



No. X-KRŽ-07/394

Sarajevo, 6 April 2010

The Court of Bosnia and Herzegovina, Section I for War Crimes, the Appellate Division Panel of Judges Dragomir Vukoje, as the Presiding Judge, and Tihomir Lukes and Phillip Weiner, as the Panel members, with Legal Adviser-Assistant Neira Kožo, participating as the Minutes-taker in the criminal case against the Accused, Novak Đukić, for 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 as read with Article 180(1) of the Criminal Code of Bosnia and Herzegovina, deciding upon the Appeals that the Prosecutor's Office of Bosnia and Herzegovina and attorney Nebojša Pantić, Defense Counsel for the Accused, timely filed from the Verdict of the Court of Bosnia and Herzegovina No. X-KR-07/394 dated 12 June 2009, and following an appellate session held on 6 April 2010, attended by Mirko Lečić, the Prosecutor, Accused Novak Đukić and his Defense Counsel Nebojša Pantić and Milenko Ljubojević, reached the following

VERDICT

The Appeals filed by the Prosecutor's Office and Defense Counsel for the Accused, Novak Đukić, **are hereby refused as unfounded**, and the Verdict of the Court of Bosnia and Herzegovina No. X-KR-07/394 dated 12 June 2009 is **upheld**.

REASONING

I. Course of the Proceedings

1. The Verdict of the Court of Bosnia and Herzegovina No. X-KR-07/394 dated 12 June 2009 found the Accused, Novak Đukić, guilty of 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: the CC of B-H) as read with Article 180(1) of the CC of B-H, which was committed as described under Paragraph I of the operative part of the Verdict.

2. Pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC of B-H) along with the application of Articles 39, 42 and 48 of the CC of B-H, the Trial Panel sentenced the Accused to long-term imprisonment of 25 (twenty-five) years.

3. Pursuant to Article 56 of the CC of B-H, the time the Accused spent in custody upon the Decision of the Court as of 8 November 2007 shall be credited towards the imposed sentence, while pursuant to Article 188(4) of the CPC of B-H the Accused is relieved of the duty to reimburse the costs of the criminal proceedings and they shall be borne by the Court of Bosnia and Herzegovina.

4. Pursuant to Article 198(2) of the CPC of B-H, all injured parties are hereby instructed to pursue their claims under property law in a civil action.

5. Pursuant to Article 284(1)(c) of the CPC of B-H, the Accused is acquitted of the charges that he committed the criminal offenses under Paragraph II of the operative part of the Trial Verdict.

6. Accordingly, pursuant to Article 189(1) of the CPC of B-H the costs of the criminal proceedings and a scheduled amount shall be paid from the budget of the Court, whereas pursuant to Article 198(3) of the CPC of B-H, all injured parties are hereby instructed to pursue their claims under property law in a civil action.

7. The Prosecutor's Office (hereinafter: the Prosecutor or the Prosecution) filed an Appeal from the Trial Verdict, specifically from the decision on the criminal sanction and the decision on the costs of the criminal proceedings (in line with Article 296(1)(d) as read with Article 300(1) and (2) of the CPC of B-H), and moved the Appellate Panel to grant the Appeal in its entirety and modify the challenged Verdict by imposing on the Accused a sentence of long-term imprisonment for a longer duration and by ordering him to reimburse the costs of the criminal proceedings.

8. Attorney Nebojša Pantić, Defense Counsel for the Accused, submitted a Response to the Appeal of the Prosecutor's Office moving the Panel to refuse the Appeal as unfounded.

9. Defense Counsel also filed an Appeal from the Verdict arguing essential violations of the criminal procedure provisions under Article 297(1) and (2)(i), (j) and (k) of the CPC of B-H, violations of the criminal code to the detriment of the Accused, and erroneously and incompletely established state of facts, moving the Panel to grant the Appeal, modify the Verdict, and acquit the Accused, or revoke the Verdict and remand the case for retrial.

10. The Prosecutor's Office submitted a response to the Defense Appeal asking that this Court refuse it as unfounded.

11. On 6 April 2010, at the session of the Appellate Panel held in terms of Article 304 of the CPC of B-H, the parties to the proceedings and Defense Counsel for the Accused elaborated on their appellate grievances and also responded to the arguments of the opposite party, and they stated they fully maintained the arguments of their Appeals.

12. In a letter dated 2 April 2010, Defense Counsel argued to this Court that the Defense had obtained new evidence that it was unable to present during the main trial and enclosed that evidence in the letter. That evidence consisted of a Report of the Technical Test Center in Belgrade and 12 CDs. The Defense asked this Court to grant the Appeal, revoke the Verdict, permit the defense to present the evidence on retrial, and return an acquittal.

13. Asked by the Court why this evidence was not presented during the main trial, and what the Defense hoped to prove by the evidence (see Article 295(4) of the CPC of B-H), the Defense responded that the Report and CDs were an expert analysis, that the analysis was the result of a very complicated process, and counsel had had difficulty finding an institution to perform that expert analysis, which is why the Defense was not in a position to offer these materials at an earlier stage.

14. The Prosecutor's Office argued that the Defense did not ask for approval of the expert analysis, the Court was not informed of the analysis, and the defense motion to introduce the evidence was premature because it contemplated presentation at a possible re-trial.

15. Having heard the arguments of the parties, this Court stated that the decision on the Defense Motion would be reached subsequently.

16. Pursuant to Article 295(4) of the CPC of B-H¹, this Panel concluded that the Accused did not meet the requirements under the given provision and that the proposed Defense evidence would not be taken into consideration.

17. The Defense did not convince this Court that despite due attention and cautiousness the additional evidence could not have been secured during the first-instance proceedings, and that such evidence would have in any way affected the Verdict even if it had been considered in the course of the trial.²

18. We note that at trial, the Trial Panel was presented with the Prosecution exhibit Findings and Opinion of Expert Witness Prof. Berko Zečević, PhD, which was adduced into evidence, and the Defense exhibit Findings and Opinion of Expert Witness Vlado Kostić, MSc. Both expert witnesses were subjected to direct and cross examination before the Panel. Further, the Prosecution and Defense expert witnesses were subjected to confrontation in view of their opposite positions regarding the same issue. Thereby, the Trial Panel clarified the disputed issues in all their bearings and, on that basis, reached a proper and legitimate decision.

19. Accordingly, the “new” evidence set out in the Defense 2 April 2010 letter was not needed at trial where the quantity and content of the evidentiary material presented in the first-instance proceedings was sufficient and there was no need to clarify any facts. The legal conclusions reached by the Trial Panel on this issue were also sufficient and acceptable and left no room for any doubt in terms of complete establishment of the state of facts. This Panel concludes that any reasonable trier of fact would have reached the same conclusion.

¹ Article 295(4) of the CPC of B-H provides in full: “New facts and new evidence, which despite due attention and cautiousness were not presented at the main trial, may be presented in the appeal. The appellant must cite the reasons why he did not present them previously. In referring to new facts, the appellant must cite the evidence that would allegedly prove these facts; in referring to new evidence, he must cite the facts that he wants to prove with that evidence.”

² See *Prosecutor v. Mirko Todorović and Miloš Radić*, No. X-KRŽ-07/382, Appeals Judgment (23 January 2009) at paras. 144-145.

20. This Panel further concluded that all decisive facts derived from the evidence presented during the first-instance proceedings have been established beyond a reasonable doubt. With regard to those facts, this Panel reached the same conclusions as to the facts and law as the Trial Panel, so it is not necessary to consider the evidence proposed by the Defense even if the requirements set forth in Article 295(4) of the CPC of B-H were met.

21. Having reviewed the Verdict insofar as it is contested by the Appeals, this Panel reached a decision as stated in the operative part for the following reasons:

II. Allegations Regarding Essential Violations of the Criminal Procedure Code

22. The Defense also objected to an expert examination conducted upon the Order of the Prosecutor's Office, claiming that it was conducted by the persons to whom the Order for Expert Examination did not refer and who then produced a Report based on this evidence. The Defense argues that this evidence was therefore unlawfully obtained, and that the Court erred in admitting and basing the Verdict on it.³

23. It is not disputable that the Order of the Prosecutor's Office seeking the expert examination included only the name "Professor Berko Zečević, PhD," or that the "Analysis of the Circumstances which Led to the Massacre of the People in Kapija Square at 20:55 hours on 25 May 1995" constitutes the Findings of the authorized expert witness Zečević only, regardless of the fact that the cover page of the Findings contains the names of senior assistants Jasmin Terzić, MSc, and Alan Čatović, MSc. Dr. Zečević signed the Findings, thereby authenticating the Report.

24. It is also not disputable that Dr. Zečević had the assistance of the aforementioned persons who did not provide their own findings and opinion, but simply assisted Dr. Zečević in compiling his Findings. The Trial Panel could have found that the assistance of other persons ensured a thorough analysis. The assistance Dr. Zečević had does not bring into question his Findings or opinion because he was the one in charge of all actions undertaken by Order of the

³ Defense Appeal at p. 2.

Prosecutor's Office. It should also be noted that Dr. Zečević's was examined as to his Findings and opinion.

25. Thus, this Panel concludes that this issue is unfounded. The Trial Panel could have reasonably found this approach to be highly professional, and his Findings and Opinion to be reasonable. This Panel concludes that Dr. Zečević had sufficient expert knowledge and experience that were of great assistance to the Trial Court, bearing in mind that he appeared at the main trial, presented his Findings and opinion, was subjected to cross examination, and was also confronted with the Defense expert witness.

26. The conclusion of the Panel is further supported by Articles 95, 97, 269 and 270 of the CPC of B-H as they do not limit an expert witness regarding assistance in the course of compiling that expert's report.

27. The Defense also argued on appeal that the reconstruction of events by Dr. Zečević had not been ordered by the Prosecutor's Office and was therefore unlawful and in contravention of Article 93(1) of the CPC of B-H. The Defense argued that admission of the Report containing this evidence constituted an essential violation of criminal procedure provisions under Article 297(1)(i) of the CPC of B-H.⁴

28. This Panel concludes that the action the Defense calls "reconstruction" does not constitute "reconstruction" as contemplated by Article 93 of the CPC of B-H,⁵ and that the Trial Panel properly evaluated the issue. This Panel concludes that Dr. Zečević could, as part of his evaluation and absent a court order, visit the site to verify information to improve the quality of his Findings. Therefore, this issue lacks merit.

⁴ Defense Appeal at p. 15.

⁵ Article 93 of the CPC of B-H provides in full: "(1) In order to verify the evidence presented or to establish facts that are important to clarify matters, the body in charge of the proceedings may order a reconstruction of the event. The reconstruction shall reproduce the actions or situations with the conditions under which the event occurred according to the evidence presented. If statements by individual witnesses or the suspects or the accused describing the actions or situations are inconsistent or contradictory, the reconstruction shall, as a rule, reproduce each version of events. (2) A reconstruction shall not be performed in such a manner as to violate public peace and order or morality or endanger human life or health. (3) Certain evidence may be presented again if necessary during the reconstruction."

29. The Defense also argued that the “reconstruction” (on which his Findings and conclusions are based), and the expert’s Findings and opinion were prearranged with the Prosecutor’s Office to help prove the Prosecution theory that the shell that exploded at Kapija Square was fired from a 130 mm calibre gun in the village of Panjik.⁶

30. This Panel determines this argument to be ill-founded since the Defense did not mention a single piece of evidence to corroborate this allegation. Such baseless allegations are insufficient to establish a violation of the CPC of B-H, or indeed any miscarriage of justice. This Panel notes that this is a serious allegation of impropriety which should have never been made in the absence of supporting evidence.

31. The Defense also argued that the Verdict as a whole is accusatory in that it contains information in excess of that regarding the charged crimes, which constitutes an essential violation of criminal procedure provisions under Article 297(1)(j) of the CPC of B-H. Specifically, the Defense argues that if the Accused’s order regarding the shelling of Tuzla had been part of the Indictment, he would have defended himself differently such that he was deprived of his right to present a defense. He also argues that the operative part of the Verdict and reasoning are contradictory because the operative part mentions Kapija Square, while the Order does not mention it, which constitutes an essential violation under Article 297(1)(k). The Defense argues that no firing at any civilian target was ordered, particularly not in the indiscriminate manner as stated in the Verdict.⁷

32. Regarding this issue, this Panel was mindful of the fact that there must be an identity between the charges and the Verdict and that they must correspond because the Court reaches a decision only on the charges brought by the Prosecutor.

33. In the deliberation process, this Panel adhered to the following principles: when deciding on the Appeal, the obligation of the Appellate Panel is to examine whether the wording of the verdict is incomprehensible, internally contradictory or contradicted the grounds of the verdict, or has no grounds at all, or did not cite reasons concerning the decisive facts; the Appellate Panel

⁶ Defense Appeal at p. 15.

⁷ Defense Appeal at p. 26.

will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the Verdict formally contains all necessary elements for a well-reasoned and comprehensible verdict; and the appellant must establish that the alleged formal error, stated in the Appeal, invalidates the Verdict. We note that a non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Verdict.⁸

34. First, this Panel established that the operative part of the Verdict is identical to the factual description of the Indictment and therefore it does not exceed the charges.

35. The Trial Panel did not include the Accused's order regarding the shelling of Tuzla in the convicting part of the Verdict. That order was that on 25 May 1995 the town of Tuzla be shelled from 130 mm caliber M 46 guns. The operative part of the Verdict says that the Accused "ordered" the shelling. The Verdict properly established that the order may be proved by indirect evidence, and evidence in this case clearly showed the way in which the military structure regularly functioned and the circumstances surrounding the event as charged. On that basis, the Court concluded that the Accused was guilty.

36. This Panel also examined the defense argument concerning the contradiction between the operative part of the Verdict and its reasoning, and concluded that the Verdict was clear and comprehensible and in no way contradictory to the reasoning. This Panel concludes that the form and contents of the Verdict are in accordance with the rules of procedure and that there was no violation of law which would have possibly resulted in a different Verdict. The operative part of the Verdict does not mention the order of the Accused to shell the part of the downtown area of Tuzla called Kapija Square, but mentions the order to shell the town of Tuzla, which was declared a United Nations Safe Area under UN Resolution No. 824 dated 6 May 1993. Specifically, in paragraph 357 of the Verdict, the Trial Panel states that it did not exclude the possibility that the shell that landed on Kapija Square was not intended to explode there, but in an area nearby, such that there is no contradiction between the operative part and the reasoning of the Verdict.

⁸ See *Todorović*, *supra* at paras. 18-19.

37. On appeal, the Defense also argued that language in Paragraph 119 of the Verdict contravenes the principles of the CPC of B-H in that the Court declares itself contrary to the obligations set out in Article 14(2) of the B-H CPC,⁹ thus confirming the Court's bias and that it acted *in dubio contra reum*.¹⁰

38. Initially the Appellate Panel notes that a determination as to the existence or non-existence of certain facts is not related or limited by any special formal evidentiary rules. A free evaluation of evidence does not constitute arbitrariness in the evaluation of evidence and must be grounded on logic and common sense.

39. We think that the Trial Panel's choice of words in paragraph 119 could have been better. There, the Trial Panel wrote: "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."

40. Despite this, we conclude that the Trial Panel properly evaluated the evidence. This conclusion is supported by language in Paragraph 125 of the Verdict: "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."

41. Thus, the Trial Panel did not violate Article 14 of the CPC of B-H, which refers to the "equality of arms" standard, because the Verdict examined and established both inculpatory and exculpatory facts. Adhering to this standard, the Verdict contains evidentiary grounds for every fact which is considered reliably established, without disregarding any fact important for the determination of the matter.

⁹ Article 14(2) of the CPC of B-H provides in full: "The Court, the Prosecutor and other bodies participating in the proceedings are bound to study and establish with equal attention facts that are exculpatory as well as inculpatory for the suspect or the accused."

¹⁰ Defense Appeal at p. 2.

42. This Panel concludes that although witness testimony and other evidence could have been more extensively evaluated, the Trial Panel’s evaluation met the required baseline of evaluation standards. Further, the Trial Panel properly drew conclusions based on that evidence. Therefore, the defense claims that the Verdict lacks a comprehensive evaluation of evidence are ungrounded.

43. The Defense also submitted that language in Paragraph 108 of the Verdict was contradictory “primarily because it is impossible to deem someone honest yet find him biased at the same time.”¹¹ The Defense further argued that it follows from Paragraph 109 that the Trial Panel determined that certain witnesses were not credible and discounted their evidence without considering the substance of their testimony or even comparing it to the testimony of other witnesses.¹²

44. This Panel initially notes that the Defense has failed to specify any witness whose testimony was allegedly improperly analyzed. Furthermore, in developing this argument, the Defense has taken out of context portions of the Verdict. The Verdict describes a sophisticated method of analysis in sixteen paragraphs (paragraphs 105 through 120). The Defense, however, has failed to mention this fact or even refer to paragraph 110, where the Trial Panel noted that even when a witness is found not to be honest, portions of his testimony may still be accepted as reliable. The Trial Panel also noted that on several occasions it “believed some of a witness’s testimony without necessarily believing it all.”¹³ Compare *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1, Trial Judgment (27 September 2007) at paras. 15, 297 (Trial Court may accept some portions of testimony and reject others as unreliable).

45. This Panel further notes that other trial courts have also reasoned that even an honest witness’s opinions or conclusions could be influenced by bias. Compare *Mrkšić*, *supra*, at para. 15. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42/T, Trial Judgment (31 January 2005) at para. 7.

¹¹ Defense Appeal at p. 3.

¹² Defense Appeal at p. 3.

¹³ Trial Verdict at para. 114.

46. Having reviewed the Verdict, this Panel established that the methods of analysis employed in the Verdict are completely consistent with the relevant provisions of the procedural law. Accordingly, this Panel concludes that the defense argument that exculpatory evidence was not evaluated is ungrounded.

47. The ruling of the Trial Panel, in the part of the Verdict pertaining to general considerations of evidence, contained valid reasoning as to why some witnesses were deemed unreliable in certain portions of their testimonies or partially dishonest because of limitations in their perceptions and memories, or because of bias that affected their conclusions about the meaning of what they saw or heard, or because of their own self interest, due to friendship or loyalty to the Accused, or because they wanted to affect the outcome of the proceedings. On the other hand, the Trial Panel credited testimony of those same witnesses when it found that they honestly and accurately reported other facts because they were unaware of the significance of the particular facts or because they were unable to successfully maintain their fabrication.

48. The fact that the Trial Panel approached the evaluation of witnesses' testimonies in a comprehensive and serious manner is evident in paragraph 115 of the Verdict, which provides that 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."

49. Therefore, this Panel concludes that the Defense contentions are ungrounded.

III. Allegations Regarding Factual Findings

50. Following an extensive analysis of the Verdict and the evidence, which was considered individually and altogether, this Panel concludes that the Defense arguments are ungrounded in that the Verdict contains a properly and completely established state of facts as well as valid and acceptable reasoning on all decisive facts, upon which the sentence was based.

51. Standard of review. On Appeal, in determining whether there were incorrect or incomplete facts in the Verdict, this Panel considers only whether “any reasonable trier of fact” could have found such facts, bearing in mind that this Panel defers to the Trial Panel regarding factual findings in that the Trial Panel is charged with making credibility determinations and weighing evidence. The case of *Prosecutor v. Mirko Todorović and Miloš Radić*, No. X-KRŽ-07/382, Appeals Judgment (23 January 2009) at paras. 85-88, sets out standards for reviewing allegations of incorrectly or incompletely established facts pursuant to Article 299 of the CPC of B-H. There, the Court held:

85. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.

86. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.

87. In determining whether or not a Trial Panel’s conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

88. The Appellate Panel may substitute its own finding for that of the Trial Panel only where a reasonable trier of fact could not have reached the original Verdict, the evidence relied on by the Trial Panel could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is “wholly erroneous.”

52. The Defense also argued that the premise that the Main Staff Command of the Army of Republika Srpska (VRS) authorized retaliation against UNPROFOR and civilian targets is erroneous, because no evidence was submitted on this point, and because there was no such order and no order was designated in the Verdict.¹⁴

¹⁴ Defense Appeal at p. 11.

53. This Panel concludes that the Trial Panel properly found that following NATO warnings to the Army of Republika Srpska (VRS) that it should withdraw its weaponry from the non-exclusion zones around Sarajevo, NATO decided to conduct airstrikes against VRS positions in Bosnia and Herzegovina (BiH),¹⁵ which was done on 25 and 26 May 1995. The Main Staff of the Army of Republika Srpska consequently issued a level of full combat readiness.¹⁶ The Army of Republika Srpska also took several UN soldiers as hostages, which was aired on Serb TV and followed by a public statement by Radovan Karadžić that all NATO and UNPROFOR soldiers would be made prisoners until the end of the war.¹⁷

54. These factual findings are further supported by the testimony of witness Manojlo Milovanović, who stated that the airing of hostages prompted a chain reaction that was impossible to stop, while witness Charlef Brantz stated that he believed the shelling of Tuzla on 25 May 1995 was a consequence of NATO airstrikes.¹⁸

55. At the relevant time, witness Milovanović was the Chief of Staff of the Army of Republika Srpska, that is, “second man in the chain of command” of the Army of Republika Srpska, while Charlef Brantz was a Deputy Commander of UNPROFOR for the North-East Sector. The Trial Panel properly credited the testimony of these witnesses, where it was clear, convincing, and consistent and left no room for any doubt that the events took place as described.

56. Contrary to the Defense arguments, the issue of the order for retaliation against UNPROFOR and the civilian population of Tuzla is not important, because the criminal offense of War Crimes against Civilians and the liability mode of ordering do not require a showing of motive.

57. Besides, the Verdict contains all details relating to the general military circumstances on 25 May 1995, set out under the heading, “Situation on 25 May 1995” (just before paragraph 207), and these factual findings are corroborated by both documentary and testimonial evidence.

¹⁵ Testimony of Witness Manojlo Milovanović, 5 May 2009; T-161 (Order of the Main Staff of the RS Army dated 25 May 1995, signed by Manojlo Milovanović).

¹⁶ T-161 (Order of the Main Staff of the RS Army dated 25 May 1995, signed by Manojlo Milovanović).

¹⁷ Testimony of Witness Manojlo Milovanović, 5 May 2009.

¹⁸ T-26 (Witness Examination Record for Charlef Brantz, made in the Prosecutor’s Office of Bosnia and Herzegovina dated 5 December 2007) at p. 3.

58. The Defense also argues that the Trial Panel’s conclusion, in Paragraph 226 of the Trial Verdict, is in contravention of the testimony of witness Ljubiša Čorsović.¹⁹

59. In order to better understand this argument, we quote in full paragraph 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.²⁰ For example, witness Ljubiša Čorsović, who was the Deputy Commander of the 130 mm Gun Platoon, explained that 90% of the orders were coming from ‘Omega.’²¹ Written orders contained a Greek letter ‘Omega’ at the bottom.²² Captain ‘Omega’ was the Chief of Artillery of the Ozren Tactical Group,²³ his real name was Boro Maksić.²⁴ 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 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.”

60. Witnesses Slavko Stojanović, Goran Mrzić, Dragan Babić, and Ljubiša Čorsović stated that a certain Captain ‘Omega’ from the Ozren Tactical Group Command was often issuing orders to the 130 mm Gun Platoon Command.²⁵ The Appellate Panel therefore accepts this factual finding as proper and sufficiently reasoned.

61. The Defense challenges this finding on the ground that it is contrary to the testimony of Čorsović, despite the fact that it is supported by the testimony of several witnesses. We note that Čorsović was clear in his statement, given during the investigation, that: “I recall that most

¹⁹ Defense Appeal at p. 11.

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

²¹ Testimony of Witness Ljubiša Čorsović, 10 June 2008.

²² T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency, dated 27 November 2007) at p. 4.

²³ Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of witness Ljubiša Čorsović, 10 June 2008.

²⁴ T-87 (Reply to the Request by the MoI of the R B-H, Command of the 2nd Corps Tuzla, commander Sead Delić number 08/426-1, dated 7 July 1995); O-4 (Motion to Take-Over the Case number KT-RZ-169/07 of 8 June 2007).

²⁵ T-11 (Witness Examination Record for Slavko Stojanović, made by the State Investigation and Protection Agency dated 28 November 2007) at p. 5; T-8 at p. 5; Testimony of witness Goran Mrzić, 20 May 2008; Testimony of witness Dragan Babić, 20 May 2008; Testimony of witness Ljubiša Čorsović, 10 June 2008.

frequently received orders from the Tactical Group Command were by a certain Captain who went by the nickname Omega and this is how he introduced himself over the phone. He was originally somewhere from Ozren Mountain and I believe he was a reserve Captain. In addition to him, sometimes, on very rare occasions, some other officer from the Tactical Group Command called and conveyed orders but I believe that 90% of orders were issued by Omega. After the activities of our artillery pieces we informed the command that issued the order about the mission completed.”²⁶

62. The Trial Panel correctly concluded that the Chief of Artillery did not have the authority to issue orders directly because he was merely conveying orders he received from the commander of the Ozren Tactical Group, the Accused. Therefore, this Panel concludes that the finding of the Trial Panel that the Accused was the person issuing the orders to his subordinate units, including to the 130 mm Gun Platoon, is logical and correct.

63. Milovanović, who is knowledgeable of the command and control system in the Army of Republika Srpska, testified on this issue.²⁷ Milovanović provided a clear explanation of the then-applicable unity of command principle, that is, the principle of subordination in the Army of Republika Srpska. Further, documentary evidence as well as regulations in force at the relevant time corroborate Milovanović’s testimony that the Army of Republika Srpska functioned in accordance with the strict vertical chain of command. Given this, a commander would be the only person authorized to issue orders. While the Chief of Artillery may position artillery to be used, he cannot order its firing and may only convey an order received from the unit commander.

64. This Panel notes that the Trial Panel correctly established the factual situation surrounding this issue by corroborating all relevant evidence and reached the correct conclusion.

65. The Defense further contends that everything related to the alleged incriminating order is abstract and vague, because the Tactical Group Commander does not issue orders to the Platoon Commander, but to the Tactical Group as a whole and brigades within it.²⁸

²⁶ Witness Examination Record for Ljubiša Čorović, No. 17-04/-2-04-2-1152/07, made by the State Investigation and Protection Agency dated 29 November 2007.

²⁷ Testimony of Witness Manojlo Milovanović, 5 May 2009.

²⁸ Defense Appeal at p. 12.

66. This Panel concludes that this issue is ungrounded where the Accused was the only person authorized to issue orders for firing a 130 mm caliber gun, and this order was most frequently conveyed by Captain *Omega* who was Chief of Artillery of the Ozren Tactical Group.²⁹ The Verdict also properly established that the testimonies of witnesses Nenad Čolić, Slavko Stojanović, and Goran Mrzić are consistent in that they all claim that a 130 mm caliber gun could not have been fired without the order of the Ozren Tactical Group Commander which contained all necessary elements for targeting.³⁰

67. It was further established below that the commander of Artillery Platoon and, in his absence, the deputy commander or target analysis officer,³¹ forwarded the order received via field phone from the Ozren Tactical Group Command to the Commander of the Artillery Squad who would then execute the order.³²

68. In addition, the Verdict explained that 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 was composed of several brigades located in the same area of responsibility; the commander of the tactical group would become the superior of these united brigades and could issue orders to them.³³

69. It should be highlighted that the Ozren Tactical Group was composed of artillery support units³⁴ that were under the direct command of the Ozren Tactical Group Commander, that is, the

²⁹ Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of witness Ljubiša Čoršović, 10 June 2008.

³⁰ Testimony of Witness Nenad Čolić, 13 May 2008; Testimony of witness Slavko Stojanović, 20 May 2008; Testimony of witness Goran Mrzić, 20 May 2008.

³¹ Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of witness Ljubiša Čoršović, 10 June 2008.

³² Testimony of Witness Nenad Čolić, 13 May 2008; Testimony of witness Goran Mijatović, 13 May 2008; Testimony of witness Goran Mrzić, 20 May 2008; Testimony of witness Milan Đurić, 13 May 2008; T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency dated 27 November 2007) at p. 5; T-12 (Witness Examination Record for Dragan Babić, made by the State Investigation and Protection Agency dated 28 November 2007) at p. 5.

³³ Testimony of Witness Manojlo Milovanović, 5 May 2009.

³⁴ Testimony of Witness Dragan Jovanović, 18 March 2008.

Accused.³⁵ Artillery support units had 130 and 155 mm caliber guns.³⁶ One of these artillery units was the 130 mm Gun Platoon at Panjik on the Ozren Mountain.³⁷

70. These facts are confirmed by the orders signed by the Accused which show that the commanders of combat brigades could obtain the support of heavy artillery pieces of 130 and 150 mm, but had to request such support from the Ozren Tactical Group Commander.³⁸

71. Therefore, this Panel concludes that the Trial Panel properly found that evidence from the case file showed that the Accused was the lowest ranking person who had the authority to legally issue an order to fire the 130 mm gun.

72. The Defense further argues that Paragraph 230 of the Verdict is contradictory regarding whether anyone confirmed that Tuzla had been marked as a target on any military map.³⁹ The Defense questions why the Prosecution did not tender into evidence the original of the working map of artillery of the 2nd Ozren Light Infantry Brigade generated in April 1994, but only a photocopy, the authenticity of which it proved by a video recording.⁴⁰

73. With regard to Tuzla being an artillery target, this Panel is satisfied with the conclusions of the Trial Panel. It is not disputable that Tuzla was an United Nations safe area, that the town and its surrounding were to be free from all armed attacks and hostile acts, and that this status remained throughout the war.

³⁵ The testimony of Witness Manojlo Milovanović on 5 May 2009, and the Order signed by the Accused clearly show that he commanded artillery support units: T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995).

³⁶ T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995); T-117 (Combat Order for Defense and Attack, Ozren Tactical Group Command, Commander Novak Đukić, strictly confidential No. 017275-1 dated 05 June 1995).

³⁷ Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of witness Ljubiša Čorsović, 10 June 2008; Testimony of witness Mile Savić, 8 April 2008.

³⁸ T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995); Testimony of witness Mladen Dostanić, 10 February 2009.

³⁹ Defense Appeal at p. 13.

⁴⁰ Defense Appeal at pgs. 13 - 14.

74. In light of this, the Accused knew that at least the majority of Tuzla's population was composed of civilians and that they were to be spared from any military violence. Despite that fact, the Accused ordered a shell to be fired on Tuzla on 25 May 1995, which culminated in the death of 71 people⁴¹ and injuries to more than 130 people.⁴²

75. Contrary to the arguments raised on appeal, the Trial Panel properly reached its conclusion through circumstantial evidence that we deem sufficient to establish with certainty that the Accused is guilty of the criminal offense with which he is charged.

76. Furthermore, the Verdict correctly states that no witness who was a member of the Army of Republika Srpska testified that Tuzla was marked as a target on any military map or in the tables of targets. Witnesses Dragan Vasiljević and Goran Mrzić avoided responding to this question,⁴³ while witness Dragan Babić stated that several targets were marked in the area of Tuzla and its surroundings.⁴⁴ Babić further stated 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. The Trial Panel also considered the fact that Babić was not explicit regarding this issue in his testimony; we conclude that this shows that the Trial Panel comprehensively analyzed and evaluated all of the testimony.

77. The working artillery map of the 2nd Ozren Light Infantry Brigade⁴⁵ indicates that several places in the downtown area of Tuzla were marked as targets for a 130 mm gun which could be hit at the request of the 2nd Ozren Light Infantry Brigade. Witness Mile Savić⁴⁶ testified that a working map is not a "realization" map because a target marked on a working map will not

⁴¹ Findings and Opinion of Expert Witness Vedo Tuco dated 24 December 2008 (T-158); Medical documentation for all killed persons (T-48); Record of the External Examination and Identification of the Killed Persons in the Massacre in Tuzla on 25 May 1995 along with Photo-Documentation No. 20-1/02-3-9-7-175/95 (T-47); List of the Persons who Were Killed During the Shelling of Tuzla, dated 25 May 1995 made by an investigative judge of the Higher Court in Tuzla No. Kri 29/95 dated 26 May 1995 (T-50); Report on War Damage, Tuzla Municipal Commission for the Registration and Assessment of War Damage dated 10 July 1995 (T- 74).

⁴² Findings and Opinion of Expert Witness Vedo Tuco dated 24 December 2008 (T-158); List of Persons who were Seriously Injured at Kapija During the Shelling of Tuzla on 25 May 1995 and who Were Kept in Tuzla KMC for Medical Treatment, made by an investigative judge of Tuzla Higher Court No. Kri 29/95 dated 26 May 1995 (T-49).

⁴³ See, for example, testimonies of witnesses Dragan Vasiljević and Goran Mrzić who stated in the Court that their colleagues told them that Tuzla was not within their range.

⁴⁴ T-12 (Witness Examination Record for Dragan Babić, made by the State Investigation and Protection Agency dated 28 November 2007), p. 6.

⁴⁵ T-95 (Artillery Working Map of the RS Army, 2nd Ozren Light Infantry Brigade dated 29 April 1994)

⁴⁶ Testimony of Witness Mile Savić, 16 December 2008

necessarily be hit. Hence, the Trial Panel's conclusion that the targets marked on this map were only places which the Army of Republika Srpska had the capability of striking is correct, as is their conclusion that the map was not sufficient to prove that a place had actually been hit. This is supported by the map detailing the Sadejstvo '95 operation⁴⁷, as confirmed by the testimony of witness Nijaz Vrabac⁴⁸ which the Trial Panel found credible. Thus, it can be legitimately concluded that Tuzla was a potential target of the 130mm gun at Panjik in May 1995.

78. The Trial Panel established with certainty that the 130 mm Gun Platoon at Panjik was composed of three gun squads, meaning there were usually three guns located at Panjik.⁴⁹ One of the three 130 mm guns was facing the town of Lukavac,⁵⁰ which means that it was also facing Tuzla since both towns are in the same alignment.⁵¹

79. Witness Manojlo Milovanović explained that firing a gun pursuant to an unlawful order most probably would not be recorded in the wartime logbook. This may be why no working map of the Ozren Tactical Group was ever found, as the targets for realization of artillery fire are drawn therein, the same as in the map of the 2nd Ozren Light Infantry Brigade.

80. Considering that the Defense also objected to the thickness of the felt-tip pen used to mark the targets in the map, it should be noted that the working map with the target areas drawn on it was not permanent. Thus, it may have been amended, since that often happened in practice.

81. Therefore, the Trial Panel correctly concluded that several targets were drawn on the map of Tuzla, marked for the needs of the Light Infantry Brigade. Accordingly, there is no merit to the claim that there were subsequently drawn targets.

82. The Defense further argues that although the Panel concludes that the Accused was the last person in the vertical chain of command who was authorized to issue firing orders to the Gun

⁴⁷ T-180 (Maps of the Operations "Sadejstvo 95" and Map of the operation "Štit 94/95")

⁴⁸ Testimony of Witness Nijaz Vrabac, 31 March 2009.

⁴⁹ Testimony of Witness Goran Mrzić, 20 May 2008; testimony of witness Ljubiša Čorsović, 10 June 2008; testimony of witness Mile Savić, 8 April 2008.

⁵⁰ T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency dated 27 November 2007), p. 6; witness Ljubiša Čorsović, 10 June 2008.

⁵¹ See Map T-23 (map of the town of Tuzla showing the projectile drop angle).

Platoon at Panjik, this is incorrect and arbitrary because there was a whole chain of command between the Commander and the Platoon, the Commander does not issue orders to the Platoon, and the Platoon at Panjik is not mentioned in the commands or combat orders.⁵²

83. The evidence which shows that the Accused ordered the firing of the shell on Tuzla includes the testimony of witness Manojlo Milovanović, who explained the hierarchy of the VRS, and the testimony of Prosecution and Defense witnesses who were members of the 130 mm Gun Platoon crew deployed at the firing position in Panjik. These witnesses confirmed that a 130 mm gun was never fired without a direct order from the Ozren Tactical Group Command as such conduct would result in punishment. They also confirmed that an individual firing on his own initiative would be impossible because of the specific characteristics of the artillery piece: an entire crew is required to operate the 130 mm caliber gun, which weighs 8.5 tons, must be towed on a truck or a tracked vehicle, can only be transported on a hard surface, and must have a firing position in the vicinity of the road with targets set in advance by the Ozren Tactical Group Command. This artillery piece is not designed to hit a point target in an urban area and it is almost impossible to hit a selected target with the first projectile without causing collateral damage to the civilian population because between 4,000 to 6,800 fragments are formed during fragmentation.

84. This is further corroborated by the documentary evidence. The Order for Defense by the Ozren Tactical Group Commander Novak Đukić, No. 01/175-1, dated 25 April 1995, reads that Novak Đukić as Commander of the Ozren Tactical Group designated the town of Tuzla as a target of one 130 mm caliber gun located at the firing position Panjik and issued an order that 130 mm caliber guns can be used only upon prior approval of the Accused personally as the Ozren Tactical Group Commander. There is no question that the Accused was at his command post on 25 May 1995, and that everything was functioning as usual that day.

85. The Verdict correctly establishes that the Accused was the *de jure* Commander of the Ozren Tactical Group, which was confirmed by witness Manojlo Milovanović, and by

⁵² Defense Appeal at p. 14.

documentary evidence, that is, the orders signed by the Accused in his capacity as the Ozren Tactical Group Commander.⁵³

86. The Trial Panel also provided comprehensive reasoning of the evidence that shows that the Accused was *de facto* commander of the 130 mm Gun Platoon at Panjik. There is abundant evidence showing that the Accused regularly issued orders and instructions to the Gun Platoon and the other brigades located in his area of responsibility⁵⁴; he was informed of the execution of those orders⁵⁵; and he received daily reports on the military activities in his area of responsibility.⁵⁶ Following this, the Trial Panel correctly concluded that the soldiers in Panjik were obeying orders issued by the Accused through the chain of command.

87. Therefore, this Panel concludes that the Accused knew that the majority of the population of Tuzla was composed of civilians, that despite this fact he ordered that a shell be fired on downtown Tuzla without specifying Kapija Square as the target (considering that a 130 mm gun is not designed to hit a point target), and he was aware of the high degree of likelihood that the shell would cause a high number of casualties in the protected civilian population.

88. The Defense also claims that Panjik is more than 27,000 meters from the scene of explosion, and that the Joint Commission established that the distance was 21,000 meters. The Defense also claims that the Defense evidence on this does not mention the position of the gun in Panjik, although the Defense challenges the Findings and Opinion of the Prosecution expert witness Dr. Zečević.⁵⁷

⁵³ Witness Manojlo Milovanović, 5 May 2009. Orders signed by the Accused clearly also show that he commanded over the artillery support units: T-113 (Order for Defense, Ozren TG Command, Novak Đukić, strictly confidential No. 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).

⁵⁴ 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; witness Manojlo Milovanović, 5 May 2009; witness Dragan Jovanović, 18 March 2008; witness Ljubiša Čorsović, 10 June 2008.

⁵⁵ T-13 (Witness Examination Record for Ljubiša Čorsović, made by the State Investigation and Protection Agency, dated 29 November 2007), p. 4.

⁵⁶ T-114 (Order for Attack, issued by the Ozren TG Commander, Novak Đukić, strictly confidential number 01-128-1 dated 28 March 1995); T-117 (Combat Order for Defense and Attack, Ozren TG Command, Commander Novak Đukić, strictly confidential number 017275-1, dated 5 June 1995).

⁵⁷ Defense Appeal at p. 14.

89. We focus on the Trial Panel's findings regarding the credibility of expert witnesses for both the Prosecution and the Defense, and evaluate their respective findings and opinions before responding to individual appellate arguments.

90. We conclude that the Trial Panel correctly credited evidence of Dr. Zečević, whose Findings and Opinion were in conformity with the rules of the profession.

91. The Trial Panel properly assessed the expert witness, whose evidence was supported by specific references, written documents, and photo-documentation regarding the 25 May 1995 shelling at Kapija Square in Tuzla. After reviewing the expert's Findings and Opinion, and having seen the DVD of the hearing at which the expert witness testified, we can see that the expert's technical knowledge and experience was of assistance to the Court.

92. We note that Dr. Zečević is respected in his field,⁵⁸ and has testified before this Court twice and five times before the International Tribunal for the Former Yugoslavia (ICTY) at The Hague.⁵⁹ This is not to say that the Defense Expert Vlado Kostić, MSc, was not credible,⁶⁰ but only to stress part of the reason why the Trial Panel properly credited Dr. Zečević. The Trial Panel, after hearing the testimony of the expert witnesses, as well as their confrontation, could have properly credited Dr. Zečević's evidence.

93. In presenting his Findings and Opinion, the Defense expert countered the arguments presented by Dr. Zečević, but did not provide clear and comprehensive explanations as to how he arrived at his conclusions. Thus, the Defense did not render questionable Dr. Zečević's Findings and Opinion.

94. Consequently, we hold that the Trial Panel properly credited Dr. Zečević's Findings and Opinion. We note that the Verdict gave a clear and detailed assessment of Dr. Zečević's Findings and Opinion.

⁵⁸ Expert Witness Berko Zečević, transcript of 15 April 2008, p. 3 and 4.

⁵⁹ Expert Witness Berko Zečević, transcript of 15 April 2008, p. 4.

⁶⁰ Expert Witness Vlada Kostić, transcript of 3 March 2009, p. 5.

95. The Defense further raises on appeal the same arguments that were raised at trial pertaining to Dr. Zečević's Findings and Opinion, for which the Trial Panel provided reasonable and logical findings.

96. To determine the position of an artillery piece, it is necessary to analyze the crater caused by a shell fired from that weapon, variations in the angle of ballistic drop, fragment traces on the surface caused by the projectile explosion, and the trajectory and time of fuse activation.⁶¹

97. Having analyzed and assessed these elements, and using firing tables for a 130 mm M46 gun, Dr. Zečević determined that the distance of the firing position for the tabular conditions and the mentioned ballistic drops to be $26,500 \text{ m} \leq X_{vp} \leq 27,480\text{m}$.

98. Dr. Zečević reached this conclusion based on data on the distance of the firing position and the known azimuth, which he transferred to the topographic map. He established that in close vicinity to this point there was a communication road and Panjik village, in whose vicinity there were two villages, Nešići and Blagojevići.⁶² In order to establish the narrow zone of the location of the firing position of the 130 mm M46 gun as specifically as possible, Dr. Zečević used special software with original ballistic coefficients from the firing tables for the gun with full charge, also taking into account available data from the hydro-meteorological institute regarding the weather on 25 May 1995.

99. The Trial Panel thus justifiably accepted the conclusion of Dr. Zečević, who, based on the conducted analysis,⁶³ established that the minimum distance of the firing position was $X_{vp} = 27,100 \pm 360$ meters.

100. In considering possible zones, Dr. Zečević took into account the weight of the guns towed and concluded that the firing position must be in the close vicinity of a communication road.⁶⁴ Thereafter, Dr. Zečević went to Panjik and noticed that an area on the road to the left, several hundred meters next to the school in Panjik, could accommodate such a gun. At that

⁶¹ Findings and Opinion of Expert Witness, Prof. Berko Zečević, PhD, p. 44.

⁶² Image 87 of the Findings and Opinion of Expert Dr. Zečević.

⁶³ Ibid, pgs. 74-76.

⁶⁴ Ibid, p. 79.

location Dr. Zečević saw wheel tracks and signs of an artillery weaponry having been dug in, which confirmed his thesis about the place from which the projectile had been fired.⁶⁵

101. Defense expert Kostić, upon conducting the analysis, considering 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 using a drop angle of 43 degrees, also established the distance of the firing position to be between 11,770 +/- 240 meters and 21,170 +/- 229 meters.⁶⁶

102. As to the direction and distance between the firing position and the explosion site, Kostić concluded that the projectile arrived from the east and established the distance without indicating a specific location. He did not, however, go to the site in order to see if a suitable location existed at that distance. This makes his findings questionable, particularly considering Charlef Brantz's statement given during the investigation,⁶⁷ from which it follows that the Army of BiH was deployed east of the frontline. Witness Manojlo Milovanović confirmed that the Army of BiH did not have a 130 mm gun.

103. Additionally, the record of the on-site investigation concluded that the projectile was fired from a point on Mt. Ozren, in Vrbak, Cerovo Brdo, which is 21 km from the explosion site as the crow flies.⁶⁸ The Joint Commission Report stated that with the maximum charge, the 130 mm M46 gun is usually used for ranges between 17 and 27 km. The Commission established that in the instant case, based on the calculated azimuth and the smallest drop angle, the shortest distance from which the shell was fired would be between 20 and 21 km.⁶⁹

104. At the relevant time, the Joint Commission was not able to determine the distance as precisely as Dr. Zečević could, taking into account the situation, that the Commission could not visit Ozren mountain, and that for safety reasons, UNPROFOR members could not disclose the precise location of the weaponry.

⁶⁵ Ibid, p 79, Image 96.

⁶⁶ Ibid, pgs. 19 and 40.

⁶⁷ T-26 (Witness Examination Record for Charlef Brantz, made in the Prosecutor's Office of Bosnia and Herzegovina dated 5 December 2007).

⁶⁸ Record of Crime-Scene Investigation, made on 25 May 1995, number Kri 29/95 (T-62).

⁶⁹ Report of the Joint Commission of 26 May 1995 (T-18).

105. In his testimony, witness Charlef Brantz said: *“It is true, I changed one thing before submitting the report, which is the position where we thought the artillery weapons could be positioned, I deleted it and you can see that on the map and I added that later when the report was submitted to people in Tuzla and the commander and I did not want, actually I did not want that, I deleted it because I did not want them to use this map in order to plan the attack on the positions, in order for the B-H Army to plan the attack on new positions, that’s why I deleted it, but that is the original document.”*⁷⁰

106. The conclusion that the projectile arrived from the west, not from the east, as the Defense argues on Appeal, is also supported by the Official Note made by an employee of the PSS, First Police Station: *“On the same day around 20:55 hours, while we were at Trg oslobođenja, we heard a sharp sound of a shell flying from the west (Ozren) towards the downtown and immediately thereafter a strong detonation from the direction of the center of the town.”*⁷¹

107. Accordingly, there is no doubt that the 130 mm gun projectile came from Panjik, Ozren Mountain, where one 130 mm gun platoon was deployed in the area of responsibility of the Accused.

108. The Defense also argues that in responding to the defense counsel’s question on cross examination, Dr. Zečević was clear that a furrow visible on photo-documentation was derived from fragments and not from the fuse, which, according to the Defense, is contrary to the laws of physics and logic.⁷²

109. Defense expert Kostić pointed out in his Findings that the direction of the projectile was determined based on the position of the crater and the furrow of the fuse, and thus also the firing position of the artillery piece from which it was launched.⁷³ He concluded that the activation of the projectile with the contact fuse causes material from the surface to be ejected in the direction

⁷⁰ Witness Charlef Brantz, Transcript of 17 June 2008, p. 10 and 11.

⁷¹ T-66 (Official Note dated 26 May 1995, made by the employees of the First Police Station Tuzla) .

⁷² Defense Appeal at p. 20.

⁷³ Ibid at p. 14.

of the flight of the projectile.⁷⁴ This totally denies Dr. Zečević's thesis that the furrow, which is located by the crater, was caused by projectile fragments.

110. Based on his own reconstruction and the firing tables for the 130 mm M46 gun,⁷⁵ Dr. Zečević concluded that the angle of ballistic drop of high explosive (HE) projectiles 130 mm was between $62^{\circ} \leq \theta \leq 67^{\circ}$ and 41° .

111. Also using these same firing tables as to the ballistic drop angles and reviewing the tabular conditions, Dr. Zečević determined the distance of the firing position to be 26,500 meters $\leq X_{VP} \leq 27,480$ meters.

112. It is clear that defense expert Kostić changed the distance between the explosion site and the fixed points of the distance between the sides of the building next to which the explosion occurred. In doing this, his results were brought under suspicion.

113. Kostić expressed doubt as to the fact that the shell that hit Kapija Square was fired from an artillery piece at all, and argued that the projectile could have been set beforehand. He did not, however, explain how he reached this conclusion.

114. By contrast, Dr. Zečević established with certainty, based on the analysis of fragments from two separate regions of projectile bodies, that the fragments found at the explosion site originated from an HE projectile 130 mm M79, which is launched from an 130 mm M46 artillery gun.⁷⁶

115. Expert witness Kostić expressed his doubt about the possible number of civilian casualties, but did not corroborate his arguments with any evidence.

116. Dr. Zečević provided a very detailed explanation as to the cause of a large number of casualties, noting that the detonation of a standard artillery projectile would have primary effects

⁷⁴ Findings and Opinion of Expert Witness Vlado Kostić, p. 29.

⁷⁵ Ibid. at pgs. 63 - 64.

⁷⁶ Findings and Opinion of Expert Witness Berko Zečević, p. 68.

such as kinetic energy of fragments and secondary effects such as a blast wave impact (overpressure). Furthermore, Dr. Zečević noted that during the natural projectile fragmentation, the projectile body would be broken into a large number of fragments of different weights and shapes, and that in this specific case 4,000 to 6,800 fragments were formed from the HE projectile body of the 130 mm M79 gun.⁷⁷

117. Additionally, Dr. Zečević noted that the characteristics of the ground had an important effect in this case as it was paved with granite blocks. Because granite is very hard, fragments that hit the blocks ricocheted and passed through human bodies again, which would not have been the case had the ground been of soil, sand, or asphalt. When the fragments hit the granite, they eroded it and granite fragments were created which inflicted considerable injury to the victims.⁷⁸

118. Based on the foregoing, this Panel concludes that the Trial Panel properly accepted the conclusions of Dr. Zečević, and that the evidence supported that it was not possible to shoot at individual targets in urban areas without causing collateral damage to the civilian population.⁷⁹

119. The Defense further argues that the Trial Panel erred in concluding that Dr. Zečević's findings corresponded to other reports, which is not true, because according to this expert witness, the angle of ballistic drop was twice as big as the angle established by the Joint Team of the UNPROFOR and Sarajevo MUP.⁸⁰

120. Dr. Zečević concluded that the probable projectile trajectory was $Az = 271^0 \pm 2.5$. We conclude that the Trial Panel correctly relied on his analysis. Dr. Zečević provided an acceptable explanation that the angle of ballistic drop corresponded with the results of the Joint Commission, which established that the angle was $270^0 \pm 10$, and that any difference is reflected in a reduction of the width of the projectile trajectory zone.⁸¹

⁷⁷ Findings and Opinion of Expert Witness Berko Zečević, p. 70.

⁷⁸ Findings and Opinion of Expert Witness Berko Zečević, p. 71.

⁷⁹ Findings and Opinion of Expert Witness Berko Zečević, p. 85.

⁸⁰ Defense Appeal at page 21.

⁸¹ Findings and Opinion of Expert Witness Berko Zečević, p. 59.

121. The Verdict provided a detailed explanation of the role of the Joint Expert Commission, which consisted of a local team of investigators and UN representatives. This Commission, as mentioned above, reached almost identical conclusions as Dr. Zečević, which confirms the accuracy of the Trial Panel’s decision to credit those conclusions.

122. The Defense argues on Appeal that there is no *intent* in the definition of the crime, and for it to exist there must also be direct malice, not indirect malice that cannot be motivated by intent.⁸²

123. As set out above, the Trial Panel established with certainty, which this Panel accepts as correct, that on 25 May 1995, the Accused issued an order to the 130 mm gun platoon in Panjik to launch shell from the 130 mm gun at Tuzla, which resulted in terrible consequences for the civilians there.

124. Therefore, one of the essential elements of the offense was satisfied, that is to say, the *actus reus* of the mode of liability of ordering, as criminalized in Article 180(1) of the B-H CC.

125. Further, as correctly stated in the Verdict, the Accused committed the offense with indirect intent, regardless of the fact that in some segments of the Verdict the Trial Panel indicated with some qualifications that a person who orders an act or omission, must do that either with direct intent or with an awareness of the substantial likelihood that a crime will be committed in the execution of that order.⁸³

126. In that sense, this Panel concludes that the Verdict correctly established that the Accused was aware that there existed a substantial likelihood that a crime would be committed in the execution of his order and that he also consented to the occurrence of that consequence, whereby the *mens rea* requirement for the mode of liability of “ordering” has been met.

⁸² Defense Appeal at p. 27.

⁸³ See *Prosecutor v. Kordić and Čerkez*, Appeals Judgement, at para. 30 and *Prosecutor v. Blaškić*, Appeals Judgement, at paras. 41-42.

127. In other words, the Accused must have known that Tuzla was a United Nations safe area with a majority civilian population. By ordering that a shell be fired at Tuzla center, whether his intention was that the shell land at Kapija Square or elsewhere nearby, he was aware that there existed a substantial likelihood that civilians in the area would be injured.

128. The Verdict correctly indicates that awareness of the content of the Resolutions which granted “safe area” status to Tuzla, like any legal document, is not a condition for compliance. It was correctly concluded that Tuzla’s status as widely known throughout the territory of BiH and the rest of the world as well as to public officials, national and international media, and all the actors involved in the conflict, including the VRS members and the Tuzla inhabitants.

129. The Accused also knew that 25 May was “Youth Day” and was celebrated across the former Yugoslavia. During the trial it was established that it had been raining for days before 25 May, keeping people indoors, but that the evening of 25 May was beautiful, which accounted for the crowd of over 500 who congregated in the center of the town.

130. Given that the Accused was a professional serviceman, in the Ozren Tactical Group Commander at the relevant time, he knew that a 130 mm artillery piece could not shoot at individual targets and he was aware of the destructive power of the projectile of this gun that was launched at the center of the town.

131. The foregoing is also supported by the fact that in *Prosecutor v. Stanislav Galić*, No. IT-98-29-A, Appeals Judgment (30 November 2006), para. 140, the ICTY Appeals Chamber, in considering a similar issue, concluded that the crime may be committed with either direct or indirect intent. Specifically, the Court explained that the term “willfully” (direct intent), incorporates the concept of “recklessness” (indirect intent). See *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-T, Trial Judgment (12 December 2007), para. 951 (where the Court relied upon the commentary to Article 85 of Additional Protocol I, noting that the term “willfully” encompasses the concept of “recklessness”). Thus, this Panel concludes that the Trial Panel did not err in its findings regarding the required intent.

132. For these reasons, the Appellate Panel finds that the Verdict correctly found the existence of *mens rea* in the attack directed against civilians and the indiscriminate attack in violation of Article 173(1)(a) and (b) of the CC of B-H, that is, the mode of liability of ordering in violation of Article 180(1) of the B-H CC. Thus, we reject the defense contentions.

133. In sum, in analyzing the appellate arguments in terms of the erroneously and incompletely established state of facts, we conclude that the Trial Panel, based on the evidence, reliably established all decisive facts, and correctly concluded that the Accused, by his actions, as described in Part I of the operative part of the Verdict, satisfied all legal elements of the criminal offense of War Crimes against Civilians, in violation of Article 173(1)(a) and (b) of the B-H CC, all as read with Article 180(1) of the B-H CC. Consequently, we conclude that the Defence arguments on appeal are ill-founded.

IV. Application of Substantive Law

134. The Defense argues that in the Verdict the Court applied the B-H CC (enacted in 2003), thus breaching Articles 3 and 4.⁸⁴ The Defense also argues that the Accused's sentence could not have been imposed under the SFRY CC, hence, regarding the sanction, the criminal code was breached to his detriment. The Defense argues that the Verdict in this respect is erroneous.⁸⁵ The Defense cites the case regarding Zijad Kurtović⁸⁶, where neither B-H CC nor Article 173 of the Code applied.⁸⁷

135. It is necessary to note that the issue as to which law is more lenient to the perpetrator is decided in every individual case by comparing the old and new law(s).

136. Comparing the texts of the laws may result in a clear answer only if a new law decriminalizes something that was a criminal offense in the old law, because then the new law is evidently less stringent. In all other cases, when a criminal offense is punishable under both laws, it is necessary to establish all the circumstances that may be relevant in choosing a less

⁸⁴ Defense Appeal at page. 4.

⁸⁵ Defense Appeal at page. 8.

⁸⁶ The Court of Bosnia and Herzegovina, Appeals Verdict, Case No: X-KRŽ-06/299, dated 25 March 2009.

⁸⁷ Defense Appeal at page 10.

stringent law. These circumstances primarily refer to the sentence, its imposition, mitigation, warning measures, potential accessory sentences, new measures that constitute punishment substitutes, safeguard measures, legal consequences of the conviction, and provisions related to criminal prosecution, whether the new law envisages a basis for the exclusion of unlawfulness or culpability or punishability.

137. In this case, both the law that was in force at the time of perpetration of the criminal offense, as well as the law that is currently in force, prescribe as criminal offenses the criminal actions of which the Accused was found guilty. Actually, these are contained in Article 142(1) of the adopted SFRY CC.

138. The B-H CC prescribes a sentence of at least ten years or long-term imprisonment for the criminal offense of War Crimes against Civilians in violation of Article 173 of the CC of B-H. On the other hand, the SFRY CC prescribes a sentence of at least five years or capital punishment for the criminal offense of War Crimes against Civilians in violation of Article 142(1).

139. Having compared these sentences, the Trial Panel arrived at the conclusion that according to the law in force at the time, the prescribed sentence was lower than that under the previous law, notwithstanding the fact that the minimum sentence in the previous law was five years. This is because, according to customary international law, a capital sentence is more stringent than one of long-term imprisonment. Under customary law, the Accused has an absolute right not to be executed and the state must ensure that right — this was accomplished in BiH by the passage of the new law. In addition, it is necessary to consider whether the sentence imposed on the Accused in this case fell closer to the minimum prescribed under the law for the criminal offense, in which case the CC of SFRY could apply since it would be less stringent.

140. In light of this, we conclude that the Trial Panel, in applying the law, correctly applied the provisions of the applicable B-H CC, which entered into force on 1 March 2003. Thus, contrary to the Defense arguments on appeal, there was no violation of the principle of legality or time constraints regarding applicability prescribed in Articles 3 and 4 of the B-H CC.

V. Criminal Sanction

141. The Prosecutor's Office argued on appeal that the level of culpability of the Accused in the perpetration of the referenced offense is extremely high⁸⁸ and that the circumstances under which the offense was perpetrated make it exceptionally serious. The Prosecutor also argues that the Court correctly established facts related to the criminal offense and responsibility of the Accused, but rendered a wrong conclusion that the imposed sanction can achieve the purpose of punishment envisaged under Article 39 of the B-H CC.⁸⁹

142. Analyzing the decision as to the sanction within the scope of the Prosecution appellate arguments and pursuant to Article 308 of the B-H CPC, we conclude that the Trial Panel properly imposed the sentence, taking into account all pertinent circumstances relating to the offense and the perpetrator, which makes the sentence appropriate given the degree of culpability of the Accused, the motives behind the offense, the degree of violation of the values to be protected, as well as personal circumstances of the Accused. Therefore, this Panel concludes that the imposed long- term sentence of 25 (twenty five) years was correctly imposed. We conclude that the sentence will achieve the purpose of punishment envisioned under Article 39 of B-H CC, which requires condemnation of the criminal offense, deterrence of the perpetrator and others from committing future crimes, and an increase in the awareness of citizens of the danger of criminal offenses and the fairness of punishing perpetrators.

143. It is necessary to bear in mind that the values to be protected are universal human values, those which constitute a condition and a basis for a common and human existence and whose violation is a severe violation of international legal standards. The seriousness and gravity of these offenses is indicated by the fact that the crimes are not barred by the statute of limitations.

144. Primarily, we have considered the consequences of the offense itself, which the Trial Panel considered when imposing punishment: that the shelling was carried out on "Youth Day," a beautiful evening that followed several days of rain; hundreds of young people were gathered in downtown Tuzla; 71 people were killed and more than 130 sustained injuries. The youngest

⁸⁸ Prosecutor's Appeal at p. 3.

⁸⁹ Prosecutor's Appeal at p. 4.

killed person was 2.5 years old. The wounded went through a difficult period of suffering and pain during their rehabilitation, which has continued until the present. Many of them still suffer physical consequences from their injuries, in addition to psychological suffering which may never disappear. Further, the families of victims continue to suffer.

145. As stated above, the Trial Panel correctly established that the Accused was directly responsible for the crimes charged, considering that as the Ozren Tactical Group Commander he ordered the artillery platoon subordinated to him to shell Tuzla. As the last person in the chain of command who could order the use of guns, he could also have not issued the order to fire to prevent harming civilians.

146. Regarding the aggravating circumstances, the Trial Panel found that the Accused as a serviceman knew that an ultimate responsibility of one entrusted with command duties is the protection of civilians, regardless of their affiliation, and that the Accused's direct order resulted in one of the worst shellings of the entire war, resulting in the killing of 71 persons and injury to more than 130.

147. Further, the Trial Panel gave due consideration to the Accused's family circumstances, recognizing that he is the father of two adult children with one child receiving medical treatment in Belgrade.

148. The Trial Panel took into account, as a mitigating circumstance, the fact that the Accused cooperated with the prosecution.

149. The Trial Panel's determinations regarding aggravating and mitigating circumstances were proper. In this case, given the gravity of the offense and its consequences, only a sentence of long-term imprisonment could achieve the purpose of punishment, envisioned under Article 39 of the B-H CC. We conclude that imposing a sentence of longer duration is not warranted because the Accused committed the offense with an indirect intent in that he could not have known that the projectile would land on Kapija Square.

150. As we concluded that the Verdict correctly and completely established the state of facts related to the actions of the Accused and his culpability, we also conclude that the sentence of long-term imprisonment of 25 years was properly imposed.

151. Accordingly, the Appeal of the Prosecutor's Office pursuant to Article 313 of the B-H CPC is dismissed as ill-founded and the Verdict is upheld in its convicting part.

152. We further conclude that the decision on custody was correctly rendered. Pursuant to Article 56(1) of the B-H CC, the time the Accused spent in custody under the Decision of this Court as of 8 November 2007 is credited towards the imposed sentence.

VI. Costs of the Criminal Proceedings

153. The Prosecutor's Office also argued on appeal that the Trial Panel should have obliged the Accused to reimburse the costs of the proceedings and the scheduled amount with respect to the convicting part of the Verdict, considering that doing so would not jeopardize the subsistence of the Accused.⁹⁰

154. Considering that neither the Prosecution nor the case record provides sufficient evidence on this matter, we hold that pursuant to Article 188(4) of the B-H CPC, the Trial Panel correctly relieved the Accused of the costs and scheduled amount, in light of the fact that he is indigent. Accordingly, these costs will be paid from the budget of the Court.

155. Article 189(1) of the B-H CPC provides that costs of the criminal proceedings and scheduled amount related to the acquittal shall be paid from the Court's budget.

156. No appeal challenged the conclusion of the Trial Panel pursuant to Article 198(2) of the B-H CPC instructing the injured parties to pursue potential claims in a civil action. We are of the opinion that this was a fair resolution of the issue. Establishing facts regarding the amount of the property claims would require lengthy proceedings, which would extend the duration of the instant proceedings. Where the injured parties so agreed through their attorneys, that part of the

⁹⁰ Prosecutor's Appeal at p. 4.

Verdict has become final. We are of the same mind regarding the convicting part of the Verdict referring injured parties to pursue their claims in a civil action pursuant to Article 198(3) of the B-H CPC.

157. In conclusion, we note that, because no party raised the issue on appeal, we did not consider Part II of the Verdict in which the Accused, pursuant to Article 284(1)(c) of the B-H CPC, was acquitted of the charges. Accordingly, by the expiry of the deadline to appeal, that part of the Verdict became final and binding.

158. In accordance with the foregoing, pursuant to Article 310(1) in conjunction with Article 313 of the B-H CPC, it was decided as stated in the operative part of the Verdict hereof.

Minutes-taker

Neira Kožo

[signature affixed]

[signature and stamp affixed]

PRESIDING JUDGE

JUDGE

Dragomir Vukoje

LEGAL REMEDY: No appeal lies from this Verdict.

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

Sarajevo, 21 April 2011

Branislav Banjac, Certified Court Interpreter for English Language