON THE PROSECUTION’S MOTION TO ACCEPT AS PROVED THE FACTS ESTABLISHED BY THE ICTY.

9. On 13 November 2008 the Panel issued the decision refusing the Prosecution’s Motion to accept as proved the facts established by the ICTY No. KT-RZ 169/07 of 26 February 2008 (hereinafter: the Motion).

10. On 26 February 2008, the Prosecution filed the Motion to accept the established facts determining the nature of the armed conflict during the period referred to in the Indictment, based on Article 4 of the Law on the Transfer of Cases from the International Criminal Tribunal for the Former Yugoslavia to the Prosecutor’s Office of BiH and the Use of

Evidence Collected by the ICTY in Proceedings before the Courts in BiH (hereinafter: the Law on Transfer of Cases). The Motion is based on facts taken from the ICTY Trial Judgments in the *Prosecutor v. Tadić* case (No. IT-94-1-T dated 7 May 1997) and *Prosecutor v. Mucić et al.* case (No. IT-96-21-T dated 16 November 1998), and from the appeals judgment in the *Prosecutor v. Tadić* case (No. IT-94-1-A of 15 July 1999).

11. On 11 November 2008, the Panel offered the parties in the proceedings a hearing at which the parties would present their arguments concerning the Motion, pursuant to Article 4 of the Law on the Transfer of Cases. Both parties stated that they maintained their arguments presented in the written submissions and did not ask for a hearing regarding this matter.

12. After careful consideration of the arguments and upon a thorough review of the applicable law pertaining to the admission of the adjudicated facts, the Panel decided to refuse the Motion.

13. The Law on the Transfer of Cases applies to the case at hand because although it is not a case transferred from the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) to the Prosecutor's Office of BiH, the Law on the Transfer of Cases allows for the admissibility of evidence collected by the ICTY in proceedings before the courts in BiH.¹ Article 4 of the Law on the Transfer of Cases² stipulates that at the request of a party or *proprio motu*, the Panel, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings.

14. The procedure of acceptance of established facts is primarily intended to ensure the expediency of the proceedings. By acknowledging these established facts, the Court achieves judicial economy in the sense that it condenses the relevant proceedings to what is essential for the case of each party and eliminates the necessity to prove the fact again that has been

¹ Article 1(1) of the Law on the Transfer of Cases stipulates that "[t]he provisions set forth in this Law shall regulate the transfer of cases by the International Criminal Tribunal for the former Yugoslavia (hereinafter: the ICTY) to the Prosecutor's Office of BiH and the admissibility of evidence collected by the ICTY in proceedings before the courts in BiH."

² Article 4 of the Law on the Transfer of Cases stipulates that "[a]t the request of a party or *proprio motu*, the courts, after hearing the parties, may decide to accept as proven those facts that are established by legally binding decisions in any other proceedings by the ICTY or to accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings".

previously adjudicated in past proceedings. The procedural legal impact of taking notice of an established fact is that the burden of proof to disqualify the fact is shifted from the Prosecution to the Defense.³

15. If during a trial an accused wants to dispute an adjudicated fact of which the Court has taken notice, the accused has a right (as a matter of safeguarding the fairness of the trial) to submit evidence that calls into question the veracity of the adjudicated facts.⁴

16. The Panel emphasizes that its first concern is to ensure that the Accused is offered a speedy and fair trial in accordance with Article 13 CPC of BiH and Article 6(1) of the European Convention on Human Rights (hereinafter: ECHR). Accordingly, as long as this principle is upheld, the Court has a duty to avoid a waste of unnecessary time and resources.

17. Article 4 leaves to the discretion of the Panel the decision as to whether to accept the facts proposed. Neither the Law on Transfer, nor the CPC of BiH, provides for the criteria upon which the Panel might exercise its discretion.

18. Another Trial Panel of the Court of BiH in the Decision dated 3 October 2006, in the case of *Miloš Stupor et al* (Number: X-KR-05/24), its decision dated 26 June 2007, in the case of *Tanasković* (Number: X-KR/06/165), and its decision dated 3 July 2007, in the case of *Lelek* (Number: X-KR/06/202) set out the criteria it considered appropriate to apply in the exercise of its discretion under Article 4.

19. Those criteria took into account the rights of the accused under the law of BiH, incorporating as it does the fundamental rights protected by the ECHR. At the same time, that Panel was mindful of the ICTY jurisprudence developed in interpreting Rule 94 of the ICTY Rules of Procedure and Evidence⁵.

³ Court of BiH jurisprudence: Decision in the *Momčilo Mandić* case, Case No. X-KR-05/58, dated 5 February 2007; Decision in the *Krešo Lučić* case, Case No. X-KR-06/298, of 27 March 2007. ICTY jurisprudence: Decision on Adjudicated Facts in the *Vujadin Popović et al.* case, Case No. IT-05-88-T, dated 26 September 2006, developing further the criteria elaborated by the two ICTY Decisions on Adjudicated Facts in the *Momčilo Krajišnik* case, Case No. IT-00-39-T, of 28 February 2003 and 24 March 2005.

⁴ Article 6(2) of the CPC BiH, and Article 6(3)(d) of the European Convention on Human Rights.

⁵ Rule 94(B) states that "at the request of a party or *proprio motu*, a Trial Chamber, after hearing the parties, may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to the matter at issue in the current proceedings".

20. The Panel emphasized that Rule 94 of the ICTY and Article 4 of the Law on Transfer are not identical and that the Panel is not in any way bound by the decisions of the ICTY. However, it is self-evident that some of the issues confronting the Tribunal and the Trial Panels of the Court of BiH are similar when considering adjudicated facts, and that therefore the considerations will likewise be similar.

21. Upon review of these criteria in light of the arguments in this case, this Panel is also of the opinion that this criteria fairly protect the interests of the moving parties, the rights of the Accused, the purpose of the Law on Transfer, and the integrity of the trial process.

22. Therefore, in deciding as set out in the operative part, the Panel took into account the following criteria:

1. The fact must be truly a “fact” that is:
 - a) sufficiently distinct, concrete and identifiable;
 - b) not a conclusion, opinion or verbal testimony of a witness;
 - c) not a characterization of a legal nature.
2. The fact must contain essential findings of the ICTY and must not be significantly changed.
3. The fact must not attest, directly or indirectly, to the criminal responsibility of the accused.
4. A fact that has gained such a level of acceptance as true that it is common knowledge and not subject to reasonable contradiction can be accepted as adjudicated fact even if it relates to an element of criminal responsibility.
5. The fact must be “established by a legally binding decision” of the ICTY which means the fact was either affirmed, established or not contested on appeal and no further opportunity for appeal is possible.
6. The fact must be established in proceedings before the ICTY in which the accused against whom the fact has been established, and the accused before the Court of BiH, have the same interests with reference to contesting a certain fact. Accordingly, the facts

stated in the documents which are a subject of a plea agreement or voluntary admission in the proceedings before the ICTY shall not be accepted, given that the interests of the accused in such cases are different, often contrary to the interests of those accused who utilized their right to a trial.

7. A fact must be established in the proceedings before the ICTY, in which the accused against whom the fact has been established had legal representation and the right and opportunity to defend him. It is therefore clear that the acceptance of the fact deriving from the proceedings in which the accused has not tested it by his evidentiary instruments is unacceptable for this Panel. Even more so because the accuracy of that fact is questionable, since the accused did not have the opportunity (or had insufficient opportunity) to respond to it and try to contest it.

23. In using the criteria mentioned above, the Panel has assessed the proposed facts from the motion of the Prosecution that purport to establish the international character of the armed conflict in Bosnia and Herzegovina in 1992-1995 in the framework of the Indictment.

24. The Indictment alleges that the Accused violated rules of international humanitarian law (i.e. Articles 2 and 3 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in time of War, 12 August 1949) at the time of an armed conflict in Bosnia and Herzegovina.

25. In regard to Article 2 of the Fourth Geneva Convention which applies to international armed conflicts, this Panel does not accept facts which may be relevant, but contain characterizations of an essentially legal nature. In the view of the Panel, facts containing the legal conclusion of the existence of an “international armed conflict” are a legal element of the crime charged, and, therefore, cannot be admitted in the instant case.

26. In the opinion of the Panel, Article 3 poses a different problem. Common Article 3 applies in cases of armed conflict not of an international character; therefore admitting facts that establish the international character of the armed conflict amounts to the admission of a fact which, given the Indictment, is not necessary for this Panel to determine under common Article 3 and is therefore irrelevant. Recalling the test that it is bound to, this Court must

deny judicial notice if the facts do not meet the established criteria.

27. No separate appeal could be filed against this decision during the evidentiary proceedings, but it may be contested in an appeal against the Verdict.

D. CLOSING ARGUMENTS

1. Prosecution

28. In the introduction of its Closing Argument, the Prosecutor referred to the general facts that were proved beyond any reasonable doubt concerning the existence of the state of war and the armed conflict in Bosnia and Herzegovina.

29. The Prosecutor described the general situation at the battlefield in May 1995. He stated that during April and May 1995, the Army of the Republika Srpska (hereinafter: the VRS) units expected an offensive of the Army of the Republic of Bosnia and Herzegovina (hereinafter: the ABiH) and the Croat Defense Council (hereinafter: the HVO).

30. The Prosecutor further pointed out the issue of the NATO forces activities towards the VRS units in May 1995. The NATO strikes at the targets of the VRS were extremely intense on 25 May 1995 and there were orders given by the superior command to the Ozren Tactical Group to protect heavy artillery from the potential destruction by NATO but also to retaliate against the enemy forces.

31. Simultaneously, VRS General Staff on the same day gave “free hands” to all VRS units’ commands to retaliate by use of all means against UNPROFOR units and civilian objectives; this was primarily reflected in hostage taking of UNPROFOR personnel and intensive shelling of UNPROFOR base at Dubrave airport near Tuzla or Živinice, but also the shelling of civilian objectives in 5 safe areas within Bosnia and Herzegovina.

32. Therefore, the Republika Srpska Army General Staff considered the UN safe area – Tuzla town – a legitimate military objective, contrary to the rules of the international humanitarian law.

33. On 25 May 1995, in all VRS units, the state of increased combat readiness was in force, that particularly implied an increased alertness of the entire command personnel.

34. With a view to clarifying individual criminal responsibility of the Accused, the Prosecutor emphasized that it could be concluded from the evidence that in 1995, three years since the beginning of war, the level of subordination and the implementation of the principle of a single chain of command reached an extremely high level in the VRS, including the Ozren Tactical Group.

35. Also, as emphasized by the Prosecutor, it has, beyond any reasonable doubt, clearly defined the system of command and control within the Ozren Tactical Group. The commander was the Accused Novak Đukić, and the composition of this unit was subordinated to the Doboj Operative Group and the 1st Krajina corps.

36. In the view of the Prosecutor, the fact was established beyond any reasonable doubt that during the relevant period, as a professional and authoritative military person Novak Đukić led the Ozren Tactical Group. It is also indisputable that the Accused was at work and actively performed his duty on 25 May 1995.

37. It is clear from the principle of a single chain of command and the testimonies of the witnesses and the expert witnesses that only the Commander of the Ozren Tactical Group was the person who could approve all plans for engagement, working maps and any other application of force planned at the level of Ozren Tactical Group, and thereby the use of artillery that was directly subordinated to the Ozren Tactical Group.

38. The Prosecutor referred to the structure of artillery units that were within the Ozren Tactical Group and the units management and command system, pointing out that within its composition this unit had two types of artillery weaponry, one of which was gun artillery platoon of high destructive power, specifically 130 mm and 155 mm gun platoons that were under direct control of the Command of the Ozren Tactical Group.

39. To use those artillery weapons one needed mandatory prior authorization from the

Commander of the Ozren Tactical Group. Any use of the 130 mm Gun Artillery Platoon in the area of Panjik was only possible upon the order of the Commander Novak Đukić, as pointed out by the Prosecutor, and upon the direct order from the Command of the Ozren Tactical Group that would determine a specific target, according to the numbers under which they had been a priori plotted on the artillery working map by the Command of the Ozren Tactical Group and approved by the Commander of the Ozren Tactical Group. All witnesses for the Defense and the Prosecution confirmed that in case a round was fired without a prior authorization of the Ozren Tactical Group Commander all of those who would turn a silent ear towards this would bear heavy disciplinary consequences, and that this never happened.

40. The Prosecutor stated that it could be seen from the presented evidence that regarding the identification of the projectiles that landed on the inner center of the city of Tuzla, all physical evidence but also the reports of the expert witnesses for the Prosecution, are consistent that it can be stated beyond any reasonable doubt that the projectile was fired out of the artillery system of a M 46 130 mm gun whose range is 27 km with maximum load. It was only the Defense expert witness Kostić who used the word “most probably” in his written report and during his evidence before the Court when he stated that it was most probably a 130 mm projectile, by which he basically confirmed the Prosecution submission in relation to the identification of the weaponry and the projectile.

41. The Prosecutor further pointed out that it was proved beyond a reasonable doubt that a 130 mm shell that hit the inner centre of Tuzla was fired from the positions of the Ozren Tactical Group, that is, the village of Panjik.

42. As to the direction of the shell drop, the Prosecutor stated that during all on-site-investigations conducted in different time periods and by different institutions as well as the expertise and analysis by the professor Zečević, the position at the geographic map from which 130 mm shells, which hit Tuzla downtown on 25 May 1995 and 28 May 1995, had been fired was undoubtedly established with mathematic precision. That location is identical to the location for which a large number of witnesses claimed that the firing position of 130 mm M46 gun artillery platoon had been placed exactly there in the immediate vicinity of the Panjik.

43. In his closing arguments, the Prosecutor emphasized the status and number of victims and the status of the town of Tuzla considering that the status of victims is important for the determination of the elements of the criminal offense of War Crimes against Civilians as referred to in Article 173(1)(a) and (b). In doing so, it was stated that those were civilian victims and that Tuzla was a civilian target.

44. The Defence did not contest findings by expert witness Vedo Tuco who spoke about the victims and had no questions for cross-examination. In such a manner death of 71 persons and wounding of 130 civilians by the shell that hit *Tuzlanska kapija* on 25 May 1995 was confirmed beyond any reasonable doubt. The Prosecutor pointed out that it was also proved beyond any reasonable doubt that the attack on Tuzla downtown from indirect fire artillery system on the Tuzla downtown is actually the attack on a civilian target because it was a densely populated area.

45. Finally, the Prosecutor pointed out that it is clear from the previous analysis of evidence that only Novak Đukić, as the Commander of the Ozren Tactical Group, was a person who had powers to approve the use of 103 mm gun artillery platoon, the firing position of which was located in the area of the Panjik village, which ensues from the principle of a single chain of command that was the principle not only in the Republika Srpska Army but is the foundation of functioning any military structure in the world. Consequently, such decisions can be approved only by a commander.

46. As to the criminal sanction and its purpose, the Prosecutor referred to Article 48(1) of the Criminal Code of Bosnia and Herzegovina stating that when meting out the punishment one needs to take into account the following circumstances: the degree of criminal liability, the motives for perpetrating the offence, the degree of danger or injury to the protected object, the circumstances in which the offence was perpetrated, the past conduct of the perpetrator, his personal situation and his conduct after the perpetration of the criminal offence, and concluded that only by the most severe punishment, that is, the long-term imprisonment sentence, could the purpose of punishment set forth in Article 39 of the Criminal Code of Bosnia and Herzegovina be attained.

2. Defense

47. In the Closing Argument at the main trial on 2 June 2009 the Defense for the Accused proposed that the Court render the verdict dismissing the charges as unfounded due to the lack of evidence, and moved the Court, should it render a convicting verdict, to apply Article 4 of the CC of BiH, which means to apply the law that was applicable at the time of commission of the criminal offense.

48. In its closing argument, the Defense referred to Count 1 of the Indictment and the analysis of the Finding and Opinion of Prof. Dr. Berko Zečević, while with regard to Count 2 of the Indictment, it emphasized that the evidence tendered by the Prosecution was not of such quality so as to expect a convicting verdict.

49. As to Count 1 of the Indictment, the Defense stated the facts it considered indisputable, namely the existence of the state of war and armed conflict; that at the relevant time the Accused Novak Đukić was the Commander of the Ozren Tactical Group of the Army of the Republika Srpska in the critical time period, and that on 25 May 1995 at 20:55 a shell exploded at the square in Tuzla called *Kapija*, which resulted in the killing of 71 people while 170 people sustained injuries.

50. The Defense contested the remaining part of Count 1.

51. The Defense emphasized that regarding the allegation that the Accused ordered the artillery platoon to shell the city of Tuzla, the Prosecutor failed to offer to the Panel any documentary evidence concerning the existence of a written or verbal order.

52. The Defense states that it can be seen from the chain of command that only the Accused or his Chief of Artillery could issue order that 130 mm guns become active, but he also suggests, for the first time in closing arguments, a possibility that somebody fired a gun on their own initiative, without an order. With regard to the foregoing, the Defense concluded that in addition to the chain of command, the Prosecutor wishes to prove that fact with the working map of the artillery of the Command of the Second Ozren Light Infantry Brigade, and points out that the map concerned cannot be used as evidence because it is a

forgery, emphasizing that the Prosecutor filed a copy of the map whose authenticity he wanted to prove with a video recording. The Defense asserts that it is obvious that targets and the key with the gun marked on the map were subsequently entered and that there is a difference in the thickness and type of the felt-tip pen, which was used to enter these data.

53. Furthermore, the Defense considers inadmissible the assertion of the Prosecution that the existence of the order can be proved by the intended retaliation for the NATO attacks on the RS Army positions, because witness Manojlo Milovanović stated that the retaliation was directed at members of the NATO and UNPROFOR forces.

54. In addition, the Defense responds to the question as to whether the shell that exploded at *Kapija* arrived from the positions of 130 mm guns of the RS Army in the Panjik village, and submits that the Report of the Mixed Commission states that the shell concerned was fired under small angle of 31.16 degrees.

55. With regard to the foregoing, it points out that in the on the-site investigation report it is written that the shell was fired from the positions on Ozren, the village of Vrbak, from the place called Cerovo Brdo, which the Defense supported by its evidence (Request for Conducting Investigation by the Tuzla Cantonal Prosecutor's Office dated 22 December 1998 (O-3), Motion to take over the case by the BiH Prosecutor's Office, dated 8 June 2007 (O-4) and Decision of the BiH Court, No. X-KRN/07/394, dated 18 July 2007 (O-5)).

56. The next assertion of the Defense is that the Mixed Commission found that the distance between the explosion site and the position of the shell firing was 21.000 m. The Defense contests the possibility of the gun firing from the Panjik distance since Panjik is more than 27.000 m far away from *Kapija*. Regarding the gun range, the Defense asserts that although the maximum 130 mm gun range is 27.000 m, this range could not be reached due to the tube abrasion, and that it is applicable only to the brand new tube.

57. Finally, the Defense contests the lawfulness of the finding and opinion of the witness expert Prof. Dr. Berko Zečević asserting that the Order of the Prosecutor's Office is addressed to Prof. Dr. Berko Zečević, while the names of his assistants are indicated on the finding and opinion as its authors. In the opinion of the Defense, the expert analysis was

carried out by the persons to whom the order did not refer.

58. According to the Defense, witness expert Prof. dr. Berko Zečević disregarded the physical evidence confirming that the ballistic drop of the shell is 31.16 degrees, and not over 60 degrees, and that he got this angle after the incident reconstruction, which was not conducted in accordance with Article 93(1) of the CPC of BiH.

59. The Defense asserts that the finding was made exclusively in order to bring the indictment, namely that the witness expert had in advance defined frameworks of the conclusions and that therefore he rejected all essential and obvious facts of the incident.

60. According to the Defense, the witness expert mentions and adopts as facts the unproved allegations referred to in the earlier reports. With regard to the allegations that Kapija was a precise target, the Defense denies this fact by stressing that *Kapija* was 12 m in diameter and if this location was fired at from the distance of 27 km, one or the first shell could not hit the target precisely.

61. The Defense again refers to the minimal drop angle of around 31 degrees, as stated in the Mixed Commission calculation, and asserts that this angle would be possible only if the shell came from the west, which is not correct in the view of the Defense. Furthermore, the Defense contests the position of the car Golf in relation to the crater, namely it contests the distance between the car and the crater of around 40 cm, asserting that the distance concerned was 1.4 m. Pursuant to the foregoing, the Defense also contests the drop angle of the projectile that is stated in the finding and opinion of the Prosecutor's Office witness expert.

62. In presenting its closing arguments, the Defense for the Accused particularly referred to the following parts of the report by Prof. Dr. Berko Zečević:

1. "Effect of the fuse on the projectile impact on the target":

The Defense contests the time of fuse activation 0.00003 to 0.00005 s (30 to 50 micro seconds).

2. “Crater from the artillery (gun) HE projectiles with the front impact-detonated fuse”:
In this section, the Defense states that the document referred to by witness expert Zečević (“A Primer on Indirect Fire Crater Analysis in Iraq and Afghanistan” by Captain Edward J. Coleman and Sergeant First Class Rico R. Bussey, published in the *Field Artillery Magazine*, July-August 2005) denies the theory that the projectile direction at the point of its activation was west-east. To support this, the Defense states that in order for the theory to be correct, the appearance of the immovable and movable traces on the site ground should be quite similar of even identical to the one shown on pg. 48 of the expertise report, provided that the “fan” of the movable traces on ground spreads from the crater towards the building that accommodates *NIK* shop (from the crater westward). All this allegedly proves that the projectile was activated under a far smaller angle.

3. “Identification of projectile ballistic drop”:

In this section, the Defense starts from the fact that the distance between the crater and edge of the moveable traces on the ground where allegedly the Golf car was positioned was 1.4 m (the Defense reached this information based on the site sketch made by crime investigation technician Irfan Džinović and photos Nos. 9, 10, 11 and 13 A). In the opinion of the Defense, the foregoing proves that the drop angle could not be 63 degrees.

4. “Identification of projectile caliber and type”:

In this section, the Defense refers to photo 78 of the finding showing the projectile case fragments with visible grooves on the rotating band bearing, that undeniably originate from a 130 mm shell. Therefore, the Defense questions why parts of the main rotating band were also not found, and asserts that in that case the key physical evidence is missing.

5. “Probable area from which the HE 130 mm OF-482 or M79 projectile was launched”:

The Defense asserts that witness expert Zečević exclusively dealt with the maximum range of M46 gun and defined the artillery position without a single piece of evidence to corroborate the allegations. With regard to the foregoing, the Defense contests the stated fragmentation of the projectile 130 mm fired from the distance of around 27km to be about +/- 380m, and claims that the correct data is a fragmentation of 448 m.

63. In continuing its closing arguments with regard to the expert analysis of Prof.Dr. Berko Zečević, the Defense contests several additional allegations: an issue is raised as to why the fragments showed in the finding and opinion were not adduced as physical evidence, and on what basis the expert witness established that these were the fragments originating from the 130 mm gun.

64. Furthermore, the Defense contests the theory that the furrow concerned derived from fragments not the fuse, and states that it is impossible that the fragments make a clear, indented, straight-line furrow in the ground. Furthermore, the Defense asserts that it ensues from the listed evidence that the M-46 guns from which the shell concerned was fired were located near the new school, and not near the old one, and that this fact is of key importance since the distance between the old and the new school is around two hundred meters.

65. The Defense for the Accused stated that there is no evidence on the realistic ballistic state of the barrel considering the aspect of achieving the maximum range of around 27,500m and the precision of firing at a particular target in Tuzla.

66. In the end of its closing argument, the Defense for the Accused refers to the presentation of its evidence, namely the testimonies of witnesses Mladen Dostanić and Mile Savić, and the expert analysis of Vlada Kostić and Branka Luković who in the opinion of the Defense contest the theory of the Prosecutor's Office stating that witness Mladen Dostanić had confirmed that in the war logbook of the 2 Ozren Light Infantry Brigade there are no records on the artillery activities for that day. In the opinion of the Defense, witness Mile Savić confirmed that the shell could come from the opposite direction, namely from the direction of east. The finding and opinion of the witness expert for the Defense is contrary to the Mixed Commission Report and expert analysis of Prof. Dr. Berko Zečević.

67. The Defense further referred to the testimony of Manojlo Milovanović and Colonel Brantz who confirmed that on 25 May 1995 a half an hour before the shell explosion at the *Kapija*, the Dubrave airport was shelled from the VRS position (in the right line with the *Kapija* and more than 20.000 m far away from *Kapija*) (with 13 shells).

3. The Accused

68. The Accused asserted his right not to testify but was allowed to address the Panel with a closing statement. The Panel notes this has no evidentiary value.

69. At the beginning of his closing arguments, the Accused described the war state on Mt Ozren, with a particular reference to the period April-May 1995, expectations of the offensive attack by the ABiH at the time, his role within the Army of Republika Srpska (hereinafter: the VRS) and also the positions of his unit at Ozren in relation to the positions of the ABiH.

70. The Accused confirmed that on 5 December 1994 he was transferred to the duty of the Commander of TGO which he held until the signing of the Dayton Agreement.

71. In continuing his closing arguments, the Accused analyzed the evidence proposed during the main trial by explaining and clarifying the contents of particular pieces of evidence.

72. With regard to the Prosecution evidence, the Order by Novak Đukić for defense dated 25 April 1995, the Accused points out that he ordered the issuance of the order concerned because the earlier signed ceasefire was soon to expire and an offensive of enemy forces was expected with the objective of capturing Mt Ozren. With regard to this evidence, the Accused states that the cannons served as support to the brigades that would through their commands file with the TGO Commander their requests to use the cannons.

73. The Accused further stated that it ensues from the UNPROFOR Investigation Report that it was not until 26 May 1995 at 13:00 hrs that Charlef Brantz received an investigation order issued by UNPROFOR, and asked why it was decided to conduct a joint investigation by UNPROFOR and national civil authorities. Based on the Investigative Judge Record and the UNPROFOR Investigation Report, the Accused concludes that there are certain unclear matters in these documents.

74. Furthermore, the Accused objects that immediately after the massacre important

clues were removed, such as the bodies of the killed persons, questioning the extent to which the UNPROFOR team could see the crime-scene when the on-site investigation was completed at 14:00 hrs on 26 May 1995, while UNPROFOR was included in the investigation only after 13:00 hrs on the same day.

75. The Accused further stated that NATO forces did not launch any attack on 25 May 1995 on the TGO and states that he did not know what was happening in Pale on 25 May 1995, and that retaliation cannot be accepted as the reason for shelling the city of Tuzla, and that the Prosecution failed to provide any piece of evidence to this end. He further stated that he learned for the first time about the shelling of the Dubrave airport from the Charlef Brantz testimony.

76. Contesting the theory of the Prosecution that it is clear why the accused scheduled an urgent meeting with his subordinated commanders on 25 May 1995, the Accused pointed out that this was a regular monthly meeting with the purpose of reporting and coordination, and that the Accused held such meetings each month. In support of the foregoing, the Accused states the details from the meeting, namely that the meeting agenda included the state of combat readiness of the units, engagement of local population in the territory defense, planning, organization and carrying out of active combat actions.

77. The Accused referred to the testimony of witness Charlef Brantz indicating that this witness stated that the city of Tuzla had been shelled even before 25 May 1995 from the directions of Lopare, Capne, Zvornik and from the Vis Mountain, but that none of those shells hit the downtown. Furthermore, regarding the authenticity of the evidence that was in possession of Charlef Brantz and that had to be destroyed, the Accused objects that the originals were not delivered to the Court. In addition, the Accused also objects to the tendered CD allegedly recorded by witness Charlef Brantz, and states that Charlef Brantz could not have made this recording because it was recorded immediately after the explosion (a siren sound can be heard on the recording), while Charlef Brantz was tasked with the investigation only on 26 May 1995, namely, on the following day.

78. As to the artillery working map, the Accused points out that the map was made on 20 April 1994, at the time when the Accused was not the Ozren Tactical Group Commander.

Furthermore, the Accused opines that the circles (the alleged targets of the 130 mm gun) were marked on the map subsequently and that their authenticity cannot be proved by the camera recording.

79. The Accused further pointed out that the conclusion of the Prosecution that the Accused issued orders was incorrect given that he merely approved the requests of lower units commanders. The Accused states that an order must contain both the form and the content because it is the most decisive fact and that if it is not so, it is obvious that it does not exist.

80. In the remaining part of the closing argument, the Accused analyzed the expert analysis of Prof. Dr Berko Zečević. The Accused primarily notes that the expert witness started with a concrete analysis of the conditions that led to the massacre at *Kapija* on 25 May 1995 only from page 52 of his Finding and Opinion, and that by then he only gave a theoretical review.

81. Furthermore, the Accused analyzed the manner in which the witness expert established the direction of the projectile drop, noting that Prof. Dr Berko Zečević stated two methods applicable in the direction determination procedure.

82. The Accused objects that the witness expert stated in his finding that the standard method was applied, but that this method was nowhere compared with the crater at *Kapija*. Therefore the Accused opines that this method was but invented.

83. Furthermore, the Accused contests the drawing of the crime-scene, namely Photo 59 on page 52 of the Finding and Opinion concerned, and states that Prof. Dr. Berko Zečević drew the position of car of the Golf make as if it was on the pavement, and he compares and points to the difference between the photo concerned and the sketch of the crime-scene that was made by the investigation team directly after the incident.

84. Furthermore, the accused points to the ground-level movable traces proving the opposite direction of the projectile drop. To wit, it is a fact that when a shell hits the ground it throws out material ahead and sidewise, and the quantity of the thrown-out material

depends on the drop angle. The Accused states that the traces of cubes were more to the right and less to the left of the crater. With regard to the foregoing, the Accused considered unprofessional the response of Prof. Dr. Berko Zečević that he could not evaluate the traces concerned because the access to the crime-scene was available only after the removal of the bodies of killed persons. Furthermore, the Accused analyzed Photo No. 11 taken at the crime-scene, and pointed out that it is not in the Finding and Opinion of Prof. Dr. Berko Zečević.

85. In the opinion of the Accused, the key photo is number 13A on which, according to the Finding and Opinion of Prof. Dr. Berko Zečević, allegedly a label covered a portion of traces. With regard to this photo, the Accused states that the crater and the fuse furrow are visible (from east to west), and that the cubes are located in the north-east direction.

86. In addition, the Accused only referred to Photo 58 showing a visible crater that Prof. Dr. Berko Zečević used in determining the center of explosion and which matches with the position 3.90m and 4.80m from the left and right corner of the building (according to the sketch made directly on the crime-scene), stating that Prof. Dr. Berko Zečević theoretically interpreted the crater on the position 2.65m and 5.60 m, and that he did so when it suited him.

87. In the second part, the Accused contests the determination of the drop angle. The Accused opines that the witness expert carried out the reconstruction contrary to the CPC of BiH.

88. Furthermore, the Accused points to the fact that Prof. Dr. Berko Zečević established that the explosion center is 400mm away from the car, contrary to the Defense expert witnesses, who established that the explosion center was 1400mm away from the car. The Accused analyzed the manner in which Prof. Dr. Berko Zečević reached the distance of 400mm in question, and established that the theory of Prof. Dr. Berko Zečević is tendentious, that he started from the desired angle of 67 degrees and 41 minutes as the appropriate angle for the maximum reach of the 130 mm gun in order to prove that the gun fired with maximum range. In addition, the Accused points out that this maximum range is not in accordance with the tables.

89. The Accused furthermore points out that according to the traces of oil that leaked from the white Golf vehicle it can be seen that the car was moved backwards and that it was not on the pavement. Finally, the Accused points out again that on the earlier mentioned photos the fuse furrow trace is visible in the direction east-west.

90. The Accused contests the correctness of the assertion referred to in the Finding and Opinion concerned, namely that fragments were taken out from 20 bodies. To wit, the Accused refers to the Finding and Opinion of expert witness Vedo Tuco which mentions 11 killed persons in whose bodies the fragments were found.

91. Towards the end of his closing argument, the Accused presented his theory that two explosive devices exploded at the *Kapija* square in the distance of around 1.5 to 2 m one from another, of which one with the traces in the east-west direction that made a crater having thrown out 6 granite cubes, and the other 2.65 m away from the corner of the NIK building, in front of the front part of the car, where a hole was made out of which around 25 granite cubes were thrown. To wit, the Accused states that the Indictment addresses only indications, as confirmed by the conclusions of Prof. Dr. Berko Zečević containing the word 'likely'.

92. The Accused again expressed his regrets for all the killed persons and stated that even before he was arrested he had waited to be summoned by the Prosecutor and did not want to avoid criminal responsibility because he wanted to face this horrible case, particularly out of respect for the victims.

4. The Injured Parties

93. On the same day, the authorized representative of the injured parties, Amila Kunosić-Ferizović, presented her closing argument after the closing argument of the BiH Prosecutor's Office.

94. The authorized representative of the injured parties stated that she supported the closing argument of the BiH Prosecutor's Office and gave her statement regarding claims

under property law. Amila Kunosić-Ferizović decided that claims under property law would be filed in civil proceedings in order to prevent any delay of the criminal proceedings.

95. The authorized representative of the injured parties stated that the specification of the claims under property law would require a lot of time for proving the type and the amount for each particular injured party, especially bearing in mind that 71 persons were killed by the shell and over 130 persons were wounded.

96. Amila Kunosić-Ferizović particularly pointed out the awareness of the Accused and the fact that during the war in 1992-1995 Tuzla was the UN safe zone, and that the Accused must have known that civilian targets were shelled and particularly anticipated that this could result in a large number of dead and injured civilians on 25 May 1995 at 20:55h.

97. Furthermore, Amila Kunosić-Ferizović referred to the expert analysis of Mr.Med.Sci.Dr Vedo Tuco who analyzed in detail each wounded person and established that out of the 133 wounded persons, 35 persons sustained life-threatening injuries, 62 persons sustained severe bodily injuries while 36 persons were lightly injured.

98. The authorized representative briefly referred to the mental injuries or traumas and personal mental injuries requiring special medical analysis, which specifically concerns not only the injured persons but also the families of the injured and killed persons. The authorized representative supported her closing argument by reminding the Panel of the emotional impact of the video-recording that was made immediately after the massacre, pointing to the pain of the parents who lost their children.

99. Towards the end of the closing argument, Amila Kunosić-Ferizović pointed to the manifold importance of punishing the perpetrator, particularly pointing out that the sanction/punishment represents a form of satisfaction for the victims, and that a sentencing decision by the Panel shall return dignity, reputation and the rights of the injured parties creating in them a feeling that justice has been served.

II. GENERAL CONSIDERATIONS OF EVIDENCE

A. CATEGORIES OF EVIDENCE

100. In the Indictment, the Prosecution moved for the examination of 259 witnesses, the majority of which would testify as injured parties.

101. On 22 April 2008, the list of witnesses was submitted to the Panel, referring to the witnesses that the Prosecution intended to summon in the further course of proceedings, after which the Panel held the status conference where it discussed the need to summon the majority of the injured parties as witnesses at all, bearing in mind the fact that a number of the injured parties had already hired counsel to represent them in these proceedings.

102. At trial, the Prosecution summoned a total of 38 witnesses and 2 expert witnesses, withdrawing a large number of injured witnesses. All the witnesses were examined in open session.

103. The Defense summoned 4 witnesses and 1 expert witness while the Panel summoned 1 witness and held a confrontation with the Prosecution and Defense expert witnesses in ballistics.

104. The Prosecution tendered 180 evidentiary documents while the Defense tendered 6 evidentiary documents.

B. GENERAL CONSIDERATIONS OF EVIDENCE

105. The Panel evaluated the evidence in this case in accordance with the Criminal Procedure Code of BiH (CPC of BiH) primarily the principle of presumption of innocence, referred to in Article 3 of the CPC of BiH, which embodies the general principle of the law according to which the burden of proving the liability of an Accused lies with the Prosecution who must do so beyond reasonable doubt.

106. The Panel heard all 38 witnesses called by the Prosecution and both expert witnesses,

as well as 4 witnesses and one expert witness called by the Defense. Many of these witnesses testified about the same incidents or facts, which each saw or heard from a differing physical, mental and sometimes chronological perspective. The Panel is aware that two witnesses to the same event rarely perceive that event identically, or relate it verbally in the same way, but the Panel evaluated the credibility of the testimony of each witness, first by presuming that each witness intended to tell the truth.

107. Where it was possible to reconcile the testimony of various witnesses, the Panel attempted to do so. Where such reconciliation was deemed impossible, the Panel assessed the testimony of each, first in terms of the likelihood that the differences were the result of honest mistakes in recollection or perception and then in terms of the likelihood that the witness was consciously attempting to mislead the Panel. In the case of the expert witnesses which held diametrically opposing views, the Panel held a confrontation according to Article 85(2) of the CPC.

108. The Panel found that some witnesses, though honest, were nonetheless unreliable regarding certain portions of their testimony because of limitations in their perceptions and memories, or because of biases that affected their conclusions about the meaning of what they saw or heard. However, those same witnesses were also found by the Panel to have accurately perceived, remembered and reported other facts.

109. The Panel found that other witnesses were not honest regarding certain portions of their testimony, either for reasons having to do with their own self interest, because of friendship or loyalty to the Accused, or because they wanted to affect the outcome of the proceedings.

110. However, those same witnesses were also found by the Panel to be honest and accurate in reporting other facts, sometimes because they were unaware of the significance of the fact or because they were unable to successfully maintain the fabrication.

111. In reaching these findings, the Panel observed the manner and demeanor of the witnesses when testifying, tested the internal consistency of their evidence as given on the stand and in prior statements.

112. Ultimately, the Panel found that even witnesses who were not reliable or truthful about some portions of their testimony were reliable and truthful about other facts about which they testified.

113. Therefore the Panel concluded that it would neither serve the interests of justice nor meet the obligation to freely evaluate evidence and find the truth, if it disregarded all of the evidence given by witnesses who gave some unreliable testimony. Rather, unreliability of the witness as to some of the testimony was a factor to be considered when determining the accuracy of the remaining testimony. The Panel therefore assessed the reliability and honesty of each witness and, in that context, calculated the reliability and truthfulness of each fact that a witness reported.

114. In short, for several witnesses, the Panel believed some of the witness's testimony without necessarily believing it all.

115. The majority of witnesses found it very difficult to testify in this case. In addition, the evaluation of the witnesses' credibility and the facts they testified to represented a great challenge for the Panel. It was difficult to make an evaluation of such a criminal offence which resulted in a large number of persons killed and physical and emotional consequences for numerous witnesses. However, this is a challenge that any court as a trier of facts is faced with. The Panel observed first hand the witnesses, their demeanor, their tone of voice, their attitude, their physical and emotional reactions to the questions, their nonverbal conduct in relation to the parties and counsel, and the atmosphere within which they gave their testimony. The Panel was always mindful that this case presented factors which made credibility decisions more difficult and was always aware that because of the seriousness of the charges, those assessments had to be made with diligence.

116. With respect to all the witnesses, the Panel also considered other evidence and circumstances concerning this case.

117. The Panel was of the view that minor inconsistencies among the respective testimonies of different witnesses or in one witness' testimony at the main trial do not

discredit a witness if the witness described the event referred to in the Indictment sufficiently. The Panel took into account the distance in time between the relevant event and the time of giving evidence. The Panel also concluded that certain inconsistencies in the testimonies with respect to peripheral issues would not tarnish witnesses' credibility.

118. In addition to this, pursuant to Article 15 of the CPC of BiH, the Court is entitled to freely evaluate all presented evidence. The Court considered it necessary to be satisfied that such evidence was reliable in the sense that it was given voluntarily, that it was authentic and relevant. Also, the probative value of the hearsay evidence depends on the context and the character of the particular piece of evidence, that is, on whether or not that piece of evidence is corroborated by other evidence and whether there is some other motive behind that piece of evidence.

119. The Panel reviewed every document in this case in order to decide on its reliability and probative value and concluded that the Prosecution proved their credibility beyond reasonable doubt. However, it needs to be stressed here that the Panel shall not deal equally with every piece of evidence from the case file, which is a matter of a Panel's discretion, but shall explain only those conclusions on the facts that are important for establishing the guilt of the Accused.

120. In order to evaluate the credibility of the documents, the Panel evaluated their correspondence with the other evidence. In addition to this, even when the Panel concluded that a certain document was credible, it did not automatically accept that the statements contained therein constituted an accurate description of facts, but evaluated it in correspondence with all the other available evidence.

C. GENERAL CONSIDERATIONS RELATIVE TO THE EVALUATION OF EVIDENCE

121. The Trial Panel conscientiously evaluated the findings of the expert witnesses that were presented by both Prosecution and Defense in relation to the incidents described in the Indictment.

122. In evaluating the probative value of the expert witnesses' findings, the Panel took

into consideration the expertise of specific expert witness, methodology applied by the expert witnesses respectively and the consistency of their findings with other pieces of evidence admitted by the Panel.

123. Finally, the Panel found certain relevant facts from the Indictment on the basis of indirect evidence – circumstantial evidence. This case has an ample amount of evidence that indicate certain circumstances which, when combined, refer to the existence of specific facts on which rests the guilt of the Accused. The conclusion reached on the basis of such pieces of evidence must be the only possible reasonable conclusion.

D. EVIDENCE BEYOND REASONABLE DOUBT THROUGH CIRCUMSTANTIAL EVIDENCE

124. The legislation of Bosnia and Herzegovina adopted the principle of free evaluation of evidence which prescribe that the evaluation of evidence is not limited to the rules set in advance. Therefore the Panel must conscientiously evaluate each piece of evidence respectively and in their interrelatedness and on that basis reach a conclusion as to whether a certain fact was proven or not.

125. The task of the Panel is to truthfully and completely establish both inculpatory and exculpatory facts. The standard applied when establishing the state of facts is to establish whether a reasonable trier of fact would reach that conclusion beyond reasonable doubt.

126. The standard set forth by the ICTY for establishing the state of facts beyond reasonable doubt is the test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction, which is whether *no* reasonable trier of fact *could* have reached the conclusion of guilt beyond reasonable doubt.⁶

127. In accordance with the principle of free evaluation of evidence, the relevant facts can be established during the main trial through direct and indirect-circumstantial evidence. Direct evidence comprises those pieces of evidence that directly establish a disputable fact. Indirect evidence is used to establish the veracity of a disputable fact through other facts.

⁶ Prosecutor vs. *Delalić*, Appeals Chamber Judgment, case No. IT-96-21-A, para. 434.

128. The Constitutional Court of Bosnia and Herzegovina has taken the position that the establishment of facts through circumstantial evidence is not in contradiction with the principle of a fair trial set forth under Article 6(1) of the ECHR.⁷

129. Jurisprudence has set the rule of proof through circumstantial evidence in such a way that circumstantial evidence must act as a firm close circle which allows only one conclusion in relation to the relevant fact, and objectively excludes the possibility of any other conclusion in relation to the fact at issue.

130. Following this position, it is accepted that a ground for a convicting sentence can comprise only such a series of facts that are established based on circumstantial evidence which was undoubtedly established, interrelated in a logical and firm way so as to represent a closed circle and to lead with full certainty to the only possible conclusion - that it is exactly the Accused who committed the criminal offence charged under the Indictment, and that the presented evidence excludes any other possibility.⁸

131. This position was also taken by the Supreme Court of Croatia in their conclusion that even in view of the lack of direct evidence the responsibility of the Accused is determined when the presented pieces of circumstantial evidence in their interrelatedness appear as links of a chain in the overall harmony, and constitute not only a collection of evidence but a system of circumstantial evidence, and in their totality and interrelatedness exclude any other possibility other than the one found by the First Instance Court.⁹

E. OBJECTIONS RELATIVE TO THE EVIDENCE

132. With regard to objections and for the sake of judicial economy, the Panel instructed the Prosecution and Defense to bear in mind three critical aspects, which are *relevancy*, *authenticity* and *probative value*, when they object to the admissibility of tendered documentary evidence.

⁷ Ruling of the Constitutional Court of BiH, case No. AP 5/05, para. 31.

⁸ Commentary on the Criminal Procedure Code of BiH, Council of Europe and European Commission 2005, page 716.

⁹ Supreme Court of Croatia, Kž 1744/68.

133. In the course of the evidentiary proceedings, the parties may state their objections to the evidentiary materials that are tendered following these three criteria, the Panel may then evaluate and decide on the first two criteria of objection during the evidentiary proceedings for the sake of efficiency, leaving the decision on probative value for the Verdict.

134. In that regard, the Defense for the Accused objected to the lawfulness of the Prosecution exhibit T-6, the report by the expert witness Prof. Berko Zečević, PhD, and the Panel will refer to it later in the Verdict.

135. The Defense also objected to the authenticity of the Prosecution exhibit T-22 (Annex F, appendix 4, Investigation Report by UNPROFOR) expressing their suspicion as to one part of the document which contained writing by more than one person. The Panel concluded that the Defense objection was unfounded. The arguments of the Defense did not bring into question the authenticity of this document. Furthermore, the authenticity was confirmed by witness Charlef Brantz. Mr. Brantz explained that parts of the Report were generated by several persons, that they were checked several times by different members of the Commission and that all members of the Commission agreed upon the contents thereof.

136. Bearing in mind the efficiency of the proceedings, the Defense submitted at the hearing dated 28 October 2008 the list of Prosecution evidence that they found indisputable, which are Prosecution exhibits T-70 through T-157.

137. On 14 October 2008 the parties submitted their written briefs agreeing to the medical documents that relate to the 71 killed persons as well as documents related to the injured persons.

138. In the course of evidentiary proceedings, the Prosecution tendered additional evidence T-159 through T-180 during rebuttal evidence. The Defense for the Accused placed a general objection that those pieces of evidence could not be tendered because those were pieces of evidence that had been available when the Indictment was filed.

139. The Panel did not sustain this objection. Those pieces of evidence were tendered as Prosecution rebuttal evidence and not as evidence that supplement the evidentiary

proceedings. The Panel evaluated their probative value in the process of reaching the ruling.

III. APPLICABLE LAW

A. APPLICABILITY OF THE CRIMINAL CODE OF BOSNIA AND HERZEGOVINA

140. With regard to the applicability of substantive law, the Defense objected that, according to Article 4 of the CC of BiH, the law which was applicable at the time of the commission of the offense should be applied, namely Article 142 of the CC SFRY. The Panel finds such argument ill-founded and finds that the provisions of the CC of BiH are applicable to the present case.

141. Article 3 of the CC of BiH defines the principle of legality, that is, that the criminal offence and sanctions thereof can be defined only in the law (*nullum crimen sine lege*) and that no one can be punished or sanctioned for an action which, prior to its perpetration, was not defined as a criminal offence punishable under the law or international legislation (*nulla poena sine lege*). Article 4 of the CC of BiH prescribes that the law which was in effect at the time when the criminal offence was perpetrated shall apply to the perpetrator and if the law has been amended on one or more occasions after the criminal offence was perpetrated, the law that is more lenient to the perpetrator shall be applied.

142. The principle of legality is also defined in Article 7(1) of the ECHR, which supersedes all other laws in Bosnia and Herzegovina (hereinafter: BiH) pursuant to Article 2(2) of the BiH Constitution. This provision of the ECHR provides for two general principles: 1) that no one can be found guilty of an act or omission which did not constitute a criminal offence under national or international law at the time of commission; and 2) that no heavier penalty than the one that was applicable at the time the criminal offence was perpetrated shall be imposed. It does not foresee the application of the most lenient law.

143. Article 4 a) of the CC of BiH prescribes that Articles 3 and 4 of the CC of BiH shall not prejudice the trial and punishment of any person for any action or omission, which at the time when it was committed was “criminal according to the general principles of international law”. Article 7(1) of the ECHR provides that the act or omission has to constitute a criminal offence either under national *or* international law at the time the offense was committed. Article 7(2) of the ECHR also foresees exceptions to this rule. Article 7(2)

states that paragraph 1 of the same Article “shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.¹⁰ This determines the possibility of derogation, under the prescribed conditions, from the principles defined in Articles 3 and 4 of the CC of BiH (and in Article 7(1) of the European Convention), from the application of the criminal code in effect at the time of the perpetration and from the application of the more lenient law in the proceedings for the actions defined as criminal offences under international law.

144. First, the Panel finds that the criminal offence charged against the Accused is a criminal offence pursuant to customary international law and therefore falls under “general principles of international law”, as defined in Article 4 a) of the CC of BiH, “international law” as specified in Article 7(1) of the ECHR and “the general principles of law recognized by civilized nations”, as defined in Article 7(2) of the ECHR. Based on these provisions, the CC of BiH is applicable in this case.

145. Furthermore, during the time when the criminal offences were committed, Bosnia and Herzegovina, as a successor state of the SFRY, was a signatory party to all relevant international conventions on human rights and international humanitarian and criminal law.¹¹ Likewise, the customary status of the criminal liability for war crimes against civilians and individual liability for war crimes committed in 1995 was confirmed also by the UN Secretary General¹², the International Law Commission¹³ and the jurisprudence of the ICTY

¹⁰ See also Article 15(1) and (2) of the International Covenant on Civil and Political Rights which foresees similar provisions. Bosnia and Herzegovina, as one of the successor states of Yugoslavia, has ratified this Covenant.

¹¹ This especially includes: Convention on the Prevention and Punishment of the Crime of Genocide (1948); the “*Four Geneva Conventions*”, that is Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War, all signed in Geneva on 12 August 1949; their “*Additional Protocols*” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977); Convention on the Abolition of Slavery (amended in 1956); International Convention on the Elimination of All Forms of Racial Discrimination, (1966); International Covenant on Civil and Political Rights (1966); Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968); International Convention on the Suppression and Punishment of the Crime of Apartheid (1973); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

¹² *Report of the UN General Secretary pursuant to paragraph 2 of the Security Council Resolution 808 of 3 May 1993, parts 34-35 and 47-48.*

and the ICTR¹⁴. More specifically, the ICTY has recalled that the crimes of “direct attacks against civilians” and “indiscriminate attacks” were part of customary international law at the time of the commission of the offence.¹⁵ These tribunals have determined that the criminal liability for crimes against humanity and war crimes against civilians represents an imperative standard of international law, that is, *jus cogens*.¹⁶ Therefore, it is found that war crimes against civilians constituted part of customary international law during the time period referred to in the indictment. This conclusion was also confirmed in the Study on the Customary International Humanitarian Law made by the ICRC.¹⁷

146. Also, according to the principle of universal jurisdiction, customary international humanitarian law is binding for every country in the world, regardless of whether it has ratified the relevant international legal instruments. Thus, every country has an obligation to prosecute or extradite (*aut dedere aut judicare*) all persons suspected of violating customary international humanitarian law.

147. The principles of international law acknowledged by Resolution 95 (I) of the UN General Assembly (1946) and the International Law Commission (1950) are relative to the “The Charter of the Nuremberg Tribunal and the Verdicts of the Tribunal” and therefore war crimes in general. “Principles of international law acknowledged by the Charter of the Nuremberg Tribunal and the Verdicts of the Tribunal”, adopted by the International Law Commission in 1950 and delivered to the General Assembly, foresee in Principle I that “any person who commits an act which constitutes a crime under international law is responsible

¹³ *International Law Commission, Commentary to the Draft Law on Crimes against Peace and Humankind (1996)*.

¹⁴ *Prosecutor v. Tadić*, Decision on the Defense Motion for interlocutory appeal concerning competence, para 151; *Prosecutor v. Tadić*, IT-94-1-T, Judgment, paras 618-623.

¹⁵ For direct attacks against civilians: *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 127 ; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 19 and 62. ; for indiscriminate attacks: *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 57.

¹⁶ *International Law Commission, Commentary to the Draft Articles on the Responsibility of States for International Wrongful Acts (2001), Article 26*.

¹⁷ Jean-Marie Henchaerts and Louise Doswald-Beck; *Customary International Humanitarian Law*; ICRC, Cambridge University Press, 2005. This Study analyzed the state of customary rules of international law applicable in international and non-international armed conflicts and concluded that the following rules were part of customary international law: that “serious violations of international humanitarian law constitute war crimes” (Rule 156; p. 568), that “individuals are criminally responsible for war crimes they commit” (Rule 151; p. 551), and “States must investigate war crimes allegedly committed by their nationals or armed forces, or in their territory, and, if appropriate, prosecute the suspects. They must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects.” (Rule 158; p. 607).

therefore and liable to punishment.“ Principle II likewise foresees that “the fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.”

148. Therefore, the criminal offence of war crimes against civilians, pursuant to Article 3 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (“Fourth Geneva Convention”), Article 51 of Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (“Protocol I”) and Article 13 of Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (“Protocol II”) must be, in any case, subsumed under “general principles of international law” in the light of Article 3 and 4(a) of the CC of BiH. Hence, it is found that war crimes against civilians constituted criminal offences at the relevant time, be it considered from the aspect of customary international law, international treaty law or “principles of international law”, and that the principle of legality was satisfied and reconciled with the principles of *nullum crimen sine lege* and *nulla poena sine lege*.

149. Furthermore, the Panel notes the fact that the criminal offences defined in Article 173 of the CC of BiH were also defined by the law which was in effect at the relevant time – the time of the perpetration of the criminal offence, Article 142(1) of the CC of the SFRY, namely, that the criminal offence at issue was punishable under the criminal code applicable at the time, only affirms the conclusion of the Panel on the principle of legality and renders the objection of the defense meritless.

150. Finally, the application of the CC of BiH is additionally justified by the fact that the punishment prescribed by the CC of BiH is in any case more lenient than the capital punishment that was in force at the time of the perpetration of the criminal offence, which satisfies the principle of the constraints regarding the applicability of the law, that is, the application of the law which is more lenient to the perpetrator. The position of the Panel is consistent with the ruling of the Appellate Panel of Section I of the Court of BiH in the Verdict against Abduladhim Maktouf, No. KPŽ 32/05 of 4 April 2006, and the Verdict against Dragoje Paunović, No. KPŽ 05/16 of 27 October 2006, which were upheld by the

Decision of the Constitutional Court of Bosnia and Herzegovina No. AP- 1785/06 of 30 March 2007, as well as in the Verdict handed down against Nikola Andrun No. X-KRŽ-05/42 of 19 August 2008, the Verdict against Mirko Pekez No. X-KRŽ 05/96-1 of 5 May 2009.

B. WAR CRIMES AGAINST CIVILIANS

151. The Prosecutor alleged that the Accused committed the criminal offense of War Crimes against Civilians pursuant to Article 173(1) (a) and (b) of the CC of BiH. The definition of the crime provided in Article 173(1) incorporates several general requirements which will be detailed below. In addition, sub-paragraphs (a) and (b) of Article 173(1) define the specific crimes of attacks against civilians and indiscriminate attacks. The elements of these offenses will also be detailed below.

152. Moreover, the Prosecutor alleged that the Accused committed the criminal offense of War Crimes against Civilians in violation of Article 173 (1) because he acted in violation of Articles 2 and 3 of the Fourth Geneva Convention, Article 51 of Protocol I and Article 13 of Protocol II.

153. The legal framework cited in the indictment is thus the following:

1. Article 173(1) (a) and (b) of the CC of BiH reads as follows:

(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:

a) Attack on civilian population, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;

b) Attack without selecting a target, by which civilian population is harmed;

(...)

shall be punished by imprisonment for a term not less than ten years or long-term imprisonment.

2. Article 2 of the Fourth Geneva Convention reads:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them (...).

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

3. Article 3 of the Fourth Geneva Convention, which is common to all four Geneva Conventions, provides:

In the 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 and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

4. Article 51 of Protocol I reads:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;

and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;

and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be

used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

5. Article 13 of Protocol II¹⁸ reads:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.

154. The Panel is of the opinion that Article 2 of the Fourth Geneva Convention defines the scope of application of the international treaty it introduces, and does not impose any particular conduct on an individual. The Accused therefore could not have acted in violation of Article 2. The qualification of the conflict will be dealt with below.

155. Common Article 3 contains “the fundamental humanitarian principles which underlie international humanitarian law as a whole”¹⁹. Common Article 3 is also widely recognized as being a foundation of customary international humanitarian law.²⁰ These fundamental rules are a minimum which apply to all conflicts, no matter if they are of international or non-international in character.²¹

¹⁸ The Panel notes that Protocol II does not apply to all conflicts of non-international nature, but only to those which are defined in Article 1 of Protocol II: “(...) all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) [Article 1 of Protocol I reads: “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance”] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”. Mere riots or demonstrations do not therefore enter in the scope of applicability of the Geneva Conventions. There must be an armed conflict and the forces opposing each other must each be organized.

¹⁹ *Prosecutor v. Delalić*, IT-96-21-A, Appeals Judgment, para. 143.

²⁰ *Nicaragua v. United States of America*, Case Concerning Military and Paramilitary Activities In and Against Nicaragua, Judgment of 27 June 1986, para. 218; *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 98 and 129.

²¹ *Prosecutor v. Delalić*, IT-96-21-A, Appeals Judgment, para. 143.

156. The Prosecutor did not indicate which specific provision of Common Article 3 it alleged that the Accused violated. The Panel therefore assessed the provision as a whole, when reaching a decision on the possible qualification of the nature of the conflict.

157. The Panel examined the Indictment in its entirety and in particular the allegation of violation of article 173 of the CC of BiH when analyzing the charges against the Accused. Following this analysis, it considers paragraph (1)(a) of Common Article 3 only to be relevant in the present case.

158. Article 51 of Protocol I and Article 13 of Protocol II provide for a general legal framework prohibiting the harming of a civilian population. The principle by which the civilian population must be spared from the violence of any conflict, be it of non-international or international character, is a fundamental principle of international humanitarian law. The warring parties must always refrain from implicating the civilian population in their fighting. Indeed, as the ICRC Commentaries put it, “Article 51 is one of the most important articles in the Protocol. It explicitly confirms the customary rule that innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”²² Regarding Article 13, it states that “Article 13 codifies the general principle that protection is due to the civilian population against the dangers of hostilities, already recognized by customary international law and by the laws of war as a whole.”²³

159. Whether Article 51 of Protocol I or Article 13 of Protocol II will apply to the present case might depend on the nature of the conflict, since the former is conventionally applicable to international armed conflicts and the latter to non-international armed conflicts. Furthermore, the Panel concludes that the content of these two conventional rules are also of customary nature. The principle of prohibition of attacks against civilians is thus a rule of customary international law applicable to conflicts both of international and non-international character.

²² Commentaries of the ICRC on the Protocols, para. 4761.

²³ Commentaries of the ICRC on the Protocols, para. 1923.

1. General Elements

160. As stated above, Article 173(1) of the CC of BiH requires that certain elements be met for the conduct of the Accused to constitute a war crime against civilians. All war crimes have to meet the following criteria. These general elements are:

- a. The conduct must be in violation of rules of international law in time of war, armed conflict or occupation;
- b. The violation must take place in time of war, armed conflict or occupation;
- c. The act must be related to the state of war, armed conflict or occupation;
- d. The accused must order or perpetrate the act.

a. The act must be perpetrated in violation of rules of international law in time of war, armed conflict or occupation

161. The source of law of the Court of BiH is domestic law, and the Panel is rendering its verdict based on Article 173 of the CC of BiH. However, Article 173(1) states that the Accused must act in violation of *rules of international law*. Article 2(b) of Protocol I defines rules of international law as “the rules applicable in armed conflicts set forth in international agreements to which the Parties to the conflict are Parties and the generally recognized principles and rules of international law which are applicable to armed conflict”.

162. Therefore, the Panel must also base its decision on specific rules of international law, whether conventional or customary in nature, which were applicable during the period defined in the Indictment. Article 173(1) of the CC of BiH criminalizes the violation of these rules by anyone who orders or perpetrates these acts. Therefore, violation of the rule need *per se* have been criminalized under international law during the period defined in the Indictment. The prescribed conduct must have been applicable under domestic and/or international law at the time the act was committed. Referring to the Indictment, the Panel concludes the violation of the rules of international humanitarian law contained Article 3 of the Fourth Geneva Convention, Article 51 of Protocol I and Article 13 of Protocol II and their counterpart of customary nature; and therefore that these provisions of international humanitarian law are applicable to this case insofar as they satisfy the requirements of

Article 173(1) of the CC of BiH and of its reference to rules of international law.

163. According to the ICTY Appeals Chamber, “[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities (...)”²⁴. As will be explained in the section below, the Panel finds that there existed an armed conflict in the territory of Bosnia and Herzegovina during the period considered in the Indictment. The Panel will also address whether these rules of international humanitarian law, that is to say Article 3 of the Fourth Geneva Convention, Article 51 of Protocol I and Article 13 of Protocol II, were applicable to the territory of Bosnia and Herzegovina in 1995. The State of Bosnia and Herzegovina, as a successor of the Socialist Federal Republic of Yugoslavia, had ratified the Geneva Conventions and their additional Protocols.²⁵ Also, all the warring parties had signed several agreements under the auspices of the ICRC, including the Agreement signed in Geneva on 22 May 1992, by which they agreed *inter alia* to protect the civilian population against the dangers of the hostilities and not to attack civilians.²⁶ The Accused is charged with the specific offences of “attacks against civilians” and “indiscriminate attacks”. Both are prohibited conducts under international humanitarian law as they are contained in the relevant Geneva Conventions and their Additional Protocols. Both are also generally recognized as being part of customary international law and apply to conflict both of internal and international nature.²⁷ These rules of customary international law were applicable at the time of the offense in the territory of Bosnia and Herzegovina and the Accused was therefore bound to obey them.

²⁴ *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 70.

²⁵ Ratified by the SFRY on 11 June 1979. See Bosnia and Herzegovina’s Declaration of Succession of 31 December 1992, where it declared that it had become party to the Geneva Conventions and the Additional Protocols as the date of its independence, 6 March 1992.

²⁶ Exhibit T-55 (Agreement between the representatives of the peoples in BiH regarding the obligatory application of the rules of international humanitarian law in Bosnia and Herzegovina, signed on 22 May 1992 in Geneva under the auspices of the ICRC), paras. 2.3 and 2.5.

²⁷ See ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Report 1996, paras. 78 to 82, in particular: “The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. (...)” (para. 78); *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, the discussion in paras. 100 to 127, in particular: “(...) it cannot be denied that customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.” (para. 127) ; specifically for attacks against civilians: *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 19 and 62. ; for indiscriminate attacks: *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 57.

164. Both Article 51(2) of Protocol I and Article 13(2) of Protocol II provide that “the civilian population as such, as well as individual civilians, shall not be made the object of an attack”. It clearly stems from both these provisions that there is an obligation on the warring parties not to attack the civilian population and individual civilians. Thus, the Accused had an obligation, following these provisions, to comply with a specific obligation under international humanitarian law.

165. Finally, regarding the required mental state, the Panel emphasizes that one need not have had specific knowledge of the existence of these international norms. It is sufficient that one violate these norms. It is never necessary that one have the ability to define the legal qualifications of his crime, only that he have notice that his actions and intentions are criminal. It is for the Panel to determine the crime then committed. One must however have the specific *mens rea* applicable to the underlying offence he is charged with to be found guilty, whether he is found guilty as a perpetrator or as one ordering.

166. In order to establish that rules of international law have been violated in the specific case, it is necessary to establish that the action was aimed against a protected category of civilians, protected by all mentioned articles of the Geneva Convention and its Additional Protocols.

167. According to Article 3(1) of the Fourth Geneva Convention, civilians are persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat. Besides, Protocol I defines civilians through negation, stating that civilians are “persons who are not members of armed forces”.

168. Article 50 of Protocol I stipulates that the civilian population comprises all persons who are civilians, and that the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character. This Article also states that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

169. Consequently, mindful of the definition of a “civilian”, which states explicitly that

civilians are all persons taking no active part in the hostilities and who are not members of armed forces, it is clear that in this specific case all persons who were killed and wounded were civilians. All victims were grouped in downtown Tuzla, an area densely populated by civilians. Not a single piece of evidence was presented to challenge this fact. The Panel was also mindful of the fact that the youngest victim was 2.5 years old, and that most of those killed and wounded were young people. Apart from all the aforementioned, there is another fact that represents a sufficient ground for removing any doubt regarding the status of the victims, which is the fact that the city of Tuzla was declared a safe area by the UN Security Council Resolution No. 824.²⁸ Specifically, on 6 May 1993 the UN Security Council extended the safe area to encompass the town of Tuzla. That virtually meant the cessation of attacks and any hostile activity towards the city, withdrawal of all Bosnian Serb military and paramilitary units to the distance where they would not represent a threat to the safety of the city and its population, under the supervision of UN military observers. The “safe area” status was supposed to secure safety to the city and its inhabitants, which meant that each attack on Tuzla was an attack on its civilians.

b. The violation must take place in time of war, armed conflict or occupation

170. Based on the relevant legal provisions and the evidence contained in the case-file, the Panel concludes that an armed conflict existed in the territory of Bosnia and Herzegovina during the period considered in the Indictment. The Panel notes that this fact was not challenged by the parties during the proceedings. According to the ICTY Appeals Chamber, an “armed conflict is said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.²⁹ The Panel concludes based on the evidence contained in the case-file that there was an armed conflict between the ABiH and the VRS in May 1995. This is supported by the “Declaration on the Imminent Threat of War”³⁰ signed by the Presidency of the RBiH on 8 April 1992 and entering into force immediately, which proclaims that there exists that day an imminent threat of war on the territory of BiH and transfers legislative powers to the Presidency of the RBiH. The “Decision to Declare a State

²⁸ Exhibit T-71 (UN Security Council Resolution 824 (1993) dated 6 May 1993)

²⁹ *Prosecutor v. Kunarac, Kovać and Voković*, IT-96-23 and IT-96-23/1, Appeals Judgment, para. 56.

³⁰ T-53 (Decree declaring the imminent threat of war dated 8 April 1992)

of War”³¹ signed by the Presidency of the RBiH on 20 June 1992 unequivocally declares that there exists a state of war in the territory of the Republic of BiH at that date. Based on this evidence, the Panel concludes that there existed an armed conflict in the territory of Bosnia and Herzegovina during the period considered in the Indictment.

171. Also, it is clear from the attack or defense orders issued by Novak Đukić as the Ozren Tactical Group commander, presented to the Panel during the main trial, that they were issued in the framework of combat activities directed against the Army of BiH.³²

172. Witness Manojlo Milovanović, who at the relevant time was the Chief-of-Staff of the VRS and the Deputy Commander of the VRS Main Staff, an educated military officer, also testified about the conflict.³³ He explained in detail the general situation in the war theater in May 1995, in the context of the military operation “Sadejstvo 95”. Paragraph 1 of the “Sadejstvo 95” operation states that the objective is to defeat the 2nd Corps of the so-called ABiH in the wider region of Tuzla, inflict heavy losses on them in terms of man power and equipment, while the city of Tuzla itself was to be squeezed into an enclave and possibly even liberated.³⁴ According to this witness, this operation was aimed at harmonizing the operations of all VRS units or corps in the war theater, which unequivocally meant that there were conflicts between the ABiH and the VRS.

173. The Prosecution, by citing both Articles 2 and 3 of the Fourth Geneva Convention on the one hand, and both Articles 51 of Protocol I and 13 of Protocol II on the other, seems to ask the Panel to decide whether the conflict was international or internal in nature. The Panel recalls that in its Decision dated 13 November 2008 in which it ruled on the Motion of the Prosecutor’s Office for Admission of Established Facts, it had refused to admit those facts that purported to determine the nature of the conflict, because these facts did not meet the necessary criteria set to be considered an established fact.

³¹ T-54 (Decision declaring the state of war dated 20 June 1992)

³² See for example T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-114 (Order for attack, Ozren TG Command, Novak Đukić, strictly confidential number 01-128-1, dated 28 March 1995); T-116 (Combat order for 11 May 1995, Ozren TG Command, Novak Đukić, dated 6 May 1995); T-117 (Combat order for defense and attack, Ozren TG Command, Novak Đukić, strictly confidential number 017275-1, dated 5 June 1995).

³³ Witness Manojlo Milovanović, 5 May 2009.

³⁴ T-168 (Text–table part of the plan for the attack operation “Sadejstvo – 95”).

174. Article 173 of the CC of BiH requires that the offence be committed in time of war, armed conflict or occupation. It does not require that the conflict be either internal or international in nature. Moreover, the warring parties agreed in the 22 May 1992 Agreement³⁵ that Article 3 of the Fourth Geneva Convention, as well as other relevant provisions from the Fourth Geneva Convention and of Protocol I, both applicable to international and non-international armed conflicts, would be complied with by the warring parties. Also, the offence of “attacks against civilians” and “indiscriminate attacks” are part of customary international law and apply to all conflicts, no matter their nature.³⁶ Based on this, the Panel does not deem it necessary to qualify the conflict in Bosnia and Herzegovina or in the Tuzla area as being either international or non-international in character.

c. The act must be related to the state of war, armed conflict or occupation

175. The third condition of Article 173 (1) of the CC of BiH is that there must be a nexus between the act of the Accused and the armed conflict. Indeed, “[t]he armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit the crime, his decision to commit the crime, the manner in which it was committed or the purpose for which it was committed”³⁷.

176. Several factors can determine the existence of a nexus between the act of the Accused and the armed conflict. Factors can include the position of the accused, the nature of the victim, the goal of the attack, or the fact that the act was committed in the context of the Accused’s official duties.³⁸ In the present case, it is obvious that the shell that hit Tuzla and which was ordered by the Accused was fired in a military context.

177. In the present case, the Panel finds that the Accused was a military person and was the commander of the Ozren Tactical Group in May 1995. In that capacity, he had authority over the 130 mm Gun Platoon located at Panjik and which had Tuzla in its range of fire. The

³⁵ Exhibit T-55 (Agreement between the representatives of the peoples in BiH regarding the obligatory application of the rules of international humanitarian law in Bosnia and Herzegovina, signed on 22 May 1992 in Geneva under the auspices of the ICRC)

³⁶ *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 19 and 62; J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, p. 37 to 45.

³⁷ *Prosecutor v. Kunarac, Kovać and Voković*, IT-96-23 and IT-96-23/1, Appeals Judgment, para. 58.

³⁸ See *Prosecutor v. Kunarac, Kovać and Voković*, IT-96-23-A and IT-96-23/1, Appeals Judgment, para. 59.

Panel finds that the gun that hit the center of Tuzla was fired by that Platoon following a military order given by the Accused. Furthermore, the victims of the shelling of the Kapija square located in Tuzla were all civilians. As the evidence demonstrated, the age of the victims were ranging from 2 to 52 years old.

178. All these elements indicate that Kapija square incident was directly related to the armed conflict in BiH in 1995. The actions committed by the Accused took place during the state of war and the armed conflict which the Accused was aware of and which he was undoubtedly part of.

d. The accused must order or perpetrate the act

179. Finally, Article 173 (1) of the CC of BiH requires that the Accused either directly perpetrate the illegal act or order the said act. The Panel emphasizes that this relates to the mode of liability of the Accused and does not constitute an element of the crime as such.* The Prosecution alleged that the Accused ordered, in violation of Article 180 (1) of the CC of BiH, the alleged criminal offenses. The Panel will examine the law on ordering and whether the Accused ordered the shelling of Tuzla below. Since the Accused in the present case is charged with having ordered the war crimes specified above, the Panel considers it unnecessary here to rule on the different modes of liability which can be impugned to an individual charged with war crimes against civilians pursuant to Article 173 of the CC of BiH.

2. Specific crimes

180. As stated above, the Indictment charges the Accused with having committed two underlying offenses contained in Article 173 (1) of the CC of BiH, namely an attack against civilians and indiscriminate attacks. Furthermore, the Indictment alleges that these offenses were committed in violation of Common Article 3 of the Geneva Conventions, Article 51 of Protocol I and Article 13 of Protocol II. As the CC of BiH does not define these underlying offences, the Panel will have recourse to international law to interpret the applicable domestic provisions as these explicitly and specifically refer to international law.

* Translator's Note : The English version contains this sentence for the sole purpose of further clarification, and is not contained in the authoritative Bosnian-Croatian-Serbian version.

a. Attack against Civilians

181. Article 173(1)(a) of the CC of BiH, as well as, in their relevant parts, Article 51(2) of Protocol I, Article 13(2) of Protocol II state the principle that a civilian population as such, as well as individual civilians, shall never be the object of attack. More specifically, Article 173(1)(a) of the CC of BiH prohibits an attack conducted against a “civilian population, settlement, individual civilians or persons unable to fight”.³⁹

182. The criminal offence of attacking civilians embodies the fundamental principle of international humanitarian law: the principle of distinction.⁴⁰ This basic rule is contained in Article 48(1) of Protocol I and it is broadly accepted as being part of customary international law and applies to conflicts of both international and non international character.⁴¹ According to this principle, the warring parties have the obligation, at all times, to distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives. The aim of this principle is to protect the civilian population and civilian objects.

183. The elements of an attack against civilians are the following: there needs to be an attack; against a civilian population; and the perpetrator must have acted with direct intent or with indirect intent (recklessness).

184. Article 173(1)(a) of the CC of BiH requires that there be an “attack”, which is defined in Article 49 of Protocol I as “acts of violence against the adversary, whether in offence or in defense”.

185. Civilians and the civilian population are protected by the relevant provisions. As Common Article 3 puts it, civilians are “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de*

³⁹ The Panel notes that while persons who are not able to fight could have different connotations depending on the circumstances of a case, this provision is met in this instance by the most simplest of definitions. Indeed, the youngest victim was 2 years old and by any standard was unable to fight.

⁴⁰ *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Appeals Judgment, para. 54.

⁴¹ *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 127 ; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 19 and 62.

combat (...)". Article 50 of Protocol I⁴² defines a civilian as: the person "who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol"; which are members of the armed forces, militias, and those who spontaneously take their arms.⁴³

186. In addition, "the civilian population comprises all persons who are civilians"⁴⁴ and the presence of certain individuals who are not civilians among the civilian population does not deprive the civilian population of its character.⁴⁵

187. A civilian is thus an individual who is not a combatant, in its broad meaning. In other words, "apart from members of the armed forces,⁴⁶ everybody physically present in a territory is a civilian"⁴⁷. If there were to be a doubt on the civilian character of an individual, the person would be considered a civilian.⁴⁸

188. Finally, article 173(1)(a) of the CC of BiH requires that the attack against civilians result in death, grave bodily injuries or serious damaging of people's health. Therefore, not

⁴² Which is applicable to this case regardless of the nature of the conflict, as it is contained in the May 22 Agreement as well.

⁴³ Article 4 of the Third Geneva Convention:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(...)

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

⁴⁴ Article 50(2) of Protocol I; see also *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 47.

⁴⁵ Article 50(3) of Protocol I.

⁴⁶ According to Article 43 of Protocol I, armed forces are "all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict." Its members are "combatants, that is to say, they have the right to participate directly in hostilities."

⁴⁷ ICRC Commentaries on the Protocols, para. 1917.

⁴⁸ Article 50(1) of Protocol I.

only the people which deceased as a result of the attack can be considered as victims of the attack; the victims are all the people that were seriously injured by the attack. For the present case, the Panel does not need to decide on whether an attack which would not result in casualties, or only slight mental or physical injuries, enters in the definition of “war crimes against civilians” under the CC of BiH.

189. The requisite *mens rea* for attacks against civilians is that the perpetrator must conduct the attack “willfully”, which can also include recklessness, but cannot be committed with mere negligence.⁴⁹ Therefore, the perpetrator must have conducted the attack either with the direct intent that the civilians or civilian population be hurt or by knowingly taking the risk that that would be a consequence of his act.

b. Indiscriminate attacks

190. Article 173(1)(b) of the CC of BiH criminalizes an “attack without selecting a target, by which civilian population is harmed”. Indiscriminate attacks are defined with more detail in Article 51(4) and of Protocol I, which reads as follows:

Indiscriminate attacks are prohibited. Indiscriminate attacks are:
(a) those which are not directed at a specific military objective;
(b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
(c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

191. The principle of indiscriminate attacks also derives from the principle of distinction, enshrined in Article 48 of Protocol I, which obliges the warring parties to direct their operations only against military objectives.⁵⁰ Additionally it derives from the fundamental principle of humanitarian law of proportionality, by which an attack against a military target cannot be launched if the attack “expected to cause incidental loss of life, injury to civilians, damage to civilian objectives or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”⁵¹

⁴⁹ *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 54.

⁵⁰ Commentaries of the ICRC on the Protocols, para. 1947.

⁵¹ Article 51(5)(b) of Protocol I. See also *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 58, and in particular footnotes 104 and 106.

192. The elements of an indiscriminate attack are the following: there needs to be an attack; launched indiscriminately; and the perpetrator must have acted with direct intent or with recklessness. The Panel defined in paragraphs 184 to 187 the notions of “attack” and “civilians”. It will define here what a military target is, since Article 51(4)(a) of Protocol I defines indiscriminate attacks as not being directed at a specific military target. It will also specify the requisite *mens rea* for the offence of indiscriminate attacks.

193. Indiscriminate attacks, which strike civilian and military targets without distinction, are prohibited not only by Protocol I of the Geneva Conventions, but also by a well-established rule of customary international law.⁵² The customary nature of the rule extends to both conflicts that are international and non-international in character.⁵³

194. Depending on the circumstances in which the attack took place, an indiscriminate attack may also qualify as a direct attack against civilians. The principle of distinction distinguishes between civilian and military targets, which means that the person planning an attack must do so having in mind that distinction. If no such distinction is possible, then such attacks may qualify as direct attacks against civilians, which will be determined on a case-by-case basis, and the Panel concluded it is the case here.⁵⁴ For example, in a broad area that is entirely civilian in nature and where a shell lands in the center of this large radius, it is elemental that the target, if any, was civilian in nature, even if the specific target cannot be proved. The determination of the civilian nature of the place of the attack can be accentuated by the fact that that area was a UN safe area. Therefore, the determination of a legitimate military target is not required in each case for an attack to be qualified as indiscriminate.

195. Moreover, the language used in Article 173(1)(b) does not indicate that the scope of civilians which can be considered as victims of indiscriminate attacks could be limited. The Panel finds therefore that victims of indiscriminate attacks are all people that were physically injured, be it slightly or severely, as well as persons who suffered mentally and who died as a result of the attack launched indiscriminately.

⁵² J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, p. 37 to 45; *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 57.

⁵³ J-M Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law. Volume I: Rules*, p. 38 and 39; *Prosecutor v. Tadić*, IT-94-1, Decision by the Appeals Chamber on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 127.

⁵⁴ *Prosecutor v. Galić*, IT-98-29-T, Trial Judgment, para. 57 and *Prosecutor v. Galić*, IT-98-29-A, Appeals Judgment, para. 132.

196. Military objectives are defined in Article 52(2) of Protocol I, as far as objects are concerned, as “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. These also include, and principally so, the armed forces, their members, installations, equipment and transports.⁵⁵

197. The *mens rea* for indiscriminate attacks is identical to the one required for attacks against civilians: the perpetrator must have committed the act willfully, i.e. “with his mind on the act and its consequences” or “without being certain of a particular result, accepts the possibility of it happening”, but not by “ordinary negligence or lack of foresight”.⁵⁶

C. INDIVIDUAL CRIMINAL RESPONSIBILITY

198. The Indictment charges the Accused with having ordered the criminal offence of War Crimes against Civilians, contrary to article 180(1) of the CC of BiH, which is almost identical to that Article 7(1) of the Statute of the ICTY and reads as follows:

A person who planned, instigated, ordered, perpetrated or otherwise aided and abetted in the planning, preparation or execution of a criminal offence referred to in Article (...) 173 (*War Crimes against Civilians*) (...) of this Code, shall be personally responsible for the criminal offence. (...)

199. Following the ICTY jurisprudence, “‘ordering’ means a person in a position of authority using that authority to instruct another to commit an offence”⁵⁷. Thus, the *actus reus* of “ordering” involves that a person in a position of authority orders another person to commit an offence.⁵⁸ The person ordering can be a *de jure* or *de facto* commander of the person committing the crime.⁵⁹ The order can be given in any form⁶⁰, be it written or oral,

⁵⁵ Commentaries of the ICRC on the Protocols, para. 1951.

⁵⁶ Commentaries of the ICRC on the Protocols, para. 3474.

⁵⁷ *Prosecutor v. Galić*, Trial Judgment, para. 168; see also *Prosecutor v. Limaj et al.*, Trial Judgment, para. 515; *Prosecutor v. Stakić*, Trial Judgment para. 445.

⁵⁸ *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, para. 28.

⁵⁹ *Prosecutor v. Limaj et al.*, Trial Judgment, para. 515.

⁶⁰ *Prosecutor v. Brđanin*, Trial Judgment, para. 270.

implicit or explicit⁶¹. The order may be proven by circumstantial evidence.⁶² It must also be proven that there exist a causal link between the order and the perpetration of the crime.⁶³

200. As for the required *mens rea*, the Panel finds that the person who orders an act or omission must do so either with direct intent or with the awareness of the substantial likelihood that the crime will be committed in execution of that order.⁶⁴ It must be shown at least that the Accused acted with the awareness of the substantial likelihood that the underlying offence contained in Article 173(1) of the CC of BiH will be committed. Finally, the Trial Panel finds that the superior ordering with such awareness of a substantial likelihood that serious injury will be caused to a civilian population will be regarded as accepting the crime.⁶⁵ Additionally, the Panel finds that the person ordering must also have the requisite *mens rea* of the underlying crime for which he is charged⁶⁶, which in this case is the crime of attack against civilians and indiscriminate attacks and was detailed above.

⁶¹ *Prosecutor v. Blaškić*, Trial Judgment, para. 281.

⁶² *Prosecutor v. Limaj et al.*, Trial Judgment, para. 515.

⁶³ *Prosecutor v. Strugar*, Trial Judgment, para. 332.

⁶⁴ See *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, para. 30; see also *Prosecutor v. Blaškić*, Appeals Judgment, paras. 41-42. In

⁶⁵ *Prosecutor v. Blaškić*, Appeals Judgment, para. 42.

⁶⁶ *Prosecutor v. Brđanin*, Trial Judgment, para. 270.

IV. GENERAL FACTUAL FINDINGS

A. THE SITUATION IN AND AROUND TUZLA PRIOR TO THE EVENTS ALLEGED IN THE INDICTMENT

1. The town of Tuzla

201. The town of Tuzla is located in the north-eastern part of Bosnia and Herzegovina. In 1993, the United Nations Security Council adopted Resolution 824 which declared six cities of BiH “safe areas”, including Tuzla.⁶⁷ Under the Resolution, the towns that were “safe areas” and their surroundings were to be free from all armed attacks and hostile acts and were under UN protection. The UN Security Council Resolution 836, also adopted in 1993, confirmed the status of the safe areas.⁶⁸ This status remained throughout the war.

202. The awareness of the content of these Resolutions, like any legal document, is not a condition for their compliance. However, the Panel notes that the status of the town of Tuzla was widely known throughout the territory of BiH and the rest of the world. The content of a UN Security Council Resolution was known throughout the period of the conflict by public officials, national and international media and all the actors involved in the conflict, including the Army of the Republika Srpska (VRS) members and the inhabitants of Tuzla. The Panel therefore concludes that the status of Tuzla was common knowledge and was certainly available to anyone in the command structure of the VRS. For example, witnesses Charlef Brantz and Manojlo Milovanović both confirmed that they were aware of the special status of the town of Tuzla and explained to the Panel that the safe areas were UN protected zones where attacks were prohibited.⁶⁹ Witness Mladen Dostanić, member of the VRS and Chief of Staff of the 2nd Ozren Light Infantry Brigade, added that, in his opinion, the inhabitants of Tuzla were civilians.⁷⁰ The Panel is convinced that the Accused was well informed that, following the relevant UN Security Council Resolutions, it was prohibited to launch any attack on the town of Tuzla and its inhabitants.

⁶⁷ Exhibit T-71 (UN Security Council Resolution 824 (1993) dated 6 May 1993)

⁶⁸ Exhibit T-72 (UN Security Council Resolution 836 (1993) dated 4 June 1993)

⁶⁹ Witness Charlef Brantz, 17 June 2008; Witness Manojlo Milovanović, 5 May 2009.

⁷⁰ Witness Mladen Dostanić, 10 February 2009.

2. Warring activities in and around Tuzla

203. It is important to understand what the general warring situation was prior to the events alleged in the Indictment. The Panel examined numerous exhibits and heard several witnesses who testified about the warring situation in North Eastern Bosnia in 1995, and more particularly the situation in May of 1995. Witness Manojlo Milovanović explained that at the beginning of 1995, the ABiH had gained territory which the VRS was consequently trying to regain. Witness Mladen Dostanić also explained that, following the ABiH moving forward, the VRS had issued an increased level of combat readiness.⁷¹ As a result of this, the VRS Main Staff decided to take command and to harmonize the operations of all Corps. This happened at the end of March or beginning of April 1995, when the Main Staff launched the operation “Sadejstvo ’95”. The aim of this operation was to retake the territories that the VRS had lost. The operation was supposed to be completed by 30 June 1995, but was stopped when the NATO airstrikes of May 1995 began.⁷² According to Witness Manojlo Milovanović, Tuzla was never mentioned in that joint plan of operations; although it might have been mentioned by the intelligence services of the VRS. However, the documents in evidence indicate that Tuzla was mentioned in the “Sadejstvo ’95” operation plan. More specifically, this operation plan, which was approved by the VRS Main Staff, specified that the VRS had to make the town of Tuzla an enclave and, if possible, liberate it.⁷³ The map of the “Sadejstvo ’95” operation confirmed this, on which the center of the town of Tuzla is marked as a clear target.⁷⁴

204. Despite its special status, Tuzla was a targeted area by the VRS. Shells were often fired at the town and its surroundings. For example, witness Charlef Brantz explained that the town of Tuzla and its surroundings, including the Tuzla airbase, Živinice, Lukavac and the Tuzla power plant were often shelled, although those places were all located within the safe area.

205. The Panel heard that the UNPROFOR base in Tuzla, located at the Tuzla airbase in Dubrave, approximately 13 kilometers from the town of Tuzla, was also the object of

⁷¹ Witness Mladen Dostanić, 10 February 2009.

⁷² Witness Manojlo Milovanović, 5 May 2009; T-164 (Intelligence Security Plan for the “Sadejstvo – 95” operation, conducted from 29 March until 31 May 1995).

⁷³ T-168 (Text-table part of the plan for the attack operation “Sadejstvo – 95”). Witness Manojlo Milovanović confirmed that he approved this plan.

⁷⁴ T-180 (Maps of the Operations “Sadejstvo 95” and “Štit 94/95”); Witness Nijaz Vrabac, 31 March 2009.

attacks. Witness Charlef Brantz testified that the Tuzla airbase was often shelled from the directions of Lopare, Sapna, Zvornik and Vis Mountain, but that the airport was usually not shelled from Ozren.⁷⁵ Witness Manojlo Milovanović confirmed that the VRS indeed shelled the Tuzla airbase on numerous occasions and that, as the Chief of the VRS Main Staff, he was regularly informed of these shellings; he did not however specify from which direction the shells were usually fired. He also confirmed that on 25 May 1995 the airport was specifically targeted. Charlef Brantz clarified that the Tuzla UN airbase was located within the safe area;⁷⁶ therefore the Panel notes that it had to be free from armed attacks as well.

206. As the Panel explained in Section III, an indiscriminate attack can occur even when a specific military target cannot be determined. Therefore, the determination of military targets in Tuzla is unnecessary for the Panel to be able to rule on the charges against the Accused.

3. The situation on 25 May 1995

207. In order to have a full picture of all the events that happened prior to the shelling of Kapija square, which is the only event of 25 May 1995 that the Accused is charged with under Count 1 of the Indictment, the Panel will explain what the situation was in and around Tuzla on 25 May 1995. It will detail the situation in the town of Tuzla, at the UNPROFOR base, but also the airstrikes which were conducted by NATO on that day, since this event was discussed during the main trial and in the closing speeches. The Panel makes the following findings in order to place the events alleged in the Indictment in the context of the conflict.

208. Following NATO warnings to the VRS that they should retrieve their weaponry from the non-exclusion zones around Sarajevo, NATO took the decision to conduct airstrikes against VRS positions in BiH.⁷⁷ Witness Manojlo Milovanović explained to the Panel that the VRS learned about this decision between 22 and 24 May 1995 and that all VRS Corps commands were informed of this prior to the beginning of the NATO airstrikes.⁷⁸ On 25 and 26 May 1995, NATO forces conducted these airstrikes on several VRS positions and

⁷⁵ T-26 (Witness Examination Record for Charlef Brantz, Prosecutor's Office of Bosnia and Herzegovina, 5 December 2007)

⁷⁶ Witness Charlef Brantz, 17 June 2008.

⁷⁷ Witness Manojlo Milovanović, 5 May 2009; T-161 (Order of the Main Staff of the RS Army signed by Manojlo Milovanović and dated 25 May 1995).

⁷⁸ Witness Manojlo Milovanović, 5 May 2009.

facilities, including Pale (and its warehouse Jahorinski Potok) and Sarajevo.⁷⁹ Consequently, the VRS Main Staff issued a level of full combat readiness.⁸⁰ The VRS also took several UN soldiers as hostages, which was aired on Serb TV, followed by a public statement by Radovan Karadžić that all NATO and UNPROFOR soldiers would be made prisoners until the end of the war.⁸¹ According to witness Manojlo Milovanović, this statement and the broadcasting of the hostages provoked a chain reaction which was impossible to stop; UNPROFOR soldiers were captured everywhere.⁸² Also, the Panel notes that witness Charlef Brantz stated that he believed that the shelling of the town of Tuzla on 25 May 1995 was a result of the NATO airstrikes.⁸³ However, the Panel emphasizes that it does not need to state whether the NATO airstrikes of 25 and 26 May 1995 were the reason for the shelling of the town of Tuzla on 25 May. Indeed, neither the criminal offence of War Crimes against Civilians nor the mode of liability of ordering require that motive be one of their constitutive elements.

209. What is known about that day is that it was “Youth Day”, a day celebrated throughout the former Yugoslavia. Many witnesses commented on the beauty of the evening. It had been raining for days keeping people indoors. The lovely spring evening accounts for the crowd of over 500 who congregated in a celebration of life.⁸⁴

210. During the day of 25 May 1995, no explosions were heard in the town of Tuzla.⁸⁵ A general alert siren sounded in the town at least at 15:20 hours⁸⁶ and at 19:20 hours⁸⁷. After this last siren alert, a police patrol warned people not to stay in Kapija square, but the police patrol was outnumbered by the number of people that were in the square.⁸⁸ The Panel did not hear evidence on how these sirens were dealt with by the Tuzla police and population on a

⁷⁹ Witness Manojlo Milovanović, 5 May 2009; T-89 (Daily Intelligence Report, ABiH, 26 May 1995); T-161 (Order of the Main Staff of the RS Army signed by Manojlo Milovanović and dated 25 May 1995).

⁸⁰ T-161 (Order of the Main Staff of the RS Army signed by Manojlo Milovanović and dated 25 May 1995).

⁸¹ Witness Manojlo Milovanović, 5 May 2009.

⁸² Witness Manojlo Milovanović, 5 May 2009.

⁸³ T-26 (Witness Examination Record for Charlef Brantz, Prosecutor’s Office of Bosnia and Herzegovina, 5 December 2007), p. 3.

⁸⁴ Witness Đapo Samir, 24 June 2008; Witness Azra Kapetanović, 01 June 2008; Witness Bahrudin Hadžiefendić, 08 July 2008.

⁸⁵ T-68 (Official Note made by the officers from the First Police Station, Tuzla, 27 May 1995); Witness Damir Tucaković, 1 July 2008; Witness Fahrudin Rahmanović, 19 August 2008.

⁸⁶ T-65 (Report on the shelling of the town of Tuzla on 25 May 1995, made by the SJB Tuzla, 2 June 1995).

⁸⁷ T-67 (Official Note made by the officers from the First Police Station, Tuzla, 26 May 1995); T-68 (Official Note from the First Police Station, Tuzla, 27 May 1995)

⁸⁸ T-67 (Official Note made by the officers from the First Police Station, Tuzla, 26 May 1995)

general basis, that is prior to 25 May 1995. It is therefore unable to make any finding on the possible consequences of this warning.

211. In the evening of 25 May 1995, 13 shells were fired at the UNPROFOR Tuzla airbase, three of which fell on the helipad.⁸⁹ Some shells were fired from the VRS positions in Vis Mountain and Zvornik; some were 130 mm guns.⁹⁰ Following this event, at 19:30, UNPROFOR declared a red alert for the towns of Tuzla and Živinice; this red alert was extended to the whole territory of BiH on 26 May.⁹¹ A red alert signifies the full combat readiness of UNPROFOR troops; this however does not apply to other warring parties or to civilians, who were not officially informed of these alerts.⁹² Witness Manojlo Milovanović added that he was not informed through regular reports of the shelling of the Tuzla airport which took place in the evening of 25 May 1995, but he did not exclude that this was done by VRS units, since the Corps command had the authorization to open fire against the Tuzla airport and consequently the lower units did not have the obligation to inform the Main Staff of what the witness qualified as a combat operation.⁹³

B. THE ACCUSED

212. The Accused Novak Đukić was born on 10 April 1955 in Donja Kola, Banja Luka Municipality. He is a professional military person having graduated from the military academy. At the military academy, the rules of international humanitarian law, the Geneva Conventions on protection of civilians and the laws of war were taught to all professional military personnel.⁹⁴

213. Novak Đukić quickly rose through the ranks of the VRS. He was promoted to the rank of Lieutenant Colonel on 14 January 1994⁹⁵ and to the rank of Colonel on 18 May

⁸⁹ T-26 (Witness Examination Record for Charlef Brantz, Prosecutor's Office of Bosnia and Herzegovina, 5 December 2007), p. 3.

⁹⁰ Witness Manojlo Milovanović, 5 May 2009; witness Charlef Brantz, 17 June 2008.

⁹¹ Witness Manojlo Milovanović, 5 May 2009; witness Charlef Brantz, 17 June 2008.

⁹² Witness Manojlo Milovanović, 5 May 2009.

⁹³ Witness Manojlo Milovanović, 5 May 2009.

⁹⁴ Witness Manojlo Milovanović, 5 May 2009; see also exhibit T-156 which is an order signed by Radovan Karadžić on the application of international laws and customs of war by the VRS.

⁹⁵ T-123 (Report about Novak Đukić by General Momčilo Perišić, 2 September 2004)

1995⁹⁶. He was part of the 1st Krajina Corps. He was appointed commander of the Ozren Tactical Group in January 1995.⁹⁷ His field of expertise was in security and he was brought to the Ozren Tactical Group to install discipline in the ranks. After the war, he was promoted to the rank of General.⁹⁸

C. ORGANIZATION AND WEAPONRY OF THE OZREN TACTICAL GROUP

1. Organization of the 1st Krajina Corps of the VRS, up to the 130 mm Gun Platoon at Panjik

214. The commander of the VRS Main Staff was General Ratko Mladić. The latter had several direct associates, which composed the Main Staff. Manojlo Milovanović was Chief of the VRS Main Staff and Deputy Commander of the VRS Main Staff. The VRS was composed of six geographically-based Corps, under the direct command of the Commander of the Main Staff: the Drina Corps, the 1st Krajina Corps, the 2nd Krajina Corps, the Sarajevo-Romanija Corps, the Hercegovina Corps and the East Bosnia Corps. The Commander of the 1st Krajina Corps, of which the Accused Novak Đukić was a part, was Momir Talić.⁹⁹

215. The 1st Krajina Corps was *i.a.* composed of independent operative groups, usually created on a temporary basis to accomplish a specific mission for a certain period of time.¹⁰⁰ The commander of an operative group could create a tactical group, which would also normally be a temporary composition created for the accomplishment of a specific mission. A tactical group was composed of several brigades located in the same area of responsibility; the commander of a tactical group would then become the superior of these united brigades. The commander of a tactical group was therefore issuing orders to the brigades subordinate to him. The aim of creating a tactical group was to have a more efficient command structure and reduce the chain of command, so that the commander of an operative group did not have

⁹⁶ T-130 (Notification regarding exceptional promotion, Commander Vladimir Arsić, confidential No. 03-872/95, 16 May 1995)

⁹⁷ T-87 (Response to the request to the RBiH Ministry of the Interior, Command of the 2nd Corps Tuzla, Commander Sead Delić, No. 08/426-1, 7 July 1995)

⁹⁸ Witness Manojlo Milovanović, 5 May 2009.

⁹⁹ Witness Manojlo Milovanović, 5 May 2009.

¹⁰⁰ Witness Manojlo Milovanović, 5 May 2009.

to issue orders to each brigade commander. The tactical group had the same combat tasks as that of a brigade.¹⁰¹

216. One of the operative groups within the 1st Krajina Corps was the Doboj Operative Group, later renamed the 9th Operative Group. This particular operative group was a permanent composition.¹⁰² The Commander of the Doboj Operative Group created the Ozren Tactical Group, also called 5th Tactical Group¹⁰³. The Ozren Tactical Group was composed of several brigades: the 1st, the 2nd, the 3rd and the 4th Ozren Light Infantry Brigade, which were supported by other brigades, including the Srbac brigade, the Prnjaver brigade, and the Dostović Battalion.¹⁰⁴ The Ozren Tactical Group was also composed of artillery support units¹⁰⁵, which were under the direct command of the commander of the Ozren Tactical Group, Novak Đukić.¹⁰⁶ The pieces of artillery of these units were 130 and 155 mm guns.¹⁰⁷

217. One of these artillery units was the 130 mm Gun Platoon located at Panjik, on the Ozren Mountain.¹⁰⁸ At the beginning of the war, that 130 mm Gun Platoon was subordinated to the 1st Mixed Artillery Regiment.¹⁰⁹ In early 1994, when the platoon arrived in Panjik¹¹⁰, it was resubordinated to the Ozren Tactical Group.¹¹¹ Following this resubordination, the 130 mm Gun Platoon at Panjik was under the direct command of the Accused Novak Đukić. In May 1995, Zlatko Bekić was the Platoon Commander and Ljubiša

¹⁰¹ Witness Manojlo Milovanović, 5 May 2009.

¹⁰² Witness Manojlo Milovanović, 5 May 2009.

¹⁰³ T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), p. 4.

¹⁰⁴ Witness Dragan Jovanović, 18 March 2008; Witness Brano Marjanović, 8 April 2008; Witness Dragan Vasiljević, 18 March 2008; Witness Mile Savić, 16 December 2008; T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995).

¹⁰⁵ Witness Dragan Jovanović, 18 March 2008.

¹⁰⁶ Witness Manojlo Milovanović, 5 May 2009. Orders signed by the Accused also clearly show that he was commanding these artillery support units: T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995)

¹⁰⁷ T-115 (Order for defense, Ozren TG Command, Commander Novak Đukić, number 01/175-1, dated 25 April 1995); T-117 (Combat order for defense and attack, Ozren TG Command, Commander Novak Đukić, strictly confidential number 017275-1, dated 5 June 1995).

¹⁰⁸ Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008; Witness Mile Savić, 8 April 2008.

¹⁰⁹ Witness Goran Mrzić, 20 May 2008.

¹¹⁰ Witness Slavko Stojanović, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008.

¹¹¹ T-7 (Witness Examination Record for Goran Mijatović, State Investigation and Protection Agency, 21 November 2007), p. 4; Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008. Witness Mile Savić explained that resubordination meant that the unit superior to a particular resubordinated unit would change. That unit becomes then the sole command of the resubordinated unit and the commander of that unit will issue orders to the resubordinated unit. This included orders to supply or fire weaponry. Resubordination was done through a very detailed order containing the name of the new command, the period of resubordination, the place of resubordination, etc. (Witness Mile Savić, 8 April 2008)

Čorsović was his Deputy.¹¹² In the absence of Zlatko Bekić, Ljubiša Čorsović was the platoon leader.¹¹³ Panjik is located 27 kilometers away from Tuzla.¹¹⁴

218. All the members of the 130 mm Gun Platoon that came to testify in court explained that they were on leave on 25 May 1995. Much of this evidence is contradictory.¹¹⁵ However, some witnesses explained that the 130 mm Gun Platoon was working in two shifts, meaning that half of the unit was on duty for about two weeks, then away from the field for about the same period of time.¹¹⁶ On a normal basis, 25 to 30% of the men were outside their units.¹¹⁷ Therefore, while the Panel acknowledges that some men may have been home on 25 May 1995, it also believes that some men were most definitely on duty that day and fired the 130 mm gun that hit Kapija square. This is supported by an order signed by the Accused and dated 24 May 1995 where he orders the “non-stop presence of the artillery pieces crew on duty and the artillery support crew”¹¹⁸. Also, witness Manojlo Milovanović explained that on 25 May 1995, all leaves were suspended by the VRS Main Staff and that the soldiers who were on leave had to return to their posts. While the Main Staff did not have the means to verify whether soldiers effectively did come back to their positions, Manojlo Milovanović told the Panel that, in his opinion, there couldn’t have been a massive absence on 25 May 1995. Therefore, evidence indicating that leaves were suspended on 25 May 1995 renders it unable for the Panel to find witnesses credible or not when they said they were not on duty on 25 May 1995. However, the Panel insists that it finds these witnesses credible in part, specifically when they explained to the Panel how the unit was functioning. Furthermore, as will be explained below, the Panel finds that the Accused was the lowest ranking person with the authority to order the firing of the 130 mm gun in Panjik.

¹¹² T-8 (Witness Examination Record for Nenad Čolić, State Investigation and Protection Agency, 22 November 2007), p. 4; T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 3 and 4; T-7 (Witness Examination Record for Goran Mijatović, State Investigation and Protection Agency, 21 November 2007), p. 4; Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

¹¹³ Witness Ljubiša Čorsović, 10 June 2008.

¹¹⁴ T-6 (Written Finding and Opinion of the expert witness Prof. Dr. Berko Zečević)

¹¹⁵ For example, witness Nenad Čolić explained that he was in Orašje with, *i.a.* Ljubiša Čorsović. However, witness Ljubiša Čorsović said that he went to Bosanski Šamac but that Nenad Čolić stayed at Ozren.

¹¹⁶ Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008; Witness Nenad Čolić, 13 May 2008.

¹¹⁷ Witness Manojlo Milovanović, 5 May 2009.

¹¹⁸ T-133 (Order to increase vigilance, Ozren TG Command, Novak Đukić, strictly confidential No. 01/235-1, 24 May 1995)

2. Authority over artillery

219. A combat brigade, like the ones that composed the Ozren Tactical Group, was composed of battalions; a battalion was composed of companies. The importance of a unit determined its ability to use a piece of artillery of a certain caliber.¹¹⁹ 62MM mortars were under the responsibility of a company. 82 MM mortars were under the responsibility of a battalion. 120MM guns were under the responsibility of a brigade. If a unit needed to use artillery of a higher caliber than the one under its responsibility, it had to request this assistance from its superior unit.¹²⁰

220. Orders signed by the Accused clearly show that the combat brigade commanders could receive support of heavy artillery pieces 130 mm and 155 mm guns but had to request this to the commander of the Ozren Tactical Group.¹²¹ This meant that a brigade commander had no authority over these guns. He could not ask directly to the commander of a 130 mm gun Platoon to fire a 130 mm gun; he had to ask such artillery support of the Accused as the commander of the Ozren Tactical Group who would then order that a 130 mm gun be fired if he deemed the request pertinent.¹²²

D. COMMAND STRUCTURE AND FUNCTIONING OF THE OZREN TACTICAL GROUP

1. Chain of command

221. Witness Manojlo Milovanović explained the typical composition of each unit, which is roughly identical at each level of command. A unit would normally be composed of a commander and his advisers. The commander is the only person who has the authority to issue orders. One of the advisers to the commander is the chief of staff, who is also the deputy commander and will take over the role of the commander when the latter is not in the

¹¹⁹ Witness Manojlo Milovanović, 5 May 2009.

¹²⁰ Witness Brano Marjanović, 8 April 2008; T-5 (Witness Examination Record for Vladimir Vavan, State Investigation and Protection Agency, 19 November 2007), p. 5 and Witness Vladimir Vavan, 8 April 2008.

¹²¹ T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995); Witness Mladen Dostanić, 10 February 2009.

¹²² Witness Manojlo Milovanović, 5 May 2009; Witness Dragan Jovanović, 18 March 2008; Witness Ljubiša Čorsović, 10 June 2008.

area of responsibility of his unit. The chief of artillery proposes how to use the artillery but cannot order to fire a piece of artillery. He can only pass on an order which he received from the commander of the unit. The operations officer is in charge of maintaining war logs and working maps.¹²³

222. The VRS was functioning according to a strict vertical chain of command.¹²⁴ This means for example that the commander of the Main Staff would issue an order to the commander of the Corps, who would pass on the order to the commander of the operational group, who would pass on the order to the commander of the tactical group, who would then pass on the order to his subordinate brigades. If there was no tactical group, the brigade commander would receive the order. An order to fire a 130 mm gun would typically go down the vertical chain of command.

2. Issuing of orders

223. The Ozren Tactical Group command was communicating with its subordinate units through a wired landline, which was used amongst other things to convey orders.¹²⁵ Orders were usually conveyed orally, but could also be issued in writing.¹²⁶

224. There was no evidence presented by either the Prosecution or the Defense indicating that the 130 mm gun was ever fired arbitrarily or without authority. On the contrary, the Panel heard several witnesses who explained that the 130 mm guns from Panjik were always fired following an order from their superior unit.¹²⁷

225. They too insisted that a 130 mm gun could not be fired without an order coming from the Ozren Tactical Group commander and containing all necessary firing elements.¹²⁸ This

¹²³ Witness Manojlo Milovanović, 5 May 2009.

¹²⁴ Witness Manojlo Milovanović, 5 May 2009.

¹²⁵ Witness Dragan Jovanović, 18 March 2008; Witness Zoran Lazarević, 8 April 2008; Witness Dragan Vasiljević, 18 March 2008; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

¹²⁶ Witness Milan Đurić, 13 May 2008.

¹²⁷ Witness Nenad Čolić, 13 May 2008; Witness Slavko Stojanović, 20 May 2008; Witness Mile Savić, 8 April 2008; Witness Mladen Dostanić, 10 February 2009; T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), p. 5; T-1 (Witness Examination Record for Dragan Jovanović, BiH Prosecutor's Office, 19 November 2007), p. 4.

¹²⁸ Witness Nenad Čolić, 13 May 2008; Witness Slavko Stojanović, 20 May 2008; Witness Goran Mrzić, 20 May 2008.

firing order could contain the coordinates of the target or the target number¹²⁹, the firing distance, the range and the angle of the gun, the type and number of shells to be fired, and the type of charge.¹³⁰ The firing elements were previously calculated by the platoon target analyst.¹³¹ The Panel emphasizes that the order contained the type and number of shells to be fired as well as the type of charge; these were therefore not decided by the foot soldiers. This was confirmed by witness Milan Đurić in court. Milan Đurić was a member of the mixed artillery platoon, a target analyst, who explained in great detail and precision the mode of issuing orders. The Panel found him credible.

226. Several witnesses explained that a certain Captain “Omega”, from the Ozren Tactical Group command, was often issuing orders to the 130 mm Gun Platoon command.¹³² For example, witness Ljubiša Čoršović, who was the Deputy Commander of the 130 mm Gun Platoon, explained that 90% of the orders were coming from “Omega”.¹³³ Written orders contained a Greek letter “Omega” at the bottom.¹³⁴ Captain “Omega” was the Chief of Artillery of the Ozren Tactical Group;¹³⁵ his real name was Boro Maksić.¹³⁶ However, the Panel finds that the Chief of Artillery did not have the authority to issue orders directly. In the present case, he was merely conveying orders he received from the commander of the

¹²⁹ Targets for which coordinates had been calculated beforehand would receive a number: (Witness Ljubiša Čoršović, 10 June 2008; Witness Mile Savić, 16 December 2008; Witness Mladen Dostanić, 10 February 2009; T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5). Whether or not all targets were numbered is irrelevant for this case. Indeed, the target analysts explained that one of them was always in the command post of the platoon command and could calculate the data necessary to fire a gun at a particular target.

¹³⁰ Witness Nenad Čolić, 13 May 2008; Witness Slavko Stojanović, 20 May 2008; T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 6 and 7; T-7 (Witness Examination Record for Goran Mijatović, State Investigation and Protection Agency, 21 November 2007), page 4; T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5.

¹³¹ Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; Witness Dragan Babić, 20 May 2008. Witness Goran Mrzić added that he believed that most of his calculations were double-checked and confirmed by the Ozren Tactical Group (T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5).

¹³² T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 5; T-8 (Witness Examination Record for Nenad Čolić, State Investigation and Protection Agency, 22 November 2007), p. 5; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008.

¹³³ Witness Ljubiša Čoršović, 10 June 2008.

¹³⁴ T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 4.

¹³⁵ Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008.

¹³⁶ T-87 (Response to the request to the RBiH Ministry of the Interior, Command of the 2nd Corps Tuzla, Commander Sead Delić, NO. 08/426-1, 7 July 1995); O-4 (Motion to take over the case number KT-RZ-169/07 dated 8 June 2007).

Ozren Tactical Group, Novak Đukić. The Panel thus finds that the Accused was the person issuing the orders to his subordinate units, including to the 130 mm Gun Platoon.

227. The Gun Platoon Commander (or, in his absence, the Deputy Commander or the Target Analyst)¹³⁷ would then convey this order he had received from the Ozren Tactical Group Command to the Gun Squad Commander by a field phone, who would then fire the gun.¹³⁸ Witness Ljubiša Čoršović also explained that, if the Target Analyst had conveyed the order, he had to report this to the Platoon Commander or his Deputy, even if after the order had been executed.¹³⁹ Neither the Gun Platoon Commander nor the Gun Squad Commander had to authority to legally issue orders to fire the 130 mm Gun.

3. Targets

228. The 130 mm Gun Platoon at Panjik was composed of three gun squads; meaning there were usually three guns located at Panjik.¹⁴⁰ One of the three 130 mm guns was facing the town of Lukavac.¹⁴¹ The Panel finds that the gun facing Lukavac was also facing Tuzla, since both towns are in the same alignment.¹⁴² This is confirmed by an order signed by the Accused and dated 25 April 1995 which indicates that one of the 130 mm guns located at Panjik had to be positioned in order to be able to target Lukavac and Tuzla¹⁴³; this order indicates the Accused's readiness to fire the 130 mm gun as ordered. Other possible targets of the guns were Gračanica, Lukavac, Puračić and the surrounding area of Doboj.¹⁴⁴

229. The Panel heard evidence showing that below the level of the Ozren Tactical Group, the units did not need to know what the target was in order to fire the 130 mm gun.¹⁴⁵

¹³⁷ Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008.

¹³⁸ Witness Nenad Čolić, 13 May 2008; Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5.

¹³⁹ T-13 (Witness Examination Record for Ljubiša Čoršović, State Investigation and Protection Agency, 29 November 2007), p. 4.

¹⁴⁰ Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čoršović, 10 June 2008; Witness Mile Savić, 8 April 2008.

¹⁴¹ T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 6; Witness Ljubiša Čoršović, 10 June 2008.

¹⁴² See map T-23 (Map of the town of Tuzla showing the projectile drop angle)

¹⁴³ T-115 (Order for defense, Ozren TG Command, Commander Novak Đukić, number 01/175-1, dated 25 April 1995)

¹⁴⁴ Witness Goran Mrzić, 20 May 2008.

¹⁴⁵ Witness Mile Savić, 16 December 2008.

Several witnesses explained that the targets were known only by the Ozren Tactical Group command.¹⁴⁶ The Target Analysts also explained that they did not need to have a map to calculate the firing elements of the targets; that the coordinates of the target were sufficient.¹⁴⁷ However, the same witnesses stated that they had access to military maps on which at least some targets were marked.¹⁴⁸ The contrary evidence obtained from the witnesses renders it unable for the Panel to state whether or not the Gun Platoon or the Gun Squad actually had or could have had knowledge of the targets, although it seems more likely than not. However, the Panel concludes that the evidence clearly indicates that the Accused was the lowest ranking person who had the authority to legally issue an order to fire the 130 mm gun. Therefore, the Panel deems it unnecessary to decide on whether or not the units subordinate to the Accused had actual knowledge of the targets.

230. No VRS witness confirmed in Court that Tuzla was marked as a target on any military map or in the tables of targets. On the contrary, they all avoided responding to this question.¹⁴⁹ However, Witness Dragan Babić said in his statement that several targets were marked in the area of Tuzla and its surroundings.¹⁵⁰ He added that members of the 130 mm gun squad confirmed to him when he returned to his post in Panjik that they had opened fire on Tuzla on 25 May 1995.¹⁵¹ The witness did not deny this part of his statement in Court, but remained evasive.¹⁵² Also, the working artillery map¹⁵³ of the 2nd Ozren Light Infantry Brigade, drafted in April 1994, indicates that several places in the downtown area of Tuzla

¹⁴⁶ Witness Nenad Čolić, 13 May 2008; Witness Manojlo Milovanović, 5 May 2009; Witness Slavko Stojanović, 20 May 2008; Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

¹⁴⁷ Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008. For example, witness Milan Đurić explained that he developed a computer program which allowed him not to use maps and to calculate targets analytically and that was able to locate targets on a map based on the coordinates given to him. See also the table of targets: Findings and Opinion by expert witness Berko Zečević

¹⁴⁸ Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; Witness Dragan Babić, 20 May 2008; T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), p. 4. For example, witness Milan Đurić, who was a target analyst; explained that he received the order to target a town or any other civilian object.

¹⁴⁹ See for example statements of witnesses Dragan Vasiljević and Goran Mrzić who said in Court that they had been told by their colleagues that Tuzla was not within their range.

¹⁵⁰ T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 6.

¹⁵¹ T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 6.

¹⁵² Witness Dragan Babić, 20 May 2008

¹⁵³ Witness Mile Savić explained to the Court that a working map is not a “realization” map because a target marked on a working map is not necessarily the target that will inevitably be hit (Mile Savić, 16 December 2008). The Panel entirely subscribes to this explanation and considers the targets marked on this map only as places which the VRS had the capability of hitting, but does not consider that this map is sufficient evidence to prove that a place has actually been hit. This map only indicates a possibility of a place being hit.

are marked as targets for a 130 mm gun.¹⁵⁴ This is also confirmed by the map detailing the Sadejstvo '95 operation¹⁵⁵; as confirmed by witness Nijaz Vrabac¹⁵⁶ in Court, and which the Panel finds credible. Although the 130 mm gun was not located in Panjik when the working artillery map of the 2nd Ozren Light Infantry Brigade was drafted, the Panel finds, based on concurring evidence and witness testimony, including the documents detailing the Sadejstvo '95 operation plan, that Tuzla was a potential target for the 130 mm gun located at Panjik in May 1995.

4. Reporting structure

231. Witness Manojlo Milovanović testified about the reporting structure that was in place within the VRS. Throughout the war, each unit within the VRS would report daily to its superior unit on the military situation at 18:00 hours. Each superior had the task to unify the reports from his subordinates and send a unified report to his superior.¹⁵⁷ The reports from the Corps Command had to arrive at the Main Staff by 20:00. Between 20:00 and 21:00, the Corps Command would inform the Main Staff by phone on any changes of the situation since 18:00. By midnight, the reports were sent to the Supreme Command. Between 7:00 and 8:00 the next day, the Corps commands had to inform the Main Staff on any possible changes in the military situation that would have occurred overnight. All commanders from brigade to corps level would report to their superiors in writing. Therefore, the Panel finds that the VRS Main Staff had a complete picture of the warring situation throughout BiH on a daily basis.

232. This reporting structure was also in place at the level of the Ozren Tactical Group and its subordinate brigades. For example, witnesses Goran Mrzić and Ljubiša Čorsović explained that the Platoon would inform the Ozren Tactical Group Chief of Artillery that an order had been executed. This is also supported by an order signed by the Accused to his subordinate units requesting that these units report on the course of combat every second hour to the Forward Command Post of Ozren Tactical Group.¹⁵⁸ Another order from the

¹⁵⁴ T-95 (Artillery working map, 2nd Ozren Light Infantry Brigade, dated 29 April 1994)

¹⁵⁵ T-180 (Maps of the Operations "Sadejstvo 95" and "Štit 94/95")

¹⁵⁶ Witness Nijaz Vrabac, 31 March 2009.

¹⁵⁷ Witness Mile Savić, 8 April 2008.

¹⁵⁸ T-114 (Order for attack by the Commander of the Ozren TG, Novak Đukić, strictly confidential number 01-128-1, dated 28 March 1995)

Accused orders his subordinate brigades to report to him on the advancement of a combat operation every three hours.¹⁵⁹

233. Each unit maintained a war log which was kept by the Operations Officer and contained the report of daily combat activities of that unit; orders issued orally would also be transcribed in the war log.¹⁶⁰ It also contained the date of shelling, the number and type of shells used and the target elements.¹⁶¹ These records were referred to the relevant commands.¹⁶² This was also true in May 1995.¹⁶³ Witness Manojlo Milovanović further explained that the firing of a gun following an illegal order would most likely not be written in the war log. This is contrary to the testimony of Witness Mladen Dostanić, Chief of Staff of the 2nd Ozren Light Infantry Brigade and in whose area of responsibility the 130 mm gun in Panjik was located.¹⁶⁴ He explained that everything was noted in the war log of the brigade, including the brigade's requests for artillery support, for example of a 130 mm gun. This war log is in evidence and, indeed, does not contain any entry on 25 May 1995 related to a gun fired at the centre of Tuzla.¹⁶⁵

234. The Defense argued that all military activities were supposed to be written in the war log and that the firing of a 130 mm gun should have therefore been written in the war log of the 2nd Ozren Brigade. However, the Panel finds first that the 2nd Ozren Brigade was not the sole authority to ask for artillery support from the 130 mm gun located at Panjik. The Ozren Tactical Group Commander was issuing orders to the 130 mm Gun Platoon based on requests from a brigade who would need its support, but also based on orders coming from his superior or based on his independent decision. Therefore, the war log of the 2nd Ozren Light Infantry Brigade does not contain all entries for the use of the 130 mm gun located at Panjik, but only those that were done upon a request from the 2nd Ozren Light Infantry Brigade Commander to the Commander of the Ozren Tactical Group.

¹⁵⁹ T-117 (Combat order for defense and attack, Ozren TG Command, Novak Đukić, strictly confidential number 017275-1, dated 5 June 1995)

¹⁶⁰ Witness Manojlo Milovanović, 5 May 2009; Witness Mile Savić, 8 April 2008.

¹⁶¹ T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 6 and 7; T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), page 4; Witness Mile Savić, 16 December 2008.

¹⁶² T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 7.

¹⁶³ Witness Mile Savić, 8 April 2008.

¹⁶⁴ Witness Mladen Dostanić, 10 February 2009

¹⁶⁵ O-2 (War Logbook of the 2nd Ozren Light Infantry Brigade from 11 September 1994 to 16 September 1995)

235. The Panel was not presented with the war log of the Ozren Tactical Group, which might or might not have contained information relating to its military activity on 25 May 1995. However, this does not render the Panel unable to fully assess the situation in order to be able to decide how the events took place on that day. The Panel does not accept the Defense's allegation that the absence of a written order to fire the 130 mm gun on 25 May 1995 must bring the Panel to conclude the non responsibility of the Accused.

5. Findings

236. Based on all this evidence, the Panel finds that the Accused Novak Đukić was the last person in the vertical chain of command of the VRS who had the power to legally issue an order to the 130 mm Gun Platoon located at Panjik to fire a 130 mm gun.

237. The evidence detailed above clearly indicates that the Ozren Tactical Group command was in constant communication with all its subordinate units, including the 130 mm Gun Platoon in Panjik. This was also the case when heavy firing was taking place. Nothing indicated that this communication structure was not operating on 25 May 1995.

238. Moreover, the Panel finds that the Accused Novak Đukić was present in the command post on 25 May 1995. Indeed, the Accused issued an order to the commanders of the combat brigades to have a meeting at the command post of the Ozren Tactical Group on 25 May 1995 at 10:00 hours to, among other things, inform him of their status of combat readiness and plan and carry out active combat activities.¹⁶⁶ The Accused issued another order to the intelligence units for the purpose of organizing a meeting with municipal presidents on 25 May 1995 at 12:00 hours.¹⁶⁷

239. Whether or not the increase in the level of combat readiness that day was related to the VRS Main Staff being informed of an imminent airstrike by NATO and might have reached the Accused is irrelevant to the present case.

¹⁶⁶ T-131 (Order for Commanders to Report, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/231-1, for 25 May 1995)

¹⁶⁷ T-132 (Order to Intelligence Units, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/232-3, 24 May 1995)

V. FACTUAL AND LEGAL FINDINGS

A. COUNT 1: SHELLING ON 25 MAY 1995

1. Factual Findings

a. Did the incident occur?

i. Description of the incident on Kapija in the evening of 25 May 1995

240. The Indictment states that on 25 May 1995 at 20.55 one 130 mm caliber artillery projectile hit a location in the immediate town centre called *Kapija*, in the square where Majevička, Božidara Adžije, Dr. Mujbegovića, Partizanska, Maršala Tita and Nikole Tesle streets intersect.

241. As stated before, the eye-witnesses testified that on that day, after earlier rainy days, the weather had been nice and that many people gathered in the evening hours at the Kapija square, known as a gathering place for young people. Witness Bahrudin Hadžiefendić stated that around 20:00 a handball game ended and everybody gathered at Kapija. There were hundreds of young people.

242. All the witnesses who were present at the Kapija location at the relevant time, confirmed the time stated in the Indictment (20:55) that the shell hit Kapija square. Each witness described in detail the place where they had been located at the moment when the shell fell, and marked the spot on a sketch of the Kapija square.¹⁶⁸ Witnesses stated that an explosion was heard and that a flash of light was seen,¹⁶⁹ which killed and injured many in Kapija square. Witnesses explained that the bodies of the killed and wounded were evacuated to the Gradina Hospital after the explosion.

¹⁶⁸ T-28 – T-45.

¹⁶⁹ Witness Samir Đapo (24.06.2008), Damir Tucaković (01.07.2008), Azra Kapetanović (01.07.2008), Azra Mitrović (01.07.2008), Ahmed Isić (01.07.2008), Bahrudin Hadžiefendić (08.07.2008), Edin Buzaljko (08.07.2008), Asim Hadžiselimović (08.07.2008), Dino Kalesić (08.07.2008), Fahrudin Rahmanović (19.08.2008), Adnan Mujačić (19.08.2008), Marica Grandić (19.08.2008), Nadir Huremović (26.08.2008), Vildana Isić (26.08.2008), Edin Altunbabić (26.08.2008), Adnan Aliefendić (26.08.2008), Adis Nišić (02.09.2008), Salih Brkić (02.09.2008); video footage (T-27).

243. These facts were also confirmed by the UN representative, Charlef Brantz, who was a representative of the investigation team established in order to carry out an investigation of the incident concerned.

244. The material evidence of the Prosecution also substantiates the allegations referred to in the Indictment.¹⁷⁰ The Defense for the Accused Novak Đukić rendered incontestible the fact that on 25 May 1995 at 20:55 a projectile landed on the Kapija square, and that it caused the death of 71 persons, while more than 130 persons were wounded.

ii. Victims and Material Damage

245. After the shell hit, reports were constantly coming in on the number of victims of the explosion.¹⁷¹ Different numbers of killed and injured persons can be observed in different reports. Reports were made on the day of, or several days after the incident, the situation with the wounded persons constantly changed, and accordingly the reports on a precise number of victims. According to the official data, the total number of killed persons is 71.¹⁷² On the basis of analysis of the existing medical documentation, over 130 persons sustained injuries.¹⁷³ Major Guy Sands, Chief of the G-5 Department, was in the immediate vicinity of the place where the shell exploded. He visited the hospital where the victims were taken after the explosion, where he arrived around 22:15, together with the medical personnel of the Norwegian hospital in order to evaluate the situation. Ambulances kept arriving at the front gate.¹⁷⁴ In the report sent by him to the Commander of the North-East Sector on 26 May

¹⁷⁰ CD recording of the crime scene (T-27); Photo-documentation of the crime scene with its explanation (T-25, 25a, 25b), UNPROFOR Investigation Report dated 27 May 1995 (T-14); Sketch of the crime scene dated 25/26 May 1995 (T-16); Report by the mixed commission dated 26 May 1995 (T-18), Annex F to the Report (T-19); Record of the on-site investigation number Kri 29/95 dated 25 May 1995.

¹⁷¹ Joint Commission Report dated 26 May 1995 (T-18); Letter of the Brigadier General Hagrup Haukland sent to Major General Ropert Smith (T-15); UNPROFOR Investigation Report dated 25 May 1995 (T-14); List of killed and injured persons made by UNPROFOR on 27 May 1995 (T-17); Joint Commission Report dated 26 May 1995 (T-18),

¹⁷² Finding and Opinion of expert witness Vedo Tuco dated 24 December 2008 (T-158); Medical documentation for all killed persons (T-48); Record of external examination and identification of the persons killed in the massacre in Tuzla on 25 May 1995 with the attached photodocumentation number 20-1/02-3-9-7-175/95 (T-47); List of the persons killed in the Tuzla shelling on 25 May 1995 made by the Investigative Judge of the High Court in Tuzla number Kri 29/95 dated 26 May 1995 (T-50); War damage report made by the Municipal Commission for listing and assesment of war damage in Tuzla made on 10 July 1995 (T-74);

¹⁷³ Finding and Opinion of witness expert Vedo Tuco dated 24 December 2008 (T-158); List of the persons severely injured in the Tuzla shelling on 25 May 1995 at the location of Kapija, who were kept for medical treatment in the CMC Tuzla made by the Investigative Judge of the High Court in Tuzla number Kri 29/95 dated 26 May 1995 (T-49);

¹⁷⁴ Major Guy Sands' Report dated 26 May 1995 (T-24); List of the persons injured in the Tuzla shelling on 25 May 1995 at the location of Kapija, who were discharged after receiving medical help in the CMC Tuzla made

1995 it is stated that every building at the square was damaged, windows broken, and shrapnel traces remained on the walls. Around 40m away from the impact site there were still parts of flesh, organs and pools of blood. In the report, this incident was called the Massacre of Innocent.¹⁷⁵ The record of on-sight investigation also contains a report on damage to the buildings resulting from the explosion.¹⁷⁶

246. The Directorate for Reconstruction and Construction estimated the amount of the damage on the buildings at the Kapija location.¹⁷⁷ A commission established that the total material damage on the buildings amounted to DM 33,988.

iii. Conclusion: Tuzla was shelled / there was an explosion

247. Based on the evidence presented, the Panel found beyond any reasonable doubt that the event did take place, namely, that on 25 May 1995 at 20:55 hours, an artillery shell landed and exploded in the Tuzla city center at the square known as *Kapija*, resulting in the death of 71 persons while more than 130 persons were injured.

248. The Defense did not challenge this fact.

b. How did the event happen?

i. Introduction

249. To find all the relevant facts surrounding this event, a mixed expert team made of local representatives and the UN representatives was established whose task was to find all the facts surrounding this event. The local investigative team, headed by Investigative Judge Emin Halilčević, came to the explosion site at 21:30 hours to conduct the investigation.¹⁷⁸

by the Investigative Judge of the High Court in Tuzla number Kri 29/95 dated 26 May 1995 (T-51); Medical documentation for the injured persons dated 14 October 2008 with a copy of discharge lists for the injured (T-52); War Damage Report made by the Municipal Commission for listing and assesment of war damage in Tuzla made on 10 July 1995 (T-74);

¹⁷⁵ Ibid. page 3 (T-24)

¹⁷⁶ Record of the investigation No. 29/95 of 25 May 1995 (T-62); video footage (T-27).

¹⁷⁷ JP Directorate for Tuzla Reconstruction and Construction, assesment of the amount of damage to the buildings at the location *Kapija* in Tuzla, 10 July 1995 (T-73).

¹⁷⁸ Record of the investigation No. 29/95 of 25 May 1995 (T-62); witness Nedžad Vejzagić 18 March 2008

Public security center officers photographed the explosion site, collected metal pieces, and made a sketch of the explosion site.¹⁷⁹

250. On 26 May 1995, an order was given to the officers of the Republic of Bosnia and Herzegovina Ministry of Interior to join the investigation and assist the investigative judge in shedding light on the event. On the same day, at 13:00 hours, the Deputy Commander of the UNPROFOR Sector North-East Charlef Brantz was ordered to start the investigation on behalf of UNPROFOR. Given the fact that the purpose of investigation by these two teams was the same, a joint commission was established.¹⁸⁰ The Commission finished its investigation and on 28 May 1995 they completed the Report and attached their enclosures.

251. The Panel will refer to particulars from these reports in the Verdict.

252. In reference to the circumstances surrounding this event, the Prosecution proposed Professor Dr. Berko Zečević to be heard as an expert witness at the main trial, who provided his Findings and Opinion in writing.¹⁸¹

253. The defense, on the same grounds, summoned an expert for weapons and ballistics Vlada Kostić who also provided his Findings and Opinion in writing.¹⁸²

ii. Objection raised by Defense relative to the legitimacy of Findings and Opinion by expert Berko Zečević

254. The defense raised objections relative to the legitimacy of this evidence, pointing out that the expert made the reconstruction during the preparation of his report, and that the order to conduct a forensic expertise was issued solely to the expert Berko Zečević, whereas

¹⁷⁹ T-56 (Official Letter of the Security Services Center dated 1 June 1995), T-57 (Sketch of the crime-scene, 25/26 May 1995 No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla), T-58 (Photo-documentation, 27 May 1995, No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla), T-59 (Photo-documentation, 30 May 1995, No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla), T-60 (Photo-documentation, 25/26 May 1995, No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla), T-61 (Photo-documentation, 25/26 May 1995, No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla), T-25, T-25a, T-25b (Photo-documentation of the crime scene with its explanation).

¹⁸⁰ UNPROFOR Investigation Report (T-14), Report by the Joint Commission of 26 May 1995 (T-18), witness Nedžad Vejzagić 18 March 2008, witness Charlef Brantz 18 June 2006

¹⁸¹ Findings and Opinion by expert Prof. Dr Berko Zečević (T-6)

¹⁸² Findings and Opinion by expert Vlada Kostić B.Sc. in mechanical engineering (O-1)

the title of report contains the names of senior assistants who appear as co-authors of the report.

255. The Panel considered these objections, reached the conclusion that they were not founded, and thus overruled them.

256. The Panel finds that the mere fact that there are the names of the senior assistants listed on the cover page, which means names of more persons than was specified in the order, does not make this evidence unlawful in this specific case.

257. Having considered the expert report carefully, the Panel finds that it was a rather demanding and complex forensic expertise, which included a large number of actions, and therefore the expert hired two assistants who assisted him during the performance of certain actions needed during the forensic expertise. Moreover, expert Berko Zečević signed the Findings and Opinion, and he presented it at the main trial where he was examined in-chief and cross-examined, and was physically present during the presentation of the report. Furthermore, the expert witness stated during the presentation of his Findings and Opinion that he made the reconstruction, as an aid to explain the method applied by the expert witness. The Panel concluded that the reconstruction made by expert witness Berko Zečević cannot be seen as a reconstruction in terms of Article 93 of the CPC BiH, nor was it meant to be.

258. Thus, the Panel overruled this objection as unfounded.

iii. Types of weapons that created the damage: Expert witnesses' Reports

a) Expert Witness Berko Zečević

259. The identification of the caliber and type of projectile was primarily based on material evidence found on the site of explosion such as fragments of the projectile. The caliber and type of projectile can be precisely identified based on pieces of the rotating band bearing or the rotating band or larger pieces of the body of projectile.¹⁸³

¹⁸³ Page 5 of the Findings and Opinion by expert witness Berko Zečević

260. After the visual inspection of the crime scene, the investigative commission found on the site fragments of different shapes, while fragments were also found in the bodies of the killed.¹⁸⁴

261. Expert witness Zečević concluded that there are fragments in the pool of fragments which can assist in an easier identification of projectile, and these fragments belong to the area of the bearing of rotating bands and to the fuse.¹⁸⁵

262. By the analysis of different fragments, as described in the written report, Zečević found that the fragments that were found on the site of explosion belonged to the HE projectile 130 mm M79, which is launched from an artillery gun 130 mm M46.

263. Expert witness Zečević analyzed the scale and type of damage that could be caused by the use of 130 mm projectile, and considering the results of analysis¹⁸⁶ the expert witness identified the lethal zone and the zone of damage at the *Kapija* square.¹⁸⁷ He also calculated the velocity of fragments at the moment of explosion, which ultimately affected the scale of damage. To calculate the velocity of fragments, the expert witness applied Garney's formula.¹⁸⁸

264. The expert witness eventually concluded that the results of his research on the effects of this projectile match the results of the investigative commission on the number of victims and the scale of damage at the *Kapija* square, caused by the explosion of the projectile.

b) Expert witness Vlada Kostić

265. Expert witness Kostić had the same photo-documentation at his disposal as expert witness Berko Zečević, for the analysis of the type of projectile.

¹⁸⁴ T-25b, a photo of the fragments of the projectile

¹⁸⁵ Findings and Opinion by expert witness Berko Zečević, p. 66

¹⁸⁶ pp. 70,71, Findings and Opinion by expert witness Berko Zečević

¹⁸⁷ Ibid, picture 86

¹⁸⁸ Expert witness Zečević, during the confrontation with another expert witness, pointed out that there is only one formula for the calculation of velocity of fragments, known as the Garney's formula.

266. He pointed out in his report that the fragment found belongs to the fuse of the projectile, but also that the same type of fuse is used for different calibers, 122 mm, 130 mm, and 152 mm. This was confirmed by expert witness Berko Zečević, who stated that the identification of the projectile based on its fuse is possible only in rare situations. Kostić also pointed out that the pieces shown on the photos are similar to those of both caliber 130 mm and 152 mm. Expert witness Kostić was not able to identify with certainty the caliber of the gun on the basis of the remainder of the rotating band, because, as he stated, the photo did not show how many grooves there were, considering that a 130 mm gun usually has two grooves. Expert witness Kostić also analyzed the gun captured in September 1995 on the Ozren mountain, shown in Photo No. 13 in the Report. Based on this photo, he reached the conclusion that this type of weapon did not have the range to hit Tuzla.

267. Based on his analysis, expert witness Kostić concluded that among all those types of projectiles, this projectile most probably belongs to the group of 130 mm calibers.

268. Kostić analyzed the effects of explosion in light of the persons injured on the site, and he pointed out that regardless of the characteristics of fragmentation and the lethal force of this projectile, the number of fragments, their effective range, the large lethal capacity, the ricochet features of the ground paved with granite blocks, as well as the densely visited place at the moment of detonation, there were too many killed and injured persons in this specific case. He pointed out that without knowing the exact location of people, where they were at the moment of explosion, it is not possible to assess the damaging effects. In fact, he went so far to state that this event could not have happened as alleged based on other known cases. When questioned as to what other known cases, he could not provide any specific cases.

269. Based on his analysis of the documentation,¹⁸⁹ expert witness Kostić concluded that there is no ground to objectively ascertain that an artillery shell, in this specific case, could result in such a large number of casualties.

¹⁸⁹ Page 16 of Findings and Opinion by expert witness Vlada Kostić

c) Characteristics of the 130 mm gun

270. The projectile caliber is 130 mm, type HE projectile 130 mm M79, or Russian marking OF-482.¹⁹⁰ The 130 mm M46 guns are weapons towed on trucks or tracked vehicles.¹⁹¹ The weapon is about 8 tons, and thus it can be transported only on hard surface and the firing position has to be in the vicinity of the road.¹⁹²

271. The 130 mm M46 gun has a long range with the maximum range of 27,000 meters.¹⁹³ The 130 mm gun is not intended for shooting at point targets.¹⁹⁴ Therefore, it is not possible to shoot at individual targets in urban areas with such a gun and a 130 mm M79 projectile, without causing collateral damage to the population.¹⁹⁵ Between 4,000 and 6,800 fragments are formed during the fragmentation of such projectile.

d) Conclusion of the Panel in relation to the identification of the caliber and type of projectile and the projectile effects

272. The Joint Commission Report stated that the fragments derive from the ammunition OF 482-M caliber 130 mm for the M-46 gun.¹⁹⁶ This was corroborated by other material evidence.¹⁹⁷ Witnesses Charlef Brantz and Nedžad Vejzagić, participants in the investigation, confirmed this fact during their testimony at the main trial.¹⁹⁸ It was also stated in that Report that the number and type of injuries are those which can be expected after the explosion of the HE loaded shells. The crime scene investigation report of 25 May 1995 shows that the investigation commission, made of ballistics, artillery, and explosive experts, found after they analyzed the fragments, crater, scale of damages on the surrounding facilities, and fragment traces on the walls of the buildings, that this shell was a 130 mm caliber charged with destructive HE. The forensic report of expert Berko Zečević on the

¹⁹⁰ Pages 15 and 16 of the Findings and Opinion by Berko Zečević

¹⁹¹ Ibid p. 93

¹⁹² Ibid p. 93

¹⁹³ Witness Manojlo Milovanović, 5 May 2009

¹⁹⁴ Ibid

¹⁹⁵ P. 93 of the Findings and Opinion by Berko Zečević

¹⁹⁵ Ibid, p. 93

¹⁹⁶ Report by the mixed commission dated 26 May 1995 (T-18),

¹⁹⁷ UNPROFOR Investigation Report (T-14), T-20, T-21, Record of the investigation No. 29/95 of 25 May 1995 (T-62)

¹⁹⁸ Nedžad Vejzagić, 18 March 2008, p. 7 of the transcript; Charlef Brantz, 17 June 2008

caliber and type of the projectile matches completely these evidentiary documents and the witness' testimonies. Even expert witness Kostić stated that this was most probably this type of projectile.

273. Based on everything stated above, the Panel is satisfied beyond any reasonable doubt that it was a 130 mm M46 projectile that exploded at the *Kapija* square on 25 May 1995.

274. Considering all the features of the 130 mm gun M46, charged with destructive HE, the projectile fired from this gun may cause enormous destructive effects.

275. Accordingly, the Panel was satisfied beyond any reasonable doubt that the number of those killed and injured on 25 May 1995 was a result of the projectile explosion that exploded at the relevant time and place. The Defense did not challenge this fact, though the opinion of the defense expert witness Kostić did. He claimed that too many people were killed and wounded on that occasion. This was not accepted by the Panel as objective because this expert witness also testified that the number of casualties would have been even larger if the shell had come from the direction from which the expert witness Zečević claimed that it had been fired.

276. Some of the projectile fragments used to identify the caliber were taken from the bodies of the killed persons, and as it was earlier stated in paragraphs 260 to 262, it was found that they derive from a 130 mm projectile.

277. Thus, it was found beyond any reasonable doubt that the entire damage to the surrounding buildings and the injuries and killing of civilians resulted from the explosion of the 130 mm M46 projectile.

iv. Direction of the projectile – opposing reports by the experts

a) Crater and the explosion site

278. To define the direction of the projectile, it is necessary to analyze the crater of the projectile.¹⁹⁹ The expert witnesses of the Prosecution and defense gave totally opposite opinions in terms of the direction of the projectile. The only fact that the expert witnesses agreed to is the site of the crater, that is, the explosion site, as both expert witnesses pointed to the same place on the photos during their confrontation.

279. In terms of the distance between the crater, the building and the Golf vehicle, where the projectile landed, the expert witnesses provided different opinions.

280. The sketch of the crime scene, which was attached to the Joint Commission Report (Annex A), contained the marking of the projectile crater and the distance from that crater from the right and the left corner of the building at 2.65²⁰⁰ and 5.60 meters. The distance of 2.60 and 5.60²⁰¹ meters was marked as the distance between the buildings and the center of the explosion on the sketch of the crime scene containing the sketch of the crater.

1) Expert witness Berko Zečević

281. Expert witness Berko Zečević used as the starting point the exact sketch of the crime scene attached to the Joint Commission Report, that is, the distance of 2.65 and 5.60 meters from the left and the right corner of the building, next to which the projectile exploded. This expert witness found that one part of the Golf vehicle was parked on the pavement. Moreover, to identify more precisely the direction of the projectile, Zečević marked the points based on which it is possible to define the sketch that eventually results in the conclusion on the direction of the projectile. He concluded that the projectile left a clear furrow of the projectile fragments inside the granite blocks, which assisted him to identify

¹⁹⁹ Expert witness Berko Zečević, 15 April 2008: the expert witness clarified several methods for the analysis of the crater based on which the direction of the projectile is identified, and this method is used by U.S. Army (pages 15, 16, and 17 of the transcript)

²⁰⁰ Sketch of the crime scene dated 25/26 May 1995 (T-16)

²⁰¹ T-57 (Sketch of the crime-scene, 25/26 May 1995 No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla)

clearly and easily the direction, but also the first point of cross section.²⁰² The expert witness pointed out that the surface which received the landing projectile is made of granite blocks which leave the furrow of the projectile fragments, which is specific for this type of surface.²⁰³ Then, he extended the direction at the bottom of the vertical wall of the building in front of which the projectile exploded (marking 2) to the cross section with the previous direction (marking 3).²⁰⁴ After that, the expert witness identified the distance between point 3 and the edge of the vertical wall (marking 4).²⁰⁵ To calculate this distance, the expert witness calculated the width of the pavement.²⁰⁶ Thereupon, the expert witness made the sketch based on which it is possible to identify the direction of the projectile in relation to the geographic north.²⁰⁷ By the analysis of the sketch, the expert witness concluded that the direction of the projectile was west, specifically azimuth 271^{0±2,5}.²⁰⁸

2) Expert witness Vlada Kostić

282. Expert witness Kostić raised the objection that the crime scene was altered during the crime scene investigation, which was not stated anywhere in the record, and that it was difficult for him to provide an objective and specific analysis of the available crime scene data. The expert witness concluded that the surface movable traces on the sketch of the crater²⁰⁹ were on the opposite side from the one shown on the photos of the crime scene. Furthermore, he stated that the traces were spreading eastward on the sketch of the crater, whereas they spread westward on the photos. He also concluded that the traces were symmetric on the sketch of the crater, whereas they are not on the photos. The expert witness pointed to the possibility of a static explosion on the site initiated by remote control, and he claimed so based on the shape of the crater and the length of the furrow of the fuse.

283. He concluded that the trace next to the crater was the furrow of the projectile fuse. As for the crater, the expert witness stated in his Findings and Opinion that the pictures in the

²⁰² Photo No. 10 8 T-25a

²⁰³ Expert witness Berko Zečević, 15 April 2008; 28 April 2009

²⁰⁴ Picture 68, page 58 of the Findings and Opinion by expert witness Berko Zečević

²⁰⁵ Ibid

²⁰⁶ Ibid, p. 57

²⁰⁷ Picture 69, p. 58 of the Findings and Opinion by the expert witness Berko Zečević

²⁰⁸ Ibid; Table No. 4, angle of the incoming projectile; expert witness considered the minimal and maximal values acknowledging potential errors and he got the medium value of the azimuth.

²⁰⁹ T-57 (Sketch of the crime-scene, 25/26 May 1995 No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla)

case file show the crater of the oval shape in the granite blocks pavement. He also concluded, based on the photos, that its depth is somewhat bigger than 10 cm, yet no bigger than 20 cm.

284. The expert witness took 3.90 and 6.90 meters as distance between the crater and the left and right corners of the building where the projectile landed. He pointed in his findings that the direction of projectile is defined based on mutual position of the crater and the furrow of the fuse, and thus also the firing position of the weapons from which it was launched,²¹⁰ and that by the activation of the projectile with the contact fuse the material from the surface is ejected in the direction of the flight of the projectile.²¹¹ He totally denied the thesis by expert witness Berko Zečević that the furrow, which is by the crater, belongs to the fragments of the projectile.

285. Kostić took the sketch of the crater with the dimensions marked on the sketch during the crime scene investigation.²¹² However, the expert witness made his own sketch based on this sketch and he marked the position of the Golf vehicle somewhat away from the position of the crater of the projectile, and as relevant measures, he took the distance between the left and the right corners of the building that were marked on the first sketch. However, these do not represent the distance from the crater.²¹³ Thus, the movable surface traces are shown on the opposite side from what can be seen on the photos of the crime scene and what expert witness Berko Zečević showed. In this part, the Accused too challenged the position of the Golf vehicle, saying that it was not on the pavement with one of its parts.

286. Finally, Kostić concluded that the projectile arrived from the east, going westward.

²¹⁰ Ibid, p. 14;

²¹¹ Findings and Opinion by expert witness Vlada Kostić, p. 29

²¹² T-57 (Sketch of the crime-scene, 25/26 May 1995 No. 20-1/02-3-9-7-175/95, Security Services Center Tuzla)

²¹³ Picture 6 in the Findings and Opinion by expert witness Vlada Kostić

b) Ballistic drop of the projectile

1) Expert witness Berko Zečević

287. Zečević noted in his Report that prior to the explosion, the projectile flew over the building and then landed at the surface of granite blocks, immediately next to the side of the Golf vehicle.²¹⁴ He pointed out that the assessment of the minimal ballistic drop can be made based on the parameters of the height of the building²¹⁵ and its distance from the explosion site. Based on the traces of damage on the front right part of the projectile, the expert witness concluded that the ballistic drop is much higher than the angle defined during the previous considerations. To define the dropping angle more precisely, the expert witness conducted a reconstruction.²¹⁶ Based on the information then available to him (explosion site, direction, and the position of the vehicle) he carried out a measurement of the dropping angle of the projectile. The expert witness calculated that the distance between the vehicle and the explosion site was 400 mm, and that one part of the vehicle was on the pavement.

288. On the grounds of this test,²¹⁷ the expert witness concluded that based on the shooting range chart for the 130 mm M46 gun the ballistic drop of the HE projectile 130 mm falls within the interval $62^{\circ} \leq \theta \leq 67^{\circ}$ and 41'.

2) Expert witness Vlada Kostić

289. Kostić found that the distance between the vehicle and the explosion site is 1.45 meters. The expert witness concluded that a weak component of the impact wave of the projectile affected the Golf vehicle that stood nearby, which can happen only if the projectile arrived from the east. In his Report, he concluded that the minimal possible ballistic drop of the projectile is 43 degrees.²¹⁸ During his testimony, he pointed out that the projectile landed under a small angle which, considering the place of landing and the roof of the neighboring

²¹⁴ Picture 70 in the Findings and Opinion by expert witness Berko Zečević

²¹⁵ Ibid, p. 60

²¹⁶ The expert witness did not conduct the reconstruction in terms of reconstruction under the Criminal Procedure Code. The expert witness placed the vehicle and projectile on the site, and verified the data.

²¹⁷ Ibid, p. 63 and 64

²¹⁸ Pages 29 and 40 of the Findings and Opinion by expert witness Vlada Kostić

building, is some 25 degrees.²¹⁹ The expert witness pointed out that as the angle decreases, there is a higher probability that the furrow of the fuse will be formed. He completely denied the thesis of expert witness Berko Zečević on a larger ballistic drop.

c) Conclusion by the Panel on the direction of the projectile

290. The Joint Commission that conducted the investigation into this event concluded that the direction of projectile was 270 +/-10 degrees.²²⁰ Such an azimuth was also mentioned in the Report on the crime scene investigation, Report on the investigation, a letter sent to Major Rupert Smith, Report by the G2 Artillery Sergeant.²²¹ Expert witness Berko Zečević clarified in his report that the difference that appears in his Findings and the Report is only in the significant reduction of the width of the trajectory span of the projectile.²²²

291. Based on this, the Panel concluded that the Findings by expert witness Berko Zečević on the direction matches other reports on the direction.

292. In the Annex F of the Report²²³ the direction of west was marked as the direction from which this projectile came.

293. The official note made by the officers of the Public Security Station 1st police station included the information that on the relevant day at 20:55 hours, a sharp sound of the incoming projectile was heard coming from west towards the town center, and then a detonation in the town center.²²⁴

294. In terms of ballistic drop, the Joint Commission Report stated that the least possible ballistic drop for the direction of 270 degrees is 31.16.²²⁵

²¹⁹ Confrontation of witnesses, 28 April 2009 (p. 19 of the Transcript)

²²⁰ Report by the mixed commission dated 26 May 1995 (T-18)

²²¹ UNPROFOR Investigation Report (T-14), Letter of the Brigadier General Hagrup Haukland sent to Major General Ropert Smith (T-15), Annex F to the UNPROFOR Report (T-19), Record of the investigation No. 29/95 of 25 May 1995 (T-62),

²²² P. 58 of the Findings and Opinion by expert witness Berko Zečević

²²³ T-23 (Map of the town of Tuzla showing the projectile drop angle)

²²⁴ T-66 (Official Note from the First Police Station Tuzla, 26 May 1995)

²²⁵ Report by the mixed commission dated 26 May 1995 (T-18)

295. The Findings and Opinion by expert witness Berko Zečević contains the note that during the ballistic drop calculation, the Joint Commission did not identify precisely the height of the building, nor do the data on the range of the projectile 130 mm OF 482 for the given ballistic drop correspond to the data from the shooting range chart for the 130 mm M46 artillery system and the 130 mm OF 482 projectile.

296. The Defense expert witness and the Defense referred to this report to contest the conclusion on the ballistic drop reached by Berko Zečević, considering that Zečević identified a bigger angle.

297. The Panel concluded that in determining the ballistic drop of the projectile the Joint Commission noted the smallest possible angle of ballistic drop for the direction of 270 degrees, without concluding that this specific drop is the ballistic drop of the projectile, and it concluded that the projectile landed from the West.

298. Witness Nedžad Vejzagić, who participated in the crime-scene investigation, when testifying at the main trial confirmed that the commission had established that the projectile landed from the direction of west and that on that occasion the experts established which ballistic drop could be the minimal one.²²⁶

299. By accepting the findings of expert witness Zečević concerning the conclusion on the direction of the projectile, and the presented evidence that matches the stated evidence, the Panel established beyond any reasonable doubt that the projectile landed from the west.

300. The Panel did not accept the assertions of the Accused that one part of the Golf vehicle was not on the pavement. To wit, after its own observations of the photos that were taken immediately after the critical event and before the vehicle removal, the Panel found that it is clearly seen on the photos that one part of the vehicle was on the pavement.²²⁷

301. In contesting the direction from which the shell landed, the Accused asserted that the sketch of the crime-scene does not show the same place of the crater compared with what is shown on the photos of the crime-scene, emphasizing that 2 craters were showed on the

²²⁶ Nedžad Vejzagić 18 March 2008, page 7 of the Transcript

²²⁷ T-25a Picture No. 9; T-25b

photos.²²⁸ The Panel carefully addressed the issue and established the following. On the sketch of the crime-scene (T-16), number 0 marks the crater place. On photo 13a, the explosion site is also marked with number 0. However, on the photo number 10 with regard to which the Accused asserted that number 0 that marked the crater was moved, it can be seen that at the moment of photo-taking, the crime scene was not marked with numbers, and that all numbers were placed one on the top of the other. Therefore, the Panel dismissed this conclusion of the Accused as unfounded.

v. Distance from the firing site to the explosion site

a) Expert Witness Berko Zečević

302. On the basis of the shooting range tables for the 130 mm M46 gun, Zečević determined the distance of the firing position for tabular conditions and the mentioned ballistic drops to be $26,500 \text{ m} \leq X_{vp} \leq 27.480 \text{ m}$. Based on the data on the distance of the firing position and the known azimuth, the expert witness transferred the known data on the topographic map and established that there was a communication road in the close vicinity and the village called Panjik, in whose vicinity there were two villages, Nešići and Blagojevići.²²⁹ In order to establish the narrow zone of the position of the firing position of the 130 mm M46 gun as specifically as possible, Zečević used a special software with original ballistic coefficients according to the firing tables for the 130 mm M46 gun with full charge, also taking into account the available data from the hydro-meteorological institute about the atmosphere for the day 25 May 1995.

303. Based on the analysis²³⁰ made, expert witness Zečević established that the minimal distance of the firing position is $X_{vp} = 27,100 \pm 360 \text{ m}$.

304. In considering possible zones, Zečević took into account the weight of the guns that are towed on trucks, and concluded that the firing position must be in the close vicinity of a communication road.²³¹ Thereafter, the expert witness headed toward the village of Panjik and noticed that the zone on the road to the left, several hundred meters next to the school in

²²⁸ T-25a Picture No. 10 and 13a and Sketch of the crime scene dated 25/26 May 1995 (T-16)

²²⁹ Picture No. 87 of the Findings and Opinion by expert witness Berko Zečević

²³⁰ Ibid pp. 74,75,76

²³¹ Ibid page 79

Panjik satisfied all the conditions. Zečević noticed wheel tracks and visible tracks of the artillery weaponry digging in,²³² which was basically a confirmation of his thesis about the place from which the projectile had been fired.

305. Based on the analysis made, Zečević determined with a great probability a narrower location of the firing position from which the projectile 130 mm M79 was launched, which is the Panjik area on the Ozren mountain.

b) Expert Witness Vlada Kostić

306. Kostić drew his conclusion on the firing zone based on the photo documentation and expert knowledge of the construction of artillery projectiles. He pointed out that the gun shown at photo 13 of the Finding, which was seized on Ozren, is not a 130 mm M46 gun and that a projectile caliber 130 mm could not be fired from it, that its range is much shorter, and that firing the gun from Panjik at the Kapija square would not be possible even with the maximum charge.²³³ Expert witness Kostić did not draw any conclusion as to which gun shown in the photo was in question.

307. Having considered that this was a 130 mm projectile fired from the 130 mm M46 gun, taking into account the meteorological conditions on 25 May 1995 and the drop angle of 43 degrees, Kostić established the distance of the artillery position to be between 11,770 +/- 240 m and 21,170 +/- 229 m.²³⁴

c) Conclusion of the Panel on the distance from the firing position to the explosion site

308. In the record of the on-site investigation it was concluded that the projectile was fired from the base on Ozren, the village of Vrbak, place of Cerovo Brdo which is 21 km away from the explosion site.²³⁵ In the joint commission report it is stated that with maximum charge the 130 mm M46 gun is usually used for ranges between 17 and 27 km. The Commission established that in the case at hand, based on the calculated azimuth and the

²³² Ibid page 79, photo 96

²³³ Page 19 of the Finding and Opinion by expert witness Vlada Kostić

²³⁴ Ibid pages 19 and 40

²³⁵ Record of the investigation No. 29/95 of 25 May 1995 (T-62)

smallest drop angle, the shortest distance from which the shell was fired is between 20 and 21 km.²³⁶

309. In the letter sent to Major Rupert Smith by the Brigadier General Hagrup Haukland it is stated that the weaponry system was located to the west from the conflict line in the region known as the Ozren base, at least 20 km far from the explosion site.²³⁷

310. The UNPROFOR Report states that the weapon location was between 20-27 km, and that the M46 weaponry system was located on Ozren.²³⁸

311. From the enclosures based on which the stated report was made it ensues that the distance from which the projectile was fired was in excess of 20 km.²³⁹

312. Witness Charlef Brantz, while testifying at the main trial, stated that at the moment when the investigation was conducted the precise location was known from which the shell was fired, namely that this was in Panjik, but this information had to be deleted due to the risk of retaliation by the ABiH against the VRS positions in that region.

313. The witnesses who testified at the main trial, and who were members of the gun 130 mm platoon within the TG Ozren confirmed that a 130 mm gun was located in Panjik in May 1995.²⁴⁰

314. It ensues from evidence T-115 that one of the 130 mm guns was located in Panjik, and that it was assigned to fire at Tuzla.

315. The Panel gave credit to the expert witness Zečević with regard to the distance, namely the place from which the shell was fired, considering that the expert witness gave a very detailed, precise and convincing analysis in relation to the witness expert Vlada Kostić who failed to provide valid reasons as to why he disagreed with the data given in the

²³⁶ Report by the mixed commission dated 26 May 1995 (T-18)

²³⁷ Letter of the Brigadier General Hagrup Haukland sent to Major General Ropert Smith (T-15)

²³⁸ UNPROFOR Investigation Report (T-14)

²³⁹ T-22 (drawing of the projectile drop angle; Annex to the UNPROFOR report), T-23 (Map of the town of Tuzla showing the projectile drop angle)

²⁴⁰ Ljubiša Čoršović, Milan Đurić, Dragan Babić, Goran Mrzić, Goran Mijatović, Nenad Čolić, Slavko Stojanović

investigation. The Finding of the expert witness Zečević was also supported with the other stated reports in which it is mentioned that the smallest distance of the 130 mm M46 gun was between 20-27 km, and also the testimony of witness Charlef Brantz.

316. Therefore the Panel finds that the Prosecution established beyond any reasonable doubt that a projectile was fired from the 130 mm M46 gun from the distance of 27 km, namely from Panjik.

317. In contesting the opinion of expert witness Zečević, the Defense pointed out that the investigation reports state that the weaponry distance was 21,000 m. The Panel ruled this objection to be unfounded considering that it is visible from the evidence that the Joint Commission established both the minimum and maximum distance from which the 130 mm gun could be fired. The Panel considered the circumstances during that period, and it is logical to conclude that the Investigative Commission did not have a possibility to determine the precise distance, particularly when it is taken into account that they could not visit the Ozren mountain area, and that considering the situation in the war theater at that moment, due to safety reasons UNPROFOR members could not disclose the precise location of the weaponry.

318. In contesting the conclusion of the expert witness Zečević, the Defense for the Accused pointed out that witness expert Zečević knew in advance that it should be concluded that the projectile at issue was fired from the Panjik region. However, it can be seen from the introductory part of the expert witness finding exactly which documents expert witness Zečević had at his disposal. It cannot be established from the enclosed documents given to the expert witness before drafting the Finding and Opinion that the projectile firing zone was concretely Panjik, so it can be concluded that the expert witness did not have the given information in advance, but on the contrary that he made such conclusion after a full analysis of the case, which finally, in his finding, the expert witness explained in detail and logically, i.e. in which manner he reached the conclusion that the area of the Panjik village was at issue, and therefore this objection of the Defense is unfounded.

vi. Conclusion of the Panel concerning the decision to accept the findings and opinion of the expert witnesses and other evidence with regard to the manner in which the incident occurred

319. The expert witnesses for the Prosecution and the Defense gave different conclusions as to the direction from which the projectile came, the distance of the crater from the surrounding buildings, the projectile drop angle, the projectile caliber and the effects it caused. Expert witness Zečević was categorical in the presentation of his findings and opinion, while expert witness Kostić was categorical concerning certain issues, while he could not be certain regarding other issues. By their confrontation, the Panel attempted to remove the foregoing differences. Finally, the expert witnesses could not agree in their opinions on the critical incident or on the institution abroad which would be entrusted with a possible additional expert analysis in the absence of a competent institution in Bosnia and Herzegovina. Having analyzed the written findings of both expert witnesses, their examination and confrontation at the main trial, and bringing them into relation with the other evidence, the Panel accepted the Finding and Opinion of expert witness Berko Zečević.

320. Expert witness Berko Zečević based his Finding and Opinion on a scientific basis, presented empirical and scientific views, was categorical and convincing in the presentation, carried out a detailed and complete analysis of all essential factors that are decisive in drawing the conclusion on the type of projectile, the firing direction and the distance of the firing position from the explosion site, as well as the ballistic drop of the projectile, its destructive power, and gave reasonable and logical arguments. His Finding and Opinion is supported by the record on the on-site investigation made immediately after the incident had occurred, as well as by the UNPROFOR report, more precisely, of the Joint Independent Commission comprised of professionals. All this was also confirmed by witness Charlef Brantz who participated in drafting the mentioned report and who testified at the main trial, having stated on that occasion that immediately on drafting the report, UNPROFOR members knew precisely from where the shell had been fired, but they did not want to state the precise location of the shell-firing position in order not to reveal to the ABiH the positions of the VRS artillery weaponry. They also deleted this information from the map

which was tendered as evidence T-23.²⁴¹ The Panel gave credit to this witness who is independent and unbiased, and who did not have any reason to support any of the parties. Furthermore, witness Dragan Babić, in giving his statement during the investigation, confirmed in part at the main trial, stated that at the critical time he was not present in Panjik, but that he had heard on TV about the incident. After he returned to the unit, he spoke with the members of the 130 mm gun team who confirmed to him that they had fired at targets in Tuzla on that day, and that they were sorry for that.²⁴²

321. The Panel concluded that with its arguments the Defense did not manage to bring into question the Finding and Opinion of expert witness Berko Zečević with regard to the relevant issues.

322. On the other hand, in presenting his Finding and Opinion, the Defense expert witness presented the theories opposite to the thesis presented by the Prosecution expert witness, but failed to explain clearly and in detail the manner in which he reached his conclusions.

323. This expert witness changed the distance between the explosion site and the indisputably fixed points, namely the distance between one and the other side of the building next to which the explosion occurred in the manner explained in the foregoing text. By doing so, all the parameters that this expert witness reached were brought under suspicion. Furthermore, he simultaneously expressed his doubt as to the fact that the shell that hit Kapija was fired at all from any artillery weapon, presented his theory of setting the projectile beforehand, but failed to present the manner in which he reached his conclusion. During the confrontation of the expert witnesses, expert witness Kostić showed with his hand how the projectile could be placed on the site. Kostić also expressed his suspicion in an unconvincing manner into a possible number of the killed civilians. His theories were not corroborated with any piece of evidence whatsoever. As to the direction and the distance of the projectile firing and the explosion site, expert witness Kostić concluded that the projectile had come from the east and established the distance albeit failing to state the specific location. He did not go to the crime scene to establish which location was at that distance, which brings under suspicion his finding, particularly when one bears in mind that

²⁴¹ Witness Charlef Brantz, 17 June 2008

²⁴² Witness Babić Dragan, 20 May 2008

it ensues from the witness Charlef Brantz statement given in the investigation²⁴³ that the ABiH was located to the east of the frontline, and that witness Manojlo Milovanović confirmed that the ABiH did not have a 130 mm gun.

324. The Panel concluded that the finding of expert witness Kostić could not be accepted beyond any reasonable doubt.

325. Finally, based on a careful analysis of all relevant evidence, the Panel rejected all other proposed theories about the projectile. Based on all the foregoing, it was established beyond any reasonable doubt that the projectile that on 25 May 1995 landed on the Kapija square at 20.55 came from the west, from the area of Panjik village, which is located on the Ozren mountain, that it was a 130 mm M 46 caliber projectile, and that 71 persons were killed and over 130 persons sustained severe or light injuries as the result of the explosion.

c. Responsibility for the incident

326. The last question raised by this case is to know who was at the origin of the firing of the gun that hit Kapija square in Tuzla on 25 May 1995. There are two possible theories of responsibility for how this particular shelling occurred. Either the 130 mm gun was fired arbitrarily without authorization or it was done as a result of a direct order. The Panel will examine each theory in turn.

i. Arbitrary or unauthorized use of fire?

327. The Panel first looked to see if there was any evidence that this firing was done without authorization. Both documentary and viva voce evidence clearly details how guns were supposed to be fired under VRS Rules. There was no evidence presented by either the Prosecution or the Defense indicating that the 130 mm gun was ever fired arbitrarily or

²⁴³ T-26 (Witness Examination Record for Charlef Brantz, Prosecutor's Office of Bosnia and Herzegovina, 5 December 2007)

without authority. On the contrary, the Panel heard several witnesses who explained that the 130 mm guns from Panjik were always fired following an order from their superior unit.²⁴⁴

328. The VRS used their artillery pieces according to the Artillery Firing Rules in the Yugoslav People's Army of 1981.²⁴⁵ The Rulebook provides strict rules governing the usage and control of artillery fire so as to enable full control over the artillery pieces and avoid any instances of arbitrary or unauthorized usage of fire.

329. Witnesses testified that they received either a written order or an oral order from the appropriate superior.²⁴⁶ Witness Manojlo Milovanović also stated that orders could be issued both orally and in writing. The 130 mm Gun Platoon in Panjik only received its orders from the Ozren Tactical Group command.²⁴⁷ It usually received the order to fire a gun from the Chief of Artillery of the Ozren Tactical Group, nicknamed "Omega".²⁴⁸ Moreover, the 130 mm Gun Platoon received the orders through a wired landline,²⁴⁹ and the Gun Platoon Commander would then pass on the order to the Gun Squad commander, who would fire the gun.²⁵⁰

330. The Rulebook provides that orders issued by superiors contained pre-plotted and numerated targets.

331. All of the witnesses who were members of the 130 mm gun platoon were adamant that the firing orders were issued by the commander in accordance with the pre-numerated targets or the coordinates of the target.²⁵¹ The Panel heard evidence showing that below the

²⁴⁴ Witness Nenad Čolić, 13 May 2008; Witness Slavko Stojanović, 20 May 2008; Witness Mile Savić, 8 April 2008; Witness Mladen Dostanić, 10 February 2009; T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), p. 5; T-1, p. 4.

²⁴⁵ T-153 (Artillery firing rule of the JNA, 1981)

²⁴⁶ Witness Milan Đurić, 13 May 2008.

²⁴⁷ Witness Goran Mrzić, Nenad Čolić, Slavko Stojanović

²⁴⁸ T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 5; T-8, p. 5; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁴⁹ Witness Dragan Jovanović, 18 March 2008; Witness Zoran Lazarević, 8 April 2008; Witness Dragan Vasiljević, 18 March 2008; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁵⁰ Witness Nenad Čolić, 13 May 2008; Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5.

²⁵¹ Targets for which coordinates had been calculated beforehand would receive a number: (Witness Ljubiša Čorsović, 10 June 2008; Witness Mile Savić, 16 December 2008; Witness Mladen Dostanić, 10 February 2009;

level of the Ozren Tactical Group, the units did not need to know what the target was in order to fire the 130 mm gun.²⁵² Several witnesses explained that the targets were known only by the Ozren Tactical Group command.²⁵³ The contrary evidence obtained from the witnesses renders it unable for the Panel to state whether or not the Gun Platoon or the Gun Squad actually had or could have had knowledge of the targets, although it seems more likely than not. However, the Panel finds that the evidence clearly indicates that the Accused was the lowest ranking person who had the authority to legally issue an order to fire the 130 mm gun. Therefore, the Panel deems it unnecessary to decide on whether or not the units subordinate to the Accused had actual knowledge of the targets.

332. The Panel finds that at least one of the guns was calibrated to target the town of Tuzla; since one gun was facing Lukavac and that the town of Tuzla is in the same alignment.²⁵⁴ Written orders confirm that the Commander Đukic was willing to fire these guns at the intended target.²⁵⁵ There is absolutely no evidence presented that indicates any unwillingness to shell the safe area or any questions raised as to the ramifications of this type of attack. Furthermore, there was a series of checks put in place to ensure the correct enumeration of the target. Indeed, after an order was executed, the unit had to report this to its superior unit; this reporting structure was following the vertical chain of command, and the VRS Main Staff was informed of the warring situation throughout BiH on a daily basis.²⁵⁶ Any execution of an order was also normally written in the war log; however, as explained previously, the Panel heard evidence that the VRS soldiers would try to avoid leaving traces of illegal orders, which could very well be executed by the use of oral means only. Therefore, the Panel finds that not all shells fired by the 130 mm gun platoon were written down in a war log or any other military document.

T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5). Whether or not all targets were numbered is irrelevant for this case. Indeed, the target analysts explained that one of them was always in the command post of the platoon command and could calculate the data necessary to fire a gun at a particular target.

²⁵² Witness Mile Savić, 16 December 2008.

²⁵³ Witness Nenad Čolić, 13 May 2008; Witness Manojlo Milovanović, 5 May 2009; Witness Slavko Stojanović, 20 May 2008; Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁵⁴ T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 6; Witness Ljubiša Čorsović, 10 June 2008; see map T-23 (Map of the town of Tuzla showing the projectile drop angle)

²⁵⁵ T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995)

²⁵⁶ Witness Manojlo Milovanović, 5 May 2009.

333. There was extensive testimony indicating that ammunition for these guns was scarce and therefore used sparingly.

334. Orders signed by the Accused clearly show that the combat brigade commanders could receive support of heavy artillery pieces 130 mm and 155 mm guns but had to request this to the commander of the Ozren Tactical Group.²⁵⁷ This meant that a brigade commander had no authority over these guns. He could not ask the commander of a 130 mm Gun Platoon to directly fire a 130 mm gun; he had to ask the Accused as the commander of the Ozren Tactical Group for this type of artillery support. The Accused would then order that a 130 mm gun be fired if he deemed the request pertinent.²⁵⁸ The Panel therefore finds that the Accused Novak Đukić had the authority to issue orders to the brigade commanders subordinate to him, as well as to the artillery support units, including to the 130 mm Gun Platoon command. As the Panel already found previously, the Accused Novak Đukić was the last person in the vertical chain of command of the VRS who had the power to legally issue an order to the 130 mm Gun Platoon located at Panjik to fire a 130 mm gun.

335. Both Prosecution and Defense witnesses were clear in saying that there were no instances of arbitrary or unauthorized use of artillery, and had there been such cases, they would have not gone unsanctioned. This is extremely important because there was also no other evidence presented to support this type of action. At no time did the Defense even raise the possibility that this shooting was the responsibility of a rogue soldier. Witness Manojlo Milovanović testified similarly when he talked about artillery firing rules and he strongly rejected any possibility of arbitrary or unauthorized use of fire.²⁵⁹ Therefore, the Panel excludes the possibility that a 130 mm gun from Panjik was fired arbitrarily on 25 May 1995. Having removed this theory from consideration, the Panel concludes this act could only occur as the result of a direct order, which it will explain in further details below.

²⁵⁷ T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-115 (Order for defense, Ozren TG Command, commander Novak Đukić, number 01/175-1, dated 25 April 1995); Witness Mladen Dostanić, 10 February 2009.

²⁵⁸ Witness Manojlo Milovanović, 5 May 2009; Witness Dragan Jovanović, 18 March 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁵⁹ The Law on the Army of the Serb Republic of Bosnia and Herzegovina, 'Official Gazette of the Serb people in Bosnia and Herzegovina', No. 7/92 (T-152).

336. Furthermore, documentary evidence indicates that the accused was present at his command post on 25 May 1995²⁶⁰ and that the state of full combat readiness was proclaimed²⁶¹, which entailed stricter control over the troops.

ii. An order by the superior following a clear vertical chain of command

337. The Law on the Army of the Serb Republic of Bosnia and Herzegovina was founded on two principles: the principle of the *unity of command*, that is, in terms of usage of manpower and equipment; and the principle of *single authority*, that is, subordination, mandatory execution of decisions and command orders, and orders issued by the immediate superior.²⁶² Every level of command within the VRS was bound to adhere to these principles throughout the war.

338. To have a better insight into the command structure of the VRS chain of command at the relevant time, the Court called witness Manojlo Milovanović to the stand, who was the Chief of the VRS Main Staff, an educated military professional, who gave a comprehensive and detailed description of the VRS structure and chain of command, in an unbiased way, and the Panel gives credence to this aspect of the witness' testimony.

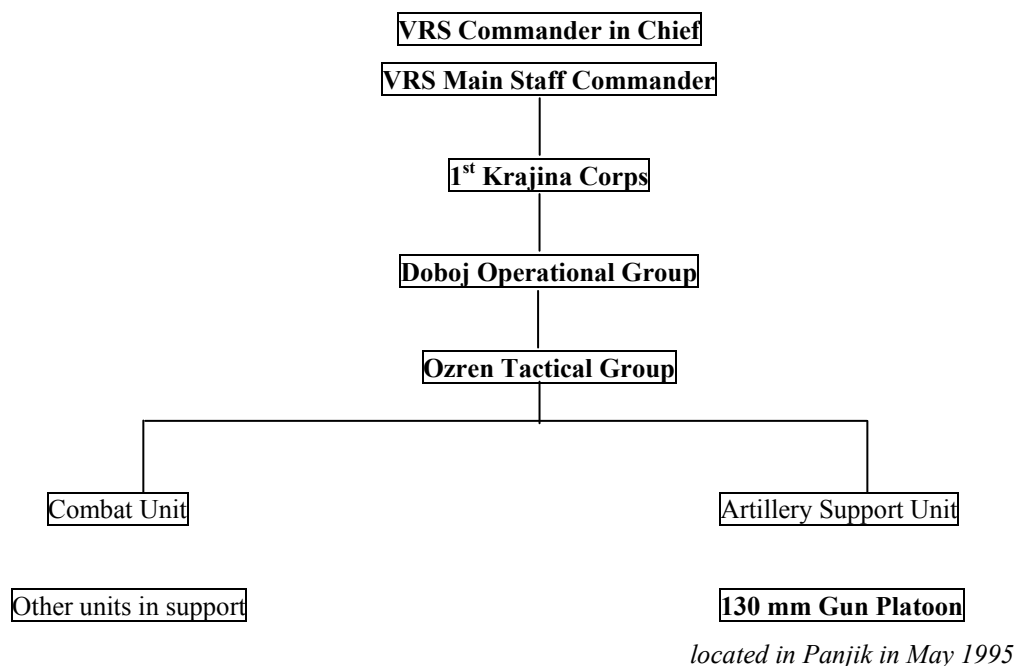
339. Witness Manojlo Milovanović confirmed that the VRS was functioning according to a strict vertical chain of command, which implied that orders could exclusively be issued by commanders and that the orders were being passed down the chain of command. Chiefs were entitled to give suggestions or pass on the orders, but were not in a position to issue any order.

²⁶⁰ The case-file contains two orders signed by the accused from his command post on 25 May 1995: T-131 (Order to report on 25 May 1995, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/231-1, for 25 May 1995) and T-132 (Order to units to provide information, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/232-3, 24 May 1995),

²⁶¹ T-133 (Order to increase vigilance, Ozren TG Command, commander Novak Đukić, strictly confidential No. 01/235-1, 24 May 1995) and T-161 (Order of the Main Staff of the RS Army signed by Manojlo Milovanović and dated 25 May 1995)

²⁶² The Law on the Army of the Serb Republic of Bosnia and Herzegovina, 'Official Gazette of the Serb people in Bosnia and Herzegovina', No. 7/92.

340. In this case the line of command was as follows:



341. A Tactical Group was a temporary unit set up to coordinate the work of several brigades operating within the same area of responsibility. A tactical group was composed of several brigades located in the same area of responsibility; the commander of a tactical group would then become the superior of these united brigades. The commander of a tactical group was therefore issuing orders to the brigades subordinate to him. The aim of creating a tactical group was to have a more efficient command structure and reduce the chain of command, so that the commander of an operative group did not have to issue orders to each brigade commander. The tactical group had the same combat tasks as that of a brigade.²⁶³ The Panel finds that, following the strict vertical chain of command in place in the VRS, a tactical group was under the direct command of the VRS Main Staff.

342. The chief of staff is also the deputy commander and will take over the role of the commander when the latter is not in the area of responsibility of his unit. The chief of artillery proposes how to use the artillery but cannot order to fire a piece of artillery. The operations officer is in charge of maintaining war logs and working maps.²⁶⁴ The platoon

²⁶³ Witness Manojlo Milovanović, 5 May 2009.

²⁶⁴ Witness Manojlo Milovanović, 5 May 2009.

target analyst calculates the firing elements of a target.²⁶⁵ The Gun Platoon commander passes on the order he receives from his superior to the field crew, or orders the firing of the gun himself if he has authority over that particular gun. The Gun Squad Commander fires the gun.²⁶⁶

343. As stated before, witnesses testified that they received either a written order or a verbal order from the appropriate superior.²⁶⁷ The 130 mm Gun Platoon in Panjik usually received the order to fire a gun from the Chief of Artillery of the Ozren Tactical Group, nicknamed “Omega”.²⁶⁸ The 130 mm Gun Platoon received the orders through a wired landline.²⁶⁹ The 130 mm Gun Platoon in Panjik only received its orders from the Ozren Tactical Group command.²⁷⁰

344. As explained above, the Panel finds that the Commander of a Tactical Group was the lowest person in the chain of command who had the authority to issue an order to fire a 130 mm gun. He was directly in charge of the use of the 130 mm gun. The Panel concludes that the Accused Novak Đukić was last in the chain of command and therefore the last person with the authority to issue an order for the firing of a 130 mm gun.

345. As explained previously, the Panel has found that the Accused was at his command post on 25 May 1995 as the Commander of the Ozren Tactical Group. Through the reporting structure put in place within the VRS, and which was functioning on 25 May 1995, the Accused was aware of the situation on the ground, which had intensified several days prior to 25 May 1995. He was in command of his subordinate units.

²⁶⁵ Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; Witness Dragan Babić, 20 May 2008. Witness Goran Mrzić added that he believed that most of his calculations were double-checked and confirmed by the Ozren Tactical Group (T-10, p. 5).

²⁶⁶ Witness Nenad Čolić, 13 May 2008; Witness Goran Mijatović, 13 May 2008; Witness Goran Mrzić, 20 May 2008; Witness Milan Đurić, 13 May 2008; T-10 (Witness Examination Record for Goran Mrzić, State Investigation and Protection Agency, 27 November 2007), p. 5; T-12 (Witness Examination Record for Dragan Babić, State Investigation and Protection Agency, 28 November 2007), p. 5.

²⁶⁷ Witness Milan Đurić, 13 May 2008.

²⁶⁸ T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 5; T-8, p. 5; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁶⁹ Witness Dragan Jovanović, 18 March 2008; Witness Zoran Lazarević, 8 April 2008; Witness Dragan Vasiljević, 18 March 2008; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁷⁰ Witness Goran Mrzić, Nenad Čolić, Slavko Stojanović

346. On 25 May 1995, the Accused was in a position to issue orders to his subordinates, as usual. There is nothing that would suggest that the Accused was prevented that day from issuing orders or had delegated his authority to any one else. This conclusion is supported by the two orders that the Accused issued that day from his command post.²⁷¹ There is one inescapable conclusion that this act was the result of a direct order issued by the Commander of the Ozren Tactical Group, that is Novak Đukić.

iii. Summary of Factual Findings

347. The Panel has explained in the above-part of the reasoning what evidence was used to establish the relevant facts, listed in the text below, as the facts used to conclude beyond any reasonable doubt who was responsible for the commission of the criminal offence charged under Count 1 in the Indictment.

- An M46 130 mm gun was located in the Panjik area on Mount Ozren at the relevant time.
- Distance from Panjik to the Kapija area in Tuzla is around 27,000 meters.
- The ultimate range of an M46 130 mm gun if maximum charge is used equals 27,000 meters.
- The area of Panjik at Mount Ozren was under the control of the VRS during the relevant time.
- An M46 gun 130 mm located in Panjik on Mount Ozren had been designated for firing at the town of Tuzla by the order of Novak Đukić even before 25 May 1995.
- 130 mm gun is not intended to be used against point targets.
- A projectile fired from an M46 130 mm gun has high destructive power and a wide lethal zone.
- An M46 130 mm gun platoon located in Panjik was part of the Gun Artillery Platoon of the Ozren Tactical Group.
- Gun Artillery Platoon, an M46 130 mm gun included, was under the direct command of the Ozren Tactical Group Commander.

²⁷¹ The case-file contains two orders signed by the accused from his command post on 25 May 1995: T-131 (Order to report on 25 May 1995, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/231-1, for 25 May 1995) and T-132 (Order to units to provide information, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/232-3, 24 May 1995),

- The Accused Novak Đukić was the Commander of the Ozren Tactical Group at the relevant time.
- The commander of the Ozren Tactical Group had exclusive competence to issue orders for the usage of the M46 130 mm gun.
- Chiefs of artillery could give proposals to the commander for the gun to be used, but they could not issue any orders for the usage.
- Orders could be issued in writing or orally.
- The M46 130 mm gun crew had direct wire connection only with the TG Ozren Command.
- TG Ozren Command was located in Panjik.
- The VRS had a clearly distinguished chain of command and subordination. Command hierarchy was strictly obeyed.
- The Accused Novak Đukić was last in the chain of command who could issue orders for the usage of the M46 130 mm gun.
- There is no evidence for arbitrary or unauthorized use of fire.
- On 25 May the Accused was at his command post.

348. For the above reasons, the Panel has concluded beyond a reasonable doubt that the Accused committed the criminal acts as described under Count 1 of the Indictment.

2. Legal Findings

349. The Panel finds that the Accused is charged with having ordered the crime of War Crimes against Civilians, contrary to Article 173(1) of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH.

350. The Panel recalls its previous findings and reiterates that it already found that three out of four general requirements of War Crimes against Civilians listed in article 173(1) of the CC of BiH are met in the present case. These general requirements are: the criminal conduct must be *in violation of rules* of international law in time of war, armed conflict or occupation; the violation must *take place* in time of war, armed conflict or occupation; and the act must *be related to* the state of war, armed conflict or occupation.

351. In addition to the above findings, the Panel determined whether the factual findings (see Section IV) allow it to reach a legal conclusion on the existence of “Attacks against Civilians” and “Indiscriminate Attacks” as underlying offences of War Crimes against Civilians. The legal requirements for an Attack against Civilians are as follows: there needs to be an attack; against a civilian population; and the perpetrator must have acted with intent, while an additional legal requirement for an Indiscriminate Attack is that the attack was launched indiscriminately

352. Finally, the Panel determines whether the last general element required by Article 173(1) of the CC of BiH is met, that is that the Accused must order or perpetrate the criminal act. By reaching this conclusion, the Panel examines the individual responsibility of the Accused and therefore analyzes whether the requirements of Article 180(1) of the CC of BiH are met.

a. Evidence supporting the existence of the commission of War Crimes against Civilians (see III.B.2.)

353. Both Attacks against Civilians and Indiscriminate Attacks require first of all that there be an attack. The Panel stated in paragraph 184 that an attack is an act of violence against the adversary, whether in offence or in defense. The Panel finds without any doubt that the shelling of Kapija square on 25 May 1995 at 20:55 can only be qualified as an attack. The firing of a gun always constitutes an attack, and the circumstances of this particular attack, *i.e.* the status of the town of Tuzla, the nature of the people that were on Kapija square, the size of the gun, the position of the VRS forces on Ozren Mountain and their prepared targets all constitute elements reinforcing the Panel’s conclusion that the shelling of Kapija square on 25 May 1995 constitutes an attack.

354. The Panel further finds that the population present at Kapija square on 25 May 1995 when the 130 mm gun launched by the VRS positions in the village of Panjik exploded in the middle of the crowded square was all civilians. This is first supported by the fact that Tuzla was a safe area created in order to allow civilians to find shelter in a designated area, the town of Tuzla, which was supposed to be free from all armed attacks. The main square of the

town most definitely is included in the safe area. Moreover, all the victims that came to testify are to be qualified as civilians. On the evening of 25 May 1995, they were all enjoying the company of their friends and family. None were armed or prepared to be attacked. Witness Mladen Dostanić, member of the VRS and Chief of Staff of the 2nd Ozren Light Infantry Brigade added that, in his opinion, the inhabitants of Tuzla were civilians.²⁷² Additionally, no witness ever indicated that there were any armed forces on the square or nearby, and the parties did not seek to introduce such evidence. Therefore, the Panel finds that the attack on Kapija square on 25 May 1995 at 20:55 was directed against a civilian population.

355. Article 173(1)(a) of the CC of BiH also requires that the Attack against Civilians result in death, grave bodily injuries or serious damaging of people's health. The Panel finds that the deceased victims and the victims which sustained serious injury which are listed hereafter are victims of the shelling on Kapija square on 25 May 1995, legally qualified as an Attack against Civilians and an Indiscriminate Attack. These victims are:

1. Deceased victims:

- Suzan Abo Ismail;
- Edina Ahmetašević;
- Elvis Alagić;
- Admir Alispahić;
- Lejla Atiković;
- Asmir Bakalović;
- Adnan Beganović;
- Damir Bojkić;
- Indira Borić;
- Ilvana Bošnjaković;
- Elma Brguljak;
- Lejla Bučuk;
- Sanja Čajić;
- Selma Čaušević;
- Amir Čekić;
- Almasa Čerimović;
- Samir Čirak;
- Zada Dedić;
- Razija Djedović;
- Amir Đapo;
- Suzana Đušić;
- Amir Đuzel;
- Muris Fatušić;
- Ago Hadžić;
- Hamdija Hakić;
- Senad Hasanović;
- Šemsa Hasičić;
- Alem Hidanović;
- Nedim Hodžić;

²⁷² Witness Mladen Dostanić, 10 February 2009.

- Hasan Hrustanović;
- Adnan Hujdurović;
- Elvira Hurić;
- Almir Jahić;
- Jelena Jezidžić – Stojčić;
- Azur Jogunčić;
- Sandro Kalesić;
- Franc Kantor;
- Damir Kurbašić;
- Vanja Kurbegović;
- Vesna Kurtalić;
- Pera Marinović;
- Nenad Marković;
- Sulejman Mehanović;
- Amira Mehinović;
- Edin Mehmedović;
- Edisa Memić;
- Adrijana Milić;
- Edin Mujabašić;
- Nešet Mujanović;
- Samir Mujić;
- Elvir Murselović;
- Šaban Mustaćević;
- Dijana Ninić;
- Selma Nuhanović;
- Indira Okanović;
- Rusmir Ponjavić;
- Raif Rahmani;
- Fahrudin Ramić;
- Nedim Rekić;
- Jasminko Rosić;
- Senahid Salamović;
- Edhem Sarajlić;
- Jasminka Sarajlić;
- Asim Slijepčević;
- Savo Stjepanović;
- Armin Šišić;
- Nihad Šišić;
- Ilinka Tadić;
- Azur Vantić;
- Mustafa Vuković;
- Adnan Zaimović;

2. Seriously injured victims:

- Sanela Ahmetović;
- Zijad Aljukić;
- Nedžad Aljić;
- Denis Altumbabić;
- Alma Avdić;
- Nihad Alić;
- Nihad Babajić;
- Alen Baraković;
- Hafija Baraković;
- Muhamed Baraković;
- Demir Behlulović;
- Almir Borogovac;
- Almir Brkić;
- Edin Buzaljko;
- Suada Čačković;

- Sead Cipurković;
- Samir Čorsulić;
- Mirza Čilimković;
- Jasmin Dajanović;
- Almir Delić,;
- Enes Dedić;
- Zoran Divjan;
- Samir Đapo;
- Goran Đulabić;
- Edin Gulamović;
- Ljubiša Glogovac;
- Estin Habibović;
- Bahrudin Hadžiefendić;
- Ajla Hadžimehmedović;
- Jasmin Hadžimehmedović;
- Asim Hadžiselimović;
- Mirsad Hajdarević;
- Jasmin Hajdarević;
- Ademir Halilčević;
- Safeta Hasanović;
- Edin Hodžić;
- Mehmed Husarčić;
- Edin Hurić;
- Elsa Hurić;
- Damir Husejnović;
- Samir Husejnefendić;
- Jasmina Ibraković;
- Admir Ikinić;
- Miralem Imamović;
- Jasenko Imširović;
- Muhamed Isić;
- Almir Jahijagić;
- Zoran Jakubec;
- Nevres Jašarević;
- Azra Kapetanović;
- Semir Kusturica;
- Alen Ljaljić;
- Šejla Ljaljić;
- Alis Mahmutović;
- Nedim Malhodžić;
- Šimo Marijanović;
- Nedžad Mašić;
- Omer Medić;
- Amel Mehmedović;
- Samir Mehmedović;
- Omer Mekić;
- Fikret Memić;
- Mirko Mišković;
- Adnan Mujačić;
- Zlatan Mujčinović;
- Damir Mujkanović;
- Senada Mujkić;
- Senad Mulajusufović;
- Alma Muratović;
- Selma Mustajbašić;
- Admir Nakić;
- Davor Nečemer;
- Edin Nukić;
- Hajrija Nurkić;
- Nedim Omerović;

- Adisa Oprešić;
- Damir Osmanović;
- Ramiz Pašalić;
- Ivo Petrović;
- Adnan Pirić;
- Selma Pirić;
- Amra Ponjavić;
- Nenad Radojčić;
- Osman Ramadanović;
- Almir Ramić;
- Zijad Ravančić;
- Jasmin Razić;
- Alema Sadiković;
- Jasmina Sahitović;
- Edin Sakić;
- Esad Salkić;
- Enver Smajić;
- Semir Smajić;
- Tihomir Stojanović;
- Entaz Suljetović;
- Zlatan Suljetović;
- Sanja Šečić;
- Sejfudin Šehmehmedović;
- Ivo Tadić;
- Melita Talić;
- Idriz Teparić;
- Krunoslav Tokić;
- Damir Tucaković;
- Jasmina Zaimović;
- Adnan Zoletić;
- Fahreta Zonić;

356. Moreover, the Panel finds that the victims who are listed hereafter and sustained lesser injuries are victims of an Indiscriminate Attack under Article 173(1)(b) of the CC of BiH. These victims are:

- Almir Alić;
- Merima Alić;
- Safeta Baraković;
- Anes Begić;
- Nedžad Begunić;
- Enes Berbić;
- Majda Borić;
- Almir Bulić;
- Emir Čehajić;
- Feđa Čustendil;
- Azra Dajanović;
- Mirel Duraković;
- Mirza Fazlović;
- Ana Gavrić;
- Benjamin Hadžiefendić;
- Adnan Hajdarhodžić;
- Eldar Hamzić;
- Majda Hamzić;
- Mensur Hasanović;
- Zijada Hasinović;
- Amir Hodžić;

- Mensur Hodžić;
- Alma Hurić;
- Nadir Huremović;
- Admir Ikanović;
- Amir Ikanović;
- Mirsad Imamović;
- Ahmed Isić;
- Nermina Islamović;
- Admir Jahić;
- Radenko Jovičić;
- Irmela Junuzagić;
- Dino Kalesić;
- Irena Kalesić;
- Emin Kodžaga;
- Edin Kofrc;
- Jasmin Konić;
- Nahid Kulenović;
- Hasan Kurtić;
- Fahrudin Međedović;
- Borislav Marić;
- Davor Mariček;
- Mevlida Mehinagić;
- Adnan Mešković;
- Asmir Mujanović;
- Emin Musemić;
- Mirza Musić;
- Admir Nakić;
- Almir Nuhanović;
- Asmir Numanović;
- Mirza Omerović;
- Damir Pirić;
- Amir Rahmanović;
- Fahrudin Rahmanović;
- Sadik Salkić;
- Alema Sadiković;
- Enes Samardžić;
- Muhamed Sejdanić;
- Mirsad Simić;
- Anželika Stojčević;
- Elisa Suljendić;
- Selma Šećerbegović;
- Admir Šehić;
- Admir Šuvalić;
- Edin Tvica;
- Jasmina Zahirović;
- Hatidža Zonić.

357. The Panel finds that the attack launched on Tuzla on 25 May 1995 at 20:55 was indiscriminate. In the present case, the Panel finds that the area surrounding Kapija square was entirely civilian in nature. The shell landed in the middle of this large area and the Panel found it elemental that the target was civilian in nature, even if the specific target could not be proven. The Panel did not exclude the possibility that the shell that landed on Kapija square was not intended to explode there, but in an area nearby. Considering that the shell

was fired from the village of Panjik, which was 27 km away from Kapija, the area in which the shell could have fallen was +/- 380 meters from the aimed target. Therefore, the shell could have been targeted at another place than Kapija. However, no matter where the shell would have landed, there was a high risk that the civilian population be hurt by such an attack.

358. Considering the above, the Panel finds that the material elements, that is to say the *actus reus*, of an Attack against Civilians and Indiscriminate Attack as criminalized by article 173(1)(a) and (b) of the CC of BiH are met in the present case.

359. Furthermore, the Panel finds that the Accused committed the offence with indirect intent.* Indeed, Article 35(1) of the CC of BiH clearly stipulates that “[a] criminal offence may be perpetrated with direct or indirect intent”. “*Dolus eventualis* is a state of mind where a person foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting”²⁷³. Article 35(3) defines indirect intent as a situation where “a perpetrator was aware that a prohibited consequence might have resulted from his action or omission to act but nevertheless consented to its occurrence”.

360. The Panel has no doubt as to the fact that the Accused knew that Tuzla was a safe area protected by UN Security Council Resolutions.²⁷⁴ The Accused knew that at least the majority of the population of Tuzla was composed of civilians, who had to be spared from any violence related to military conflicts. The Accused signed an order in which he affirms his readiness to order that the 130 mm gun in Panjik pointed at Tuzla be fired and that therefore Tuzla is ready to be targeted.²⁷⁵ Therefore, by ordering that a shell be launched on the center of Tuzla, whether he had the intent that the shell landed on Kapija square or elsewhere nearby, he deliberately took the risk that a large section of the civilian population of Tuzla be hurt, amounting to an Attack against Civilians and an Indiscriminate Attack, and thereby acted with recklessness.

²⁷³ Antonio Cassese, *International Criminal Law. Second Edition*, Oxford University Press, 2008, p. 66 [emphasis in the original].

²⁷⁴ Para number 201 and 202.

²⁷⁵ T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995)

* Translator’s note: in the English legal terminology, recklessness is a form of indirect intent.

361. The Panel bases the foregoing conclusion also on the characteristics of the weapon that was used to commit the offence, i.e. that it is not designed to hit point targets, as well as on the averment that it is almost impossible to hit the selected target with the first projectile.

362. Considering the above, the Panel finds that the subjective elements, that is to say the *mens rea*, of an Attack against Civilians and Indiscriminate Attack as criminalized by article 173(1)(a) and (b) of the CC of BiH are met in the present case.

b. Evidence supporting the individual criminal responsibility of the Accused for ordering (see III.C.)

363. The Panel finds that the Accused Novak Đukić ordered that a shell be fired on the town of Tuzla on 25 May 1995. The Panel was not presented with direct evidence that the Accused actually issued an order to fire a shell on the town of Tuzla on 25 May 1995, directly or through his Chief of Artillery, in writing or verbally. However, the Panel finds that an order can be proven through circumstantial evidence.²⁷⁶ It is therefore based on the circumstances in which the military structure was functioning on a regular basis, and the circumstances in which the incriminating events took place, that the Panel reaches the conclusion that the Accused is responsible for the crimes committed.

364. The Panel first finds that the Accused was the *de jure* commander of the Ozren Tactical Group. This has been confirmed by several witnesses and orders signed by the Accused as Commander of the Ozren Tactical Group.²⁷⁷

365. The Panel heard evidence that the 130 mm guns were always fired from Panjik following an order they received from the Ozren Tactical Group command post.²⁷⁸ This order was usually issued verbally, using a wired landline which was in use and functioning

²⁷⁶ *Prosecutor v. Limaj et al.*, Trial Judgment, para. 515.

²⁷⁷ Witness Manojlo Milovanović, 5 May 2009. Orders signed by the Accused also clearly show that he was commanding these artillery support units: T-113 (Order for defense, Ozren TG Command, Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995)

²⁷⁸ Witness Nenad Čolić, 13 May 2008; Witness Slavko Stojanović, 20 May 2008; Witness Mile Savić, 8 April 2008; Witness Mladen Dostanić, 10 February 2009; T-9 (Witness Examination Record for Milan Đurić, State Investigation and Protection Agency, 22 November 2007), p. 5; T-1 (Witness Examination Record for Dragan Jovanović, BiH Prosecutor's Office, 19 November 2007), p. 4.

all the time.²⁷⁹ This order was usually issued by Captain Omega, which the Panel heard was the Chief of Artillery of the Ozren Tactical Group.²⁸⁰ The Panel found that the Chief of Artillery did not have the authority to issue orders directly, but was merely conveying orders from the Commander of the Ozren Tactical Group, the Accused Novak Đukić. Orders were usually transcribed in the war log; however the Panel also found plausible the explanation given by Manojlo Milovanović that illegal orders would not be written down so as not to leave any trace of the said illegal order.

366. The Panel finds that the Accused had clear authority over the 130 mm Gun Platoon located in the village of Panjik, who fired the 130 mm gun which hit the center of Tuzla. There is numerous evidence indicating that the Accused was regularly issuing orders and instructions to the Gun Platoon and the other brigades located in his area of responsibility²⁸¹; that he was informed of the execution of these orders²⁸²; and that he was receiving daily reports on the military activities in his area of responsibility²⁸³. The Panel finds that the soldiers in the village of Panjik were only obeying orders from the Accused through the chain of command. Therefore, Novak Đukić was also the *de facto* commander of the 130 mm Gun Platoon located at Panjik.

367. Finally, the Panel finds that the Accused was in the command post of the Ozren Tactical Group on 25 May 1995. Indeed, he conveyed several meetings that day.²⁸⁴ Nothing indicates that he was absent from his post at any moment on that day, or that the issuing of orders was following a different pattern from the usual one, or that the communication

²⁷⁹ Witness Dragan Jovanović, 18 March 2008; Witness Zoran Lazarević, 8 April 2008; Witness Dragan Vasiljević, 18 March 2008; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008; Witness Milan Đurić, 13 May 2008.

²⁸⁰ T-11 (Witness Examination Record for Slavko Stojanović, State Investigation and Protection Agency, 28 November 2007), p. 5; T-8 (Witness Examination Record for Nenad Čolić, State Investigation and Protection Agency, 22 November 2007), p. 5; Witness Goran Mrzić, 20 May 2008; Witness Dragan Babić, 20 May 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁸¹ T-113 (Order for defense, Ozren TG Command, Commander Novak Đukić, strictly confidential number 01/26-1, dated 21 January 1995); T-115 (Order for defense, Ozren TG Command, Novak Đukić, number 01/175-1, dated 25 April 1995); Witness Mladen Dostanić, 10 February 2009; Witness Manojlo Milovanović, 5 May 2009; Witness Dragan Jovanović, 18 March 2008; Witness Ljubiša Čorsović, 10 June 2008.

²⁸² T-13 (Witness Examination Record for Ljubiša Čorsović, State Investigation and Protection Agency, 29 November 2007), p. 4.

²⁸³ T-114 (Order for attack by the commander of the Ozren TG Command, Novak Đukić, strictly confidential number 01-128-1, dated 28 March 1995); T-117 (Combat order for defense and attack, Ozren TG Command, Novak Đukić, strictly confidential number 017275-1, dated 5 June 1995).

²⁸⁴ T-131 (Order for the Commanders to Report, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/231-1, for 25 May 1995) and T-132 (Order to Intelligence Units, Ozren TG Command, Commander Novak Đukić, strictly confidential No. 01/232-3, 24 May 1995)

system was down. Everything was functioning as usual, and therefore Novak Đukić was issuing orders to the 130 mm Gun Platoon in Panjik.

368. The Panel therefore finds that the Accused issued an order to the 130 mm Gun Platoon in Panjik to fire a 130 mm gun on Tuzla on 25 May 1995.

369. The Panel also finds that that the commission of the war crimes against civilians contained in the Indictment, that is the Attack against Civilians and Indiscriminate Attack, are in direct causal link with the order to fire a 130 mm gun. Indeed, it is because an order was issued to fire the 130 mm gun on the town of Tuzla that that gun caused the human catastrophe on Kapija square on 25 May 1995.

370. The Panel hereby finds that the material elements, that is to say the *actus reus* elements of the mode of liability of Ordering as criminalized by article 180(1) of the CC of BiH are met in the present case.

371. Furthermore, the Panel finds that the Accused acted at least with the awareness of the substantial likelihood that the crime would be committed in execution of the order he issued, and therefore meets the *mens rea* requirements of the mode of liability of “ordering”. The Panel has no doubt as to the fact that the Accused knew that Tuzla was a safe area protected by UN Security Council Resolutions.²⁸⁵ The Accused knew that at least the majority of the population of Tuzla was composed of civilians, who had to be spared from any violence related to military conflicts. Therefore, by ordering that a shell be launched on the safe area of Tuzla, whether he had the intent that the shell landed on Kapija square or elsewhere nearby, he was aware of the substantial likelihood that the protected civilian population would be hurt in indescribable ways.

372. The Panel hereby finds that the subjective elements, that is to say the *mens rea* elements of the mode of liability of Ordering, as criminalized by article 180(1) of the CC of BiH, are met in the present case.

²⁸⁵ See paragraphs 201 and 202.

c. Summary of Legal Findings

373. An Attack against Civilians took place on Kapjia square on 25 May 1995, contrary to Article 173(1)(a) of the CC of BiH.

374. An Indiscriminate Attack took place on Kapjia square on 25 May 1995, contrary to Article 173(1)(b) of the CC of BiH.

375. The Accused Novak Đukić ordered the commission of the mentioned war crimes against civilians, contrary to Article 180(1) of the CC of BiH.

376. For all the above reasons, the Accused Novak Đukić is found guilty of the crime of War Crimes against Civilians, contrary to Article 173(1)(a) and (b) of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH, and is sentenced to the long-term sentence of 25 years imprisonment.

B. COUNT 2: THE SHELLING ON 28 MAY 1995

Factual Finding : Did the incident occur?

377. It is stated in the Indictment that on 28 May 1995 nine artillery projectiles fell on the city of Tuzla of which:

- a. One projectile fired at 7:30 h hit the bus stop in the Moše Pijade Street next to number 6, and Pejo Pekić from Tuzla was killed in its explosion, while material damage amounting to 7,033.00 KM was caused to the *Univerzal promet* Tuzla tobacco store located at the bus stop;
- b. The projectile fired at 07:35 hours exploded at the 16. Muslimanske brigade Street, and Safet Telarević and Anto Martinović suffered minor bodily injuries in its explosion;
- c. The projectile fired at 07:37 hours exploded at the Muje Smajlovića Street next to number 7, and its explosion caused material damage amounting to 15,384.00 KM to the warehouse of the private enterprise *La Campanela*, owned by Nijaz

- Imamović from Donje Vukovije, and material damage amounting to 24,397.00 KM to the Municipal hut facility in the compound of the Tuzla Aero Club;
- d. The projectile fired at 07:38 hours exploded at the 3 Rudolfa Vikića Street, on the sidewalk on the south side of the garage owned by Vehid Ordagić, on which occasion Almedina Hurahović suffered a minor bodily injury, while material damage was caused to the garage;
 - e. The projectile fired at 08:30 hours exploded at the II Krajiške brigade Street on the ground, so that material damage was not caused;
 - f. The projectile fired at 11:50 hours exploded at the 57 Meme Suljetovića Street, on the roof of a facility ancillary to the house owned by Rifat Bakalović, causing substantial material damage;
 - g. The projectiles fired from 12:00 to 17:37 hours exploded within the Tuzla Steel Foundry compound, causing material damage which amounted to 158,090.00 KM to the Foundry facilities.

378. The Panel primarily addressed whether the evidence existed confirming beyond any reasonable doubt that the events referred to under Count 2 of the Indictment occurred. Therefore, before rendering its decision, the Panel carefully considered all the evidence, both the witness testimonies and the physical evidence. A record on the on-site investigation was made on 28 May 1995 regarding all the foregoing events.²⁸⁶ It can be seen from the record concerned that on 28 May 1995 nine artillery projectiles fell on the city of Tuzla, of which 7 projectiles fell on the places specifically stated in the Indictment. It ensues from the presented evidence that on the critical day one projectile fell within the compound of the Livnica factory, and not several as stated in the indictment.

379. During the main trial, none of the witnesses testified with regard to these circumstances. The only witness, Charlef Brantz, in the statement from the investigation given in the Prosecutor's Office confirmed that Tuzla was shelled on 28 May 1995, and that he heard the shell that fell near the mayor's office on 28 May 1995.²⁸⁷ Haukland Hagrup's report stated that after 25 May 1995 more similar shells fell on Tuzla.²⁸⁸

²⁸⁶ T-80 (On-site investigation report, SJB Crime Police Department Tuzla, No. 20-PU-I/15-02, 28 May 1995)

²⁸⁷ T-26 (Witness Examination Record for Charlef Brantz, Prosecutor's Office of Bosnia and Herzegovina, 5 December 2007)

²⁸⁸ Letter of the Brigadier General Hagrup Haukland sent to Major General Ropert Smith (T-15)

380. The Panel also analyzed the other proposed evidence and found beyond any reasonable doubt that the stated incidents occurred, except that only one projectile fell within the Livnica compound as stated above. The factual conclusions of the Panel ensue from the physical evidence that was presented at the main trial, namely the photo documentation made by the MoI Tuzla concerning the shelling of Tuzla dated 28 May 1995 for the streets Moše Pijade next to number 6, 2. Krajiške next to number 17, M. Suljetovića 57; Rudolfa Vikića 3, 16. Muslimanske brigade, and the Record of on-site investigation dated 28 May 1995; the Record on the shelling of the house of Rifat Bakalović; Record of the external examination of the corpse of Pero Pekić dated 29 May 1995; Official Notes concerning the informative interview made with Muhamed Hajrić, Crime Police Department Tuzla dated 21 August 1997; Official Notes concerning the informative interview made with Nijaz Imamović, Crime Police Department Tuzla dated 21 August 1997; Assessment of the war damages caused to the dd Livnica Tuzla number 715 dated 7 September 2005 with the records dated 9 September 1992, 15 May 1995 and 28 May 1995.²⁸⁹

381. However, based on the proposed evidence the Panel was not able to establish beyond any reasonable doubt in which manner the critical incidents occurred.

382. It cannot be concluded from the presented evidence which type of projectile fell on the city of Tuzla on 28 May 1995, that is, from which type of weapon the projectiles were fired. Certain official notes attached to the photo-documentation concerned stated that it was artillery weaponry, but without any specification of the concrete weapon. Therefore, the Panel could not bring into connection the 130 mm M46 gun that was stated in the Indictment with the incident concerned.

²⁸⁹ T-75 (Photo documentation – the shelling of Tuzla, Moše Pijade Street next to number 6, MUP /Ministry of the Interior/ Tuzla, No. 20-1/02-3-9-174/95, dated 28 May 1995), T-76 (Photo documentation – the shelling of Tuzla, 2. Krajiške Street next to number 17, MUP Tuzla, No. 20-1/02-3-9-175/95, dated 28 May 1995), T-77 (Photo documentation – the shelling of Tuzla, 57 M. Suljetovića Street, MUP Tuzla, No. 20-1/02-3-9-197/95, dated 14 June 1995), T-78 (Photo documentation – the shelling of Tuzla, 3 Rudolfa Vikića Street, MUP Tuzla, No. 20-1/02-3-9-176/95, dated 28 May 1995), T-79 (Photo documentation – the shelling of Tuzla, 16. Muslimanske brigade Street, MUP Tuzla, No. 20-1/02-3-9-177/95, dated 28 May 1995), T-80 (On-site investigation report, SJB Crime Police Department Tuzla, No. 20-PU-I/15-02, 28 May 1995), T-81 (Record on the shelling of the house of Rifat Bakalović – 57 Meme Suljetovića Street, Tuzla Municipality, Local community Solana, No. 48/95, dated 1 June 1995), T-82 (Record on the external examination of the corpse of Pero Pekić, JZU Clinical Centre in Tuzla, Institute for Forensic Medicine, 29 May 1995), T-83 (Official note on the interview held with Muhamed Hajrić, Crime Police Department Tuzla, 21 August 1997), T-84 (Official note on the interview held with Nijaz Imamović, Crime Police Department Tuzla, 21 August 1997), T-85 (Assessment of war damage, Joint stock company Foundry Tuzla, number 715, dated 7 September 2005, with records dated 9 September 1992, 15 May 1995 and 28 May 1995).

383. As to the locations from which the projectiles were fired, the Panel was not presented with sufficient evidence. From the several official notes that constitute parts of the photo-documentation it ensues that the projectiles came from the south-west. Also, it is stated in the on-site investigation record that the projectiles came from the direction of Ozren. After the analysis of the record concerned, it cannot be established on what basis the persons who carried out the on-site investigation reached this conclusion and therefore the Panel concluded that it was just a conjecture.

384. The Panel also took into account the Finding and Opinion of the Defense witness expert Vlada Kostić who concluded based on the analyzed evidence that there was no ground for the assertion that the projectiles had come from the firing position located in the place of Panjik.

385. The Panel made a thorough and detailed analysis of all the evidence presented with regard to this Count of the Indictment, and based on them it could not reliably establish that the Accused committed the criminal offense in the manner as described in this Count of the Indictment. The Panel did not have available any other evidence of subjective or objective nature it could possibly bring into connection with the presented evidence, that would directly or indirectly charge the Accused.

386. Finally, based on the evidence adduced the Panel was not able to establish in which manner the incidents referred to in this Count of the Indictment occurred and, consequently, who is responsible.

387. Based on the foregoing, the Court acquitted the Accused of the charges under this Count of the Indictment pursuant to Article 284(c) of the CPC BiH.

VI. SENTENCING

A. SENTENCING THAT IS NECESSARY AND COMMENSURATE WITH THE GRAVITY OF THE CRIMINAL OFFENCE

388. In terms of the criminal offence of the Attack against Civilians and Indiscriminate Attack, that is, the commission of the criminal offence of War Crimes against Civilians, as described in the Verdict, which includes the shelling of the city of Tuzla, the then United Nations safe area, which culminated in the deaths of 71 people (primarily young adults) and the injuring and maiming of over 130 people, the Panel considered a sanction which is necessary and consistent with the cited legal aims, including the relevant legal elements.

1. The imposed sentence shall be necessary and commensurate with the level of the threat against persons and values protected (Article 2 of the CC of BiH)

389. In this regard, the Panel shall also be mindful of the legal elements pertaining to this specific purpose, that is, the sufferings of direct and indirect victims (Article 48 of the CC of BiH). The shelling occurred on National Youth Day. The beauty of a spring evening after days of rain attracted a large crowd of young persons in the heart of downtown Tuzla. Hundreds of young people were present, out of whom 71 were killed and more than 130 people sustained major and minor injuries. The youngest victim was only two-and-a-half. These were the direct victims. For the injured, many of them experienced difficult times, pain and suffering during rehabilitation which continues up to this day. Today, many of them still suffer the physical consequences of the wounding, in addition to the psychological suffering which may never go away. It was clear from listening and observing the testimony that the recollection of the event induced still more suffering.

390. The sufferings directly inflicted upon these victims have caused further suffering of their family members and their respective communities, which is still present. They are the parents, brothers, sisters, other relatives and friends of the killed ones, the indirect victims of the crime, who cannot reconcile the loss of their loved ones. It is clear that they continue to suffer from each loss. As it was said by the father of the youngest two-year old victim, no

sanction can ever adequately address his loss. The Panel acknowledges the legal limitations of its decision in addressing these losses.

2. Criminal sanction shall be commensurate with the extent of suffering, and be sufficient to deter others from similar criminal offences in the future (Article 6 and 39 of the CC of BiH)

391. Every armed attack against a town heavily populated by civilians can carry a great degree of suffering for the population, especially if it results in major casualties. Such attacks are bound to stir both momentary and perpetual fear with the civilian population, followed by a number of negative consequences even after the war. The main reason to criminalise activities related to the attacks against civilians under the criminal offence of War Crimes against Civilians, attacks which are contrary to customary international law, is to ensure that attacks of this nature are never repeated again in potential future conflicts. The very notion of a civilian is at risk when large scale bombing deliberately targets a civilian populace. In order to deter others a sentence must be effective to sufficiently convey the enormity of the evil to target civilians.

3. The criminal sanction shall reflect the community's condemnation of the conduct of the accused (Article 39 of the CC of BiH)

392. In the relevant case, the community comprises those living in Bosnia and Herzegovina, as well as the larger international community, who describe such conduct as criminal under national and international regulations. Both communities have clearly voiced their positions that crimes of this nature are to be condemned notwithstanding the affiliation of the perpetrator or the site of the commission, and that they must not go unpunished. The sanction must be of sufficient weight to ensure this crime is not condoned due to potential impunity.

4. Criminal sanction shall be necessary and commensurate with the educational purposes of the Code, meaning that persons should be made aware of the danger of the crime as well as the justice inherent in punishing criminals. (Article 39 of the CC of BiH).

393. Trials and sanctioning of these crimes must demonstrate zero tolerance for the crimes committed at the time of war, but also show that criminal procedure is an appropriate way to unmask the crimes and end the circle of personal retaliation. The Court or its judgment cannot order or mandate reconciliation. However, a sanction that fully amounts to the gravity of the offence may contribute to reconciliation by offering a legal and non-violent response, and promote the commitment to serve justice instead of a drive for a personal or community retaliation. This particular offense affected the whole community of Tuzla and the relatives and friends of the victims. As stated before there is nothing the Court can do to adequately address the loss suffered by both individuals and the larger community. The Court can do what it is designed to do which is to find guilt or innocence and apply the law to the result. In this case the Court hopes the sentence illustrates that even the most severe crimes can be adjudicated fairly.

B. THE SENTENCE OR CRIMINAL SANCTION MUST BE NECESSARY AND COMMENSURATE WITH THE INDIVIDUAL PERPETRATOR

394. Fairness as a legal requirement shall also be taken into consideration in calculating a sanction (Article 39 of the CC of BiH), aside the specific circumstances of not only the criminal offence, but of its perpetrator as well. The Code foresees the two aims relevant for the person convicted of the criminal offence: (1) to deter the perpetrator from perpetrating criminal offences in the future (Article 6 and 39 of the CC of BiH); and (2) rehabilitation (Article 6 of the CC of BiH). Rehabilitation is a purpose not only foreseen under the Criminal Code as one of the duties of the Court, but it is moreover the only purpose of sanctioning as recognized and exclusively demanded by international human rights law that the Court is to adhere to in accordance with the Constitution. Article 10(3) of the International Covenant on Civil and Political Rights stipulates that: “The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation

and social rehabilitation”.

395. There is a number of rules relevant to these purposes for they affect the sanctioning of the individually convicted person (Article 48 of the CC of BiH). The rules, among others, include the degree of criminal liability, the conduct of the perpetrator before, during and after the commission of the criminal offence, motives, and personality of the perpetrator. These considerations can be used in aggravation or mitigation of the sentence, as the facts dictate. The aim behind consideration of all these elements is to assist the Court in determining a sanction that is necessary and commensurate in terms of the purpose of sanctioning and elements that had already been taken into consideration in relation to the crime itself and its consequences upon the community, provided that the sanction corresponds to the preventive and reformative demands upon the specific perpetrator.

C. DEFENDANT

1. The degree of liability

396. The Accused is directly responsible for the crimes he committed. As the Commander of the Tactical Group Ozren, he ordered his subordinated artillery platoon to shell the town of Tuzla. Being the last link in the chain of command with the authority to order the use of cannon, equally so, he had an alternative not to issue such order to strike, in which case the crime would not have happened. The final responsibility rested on his shoulders. It is not necessary for the Panel to determine where the order originated, only that the Accused had the final authority to directly order this shelling or prevent this illegal shelling.

2. The conduct and personal situation of the Accused

397. Conduct and the personal situation of the Accused Novak Đukić before, during and after the commission of the crime contain both aggravating and mitigating facts, and are relevant in view of prevention and rehabilitation.

a. Prior to the commission of the criminal offence

398. The Accused was a highly-trained serviceman, with an advancing military career, known for his model behavior in the service; a family man, no prior convictions. As a graduate of the military academy he has knowledge of the law of war as well as familiarity with the Geneva Conventions. As an officer he knew that one of the ultimate responsibilities of those entrusted with command duties is the protection of civilians regardless of which side of the warring faction they belong. Despite his military record his confirmed knowledge of what constitutes an illegal order is viewed by the Panel as an aggravating factor.

b. The circumstances of the criminal offence

399. As the Commander, the Accused was respected among his soldiers. Prior to the relevant incident, he improved the organization of the Tactical Group Ozren, compared to the situation he found at his appointment as Commander. Evidence indicates that one of his contributions to the tactical group was to bring order and discipline to the ranks, and as a consequence his orders were obeyed. This also held true on May 25, 1995. His direct order resulted in one of the worst shellings of the entire war. The number killed (71) and more than 130 who suffered major and minor injuries in this attack against the UN safe area is an aggravating factor in the consideration of an appropriate sentence.

c. The circumstances after the relevant time

400. After the end of the war, the Accused Novak Đukić continued to advance in his military career until dismissed and retired. He is still married and father of two. The Panel has given due consideration to his family circumstances. His children are now adults, but the Panel recognizes one has an ongoing medical condition for which he receives treatment in Belgrade.

401. Based on his representations which were not disputed by the Prosecution, the Accused cooperated during the investigation and did not try to flee the jurisdiction of the Court which was a theoretical possibility. According to the Accused, other potential actors have fled rather than be indicted. The Panel considers these factors as mitigating circumstances.

d. Conduct during the proceedings

402. In the course of the proceedings, the conduct of the Accused was appropriate. He was respectful of the Court and his behavior was professional. His conduct during the case was appropriate and met the Panel's expectations, and is therefore neither an aggravating nor mitigating factor.

3. Motive

403. The existence of a motive does not constitute an essential element of the criminal offence in the relevant case, nor is it linked with the intent. The Accused had the necessary intent to commit the crimes prescribed under the Code and established in the reasoning to the verdict. Therefore, the Panel will make no findings on this issue, and motive is neither an aggravating nor mitigating factor.

4. The personality of the Accused

404. The Panel has no evidence on the personality of the Accused other than what he had demonstrated by the commission of the criminal offence, and his evident conduct in the courtroom, which were both discussed in previous paragraphs.

5. Reduction of punishment according to the Code

405. Article 49 of the CC of BiH cites the following in terms of the reduction of punishment:

“The court may set the punishment below the limit prescribed by the law, or impose a milder type of punishment:

- a) When law provides the possibility of reducing the punishment; and
- b) When the court determines the existence of highly extenuating circumstances, which indicate that the purpose of punishment can be attained by a lesser punishment.”

406. Bearing in mind the cited Article, the Panel inferred that the conditions set under this Article have not been met, and hence the punishment could not be reduced.

6. Deterrence and social rehabilitation

407. The length of a sentence and the time spent in jail as punishment for the crime are legitimate deterrents in most cases. They provide the offender with an opportunity to consider the effects of his actions on victims, to reflect on his past mistakes and to make amends for his criminal actions. In this instance, in order to deter future actors, a lengthy sentence is appropriate given the severity of the consequences of this crime.

7. Conclusion

408. Given the established factual and legal findings, the Panel found the Accused guilty of the criminal offence of War Crimes against Civilians referred to in Article 173(1)(a) and (b) of the CC of BiH. Given the severity of the offence and the resulting consequences, only long-term imprisonment can satisfy the interests of justice. Therefore, the Panel sentenced him for this crime to a long-term imprisonment of 25 (twenty five) years, finding that the type of criminal sanction is commensurate with the gravity of the offence given the existing aggravating and mitigating factors, and the participation and the role of the Accused in the commission of the crime, whereas the sentence shall achieve the overall purpose of criminal sanctions and punishing in terms of Article 39 of the CC of BiH.

409. Pursuant to Article 56(1) of the CC of BiH, the time that the Accused spent in custody following the decision of the Court, as of 8 November 2007, shall be credited towards the sentence of imprisonment.

VII. DECISION ON THE COSTS AND PROPERTY-LAW CLAIMS

410. In relation to the convicting part of the Verdict, pursuant to Article 188(4) of the CPC of BiH, given his poor financial standing, the Accused is relieved of the duty to pay the costs of the criminal proceedings and scheduled amounts, which shall be borne by the budget of the Court.

411. Pursuant to Article 198(2) of the CPC of BiH, the Court refers the victims to pursue their property law claims by taking civil action, considering that the process of establishing the facts in terms of the amounts of the claim would require a longer time, and would consequently unjustifiably protract the proceedings, which was agreed to by the injured parties through their attorney.

412. In relation to the acquitting part of the Verdict, pursuant to Article 189(1) of the CPC of BiH, the costs of the criminal proceedings and scheduled amounts shall be borne by the budget of the Court.

413. Pursuant to Article 198(3) of the CPC of BiH, in view of the acquitting part of the Verdict, all injured parties are referred to pursue their property law claims by taking civil action.

RECORD-KEEPER

Emira Hodžić

PRESIDING JUDGE

JUDGE

Darko Samardžić

/signature and stamp duly affixed/

LEGAL REMEDY: This Verdict may be appealed with the Appellate Panel of the Court of BiH within 15 days as of the receipt of the written copy thereof.