-draft translation-

SUD BOSNE I HERCEGOVINE СУД БОСНЕ И ХЕРЦЕГОВИНЕ

Number: X-KRŽ-05/24-3
Sarajevo, 28 April 2010

IN THE NAME OF BOSNIA AND HERZEGOVINA!

The Court of Bosnia and Herzegovina, Section I for War Crimes, sitting on the Appellate Panel comprising Judge Azra Miletić, as Presiding Judge, and Judges Tihomir Lukes and Carol Peralta, as members of the Panel, with the participation of the Legal Adviser Sanida Vahida Ramić, as minutes-taker, in the criminal case against the Accused Miloš Stupar, for the criminal offence of Genocide in violation of Article 171(a) of the Criminal Code of Bosnia and Herzegovina (hereinafter: CC of BiH) in conjunction with Article 180(2) of the CC of BiH, deciding upon the Indictment number: KT-RZ-10/05 of 12 December 2005 confirmed on 19 December 2005, amended at the main trial on 24 June 2008, and also amended on 4 March 2010, upon the main and public trial held on 28 April 2010, in the presence of the Prosecutor with the Prosecutor's Office of Bosnia and Herzegovina, Ibro Bulić, the Accused Miloš Stupar and his Defence Counsel, Lawyer Ozrenka Jakšić, on 5 May 2010, rendered and publicly announced the following

VERDICT

The Accused Miloš Stupar, a.k.a. Mišo, son of Slavojka, nee Ninić, born on 7 December1963 in Tišća, Šekovići, wherein he resides, Serb by ethnicity, citizen of BiH, police officer, married, father of four, served in the army in 1982 in Niš, medium income, no previous convictions, the criminal proceedings have been pending against him for causing minor bodily harm, defending himself while at liberty, the prohibiting measures imposed on him by the Decision of the Court of BiH, number: X-KRŽ-05/24-3 of 27 January 2010,

pursuant to Article 284(c) of the Law on Criminal Procedure of Bosnia and Herzegovina (CPC of BiH)

IS ACQUITTED OF CHARGES

that he

in his capacity of Commander of 2nd Special Police Šekovići Detachment, whose members, together with the Army of Republika Srpska (VRS) and the Republika Srpska Ministry of the Interior (MUP), carried out a widespread and systematic attack against the members of Bosniak people inside the UN protected area of Srebrenica in the period from 10 July 1995 to 19 July 1995, with the common plan to exterminate in part a group of Bosniak people by means of forced transfer of women and children from the Protected Area and by organised and systematic capture and killing of Bosniak men by summary executions by firing squad; having had the knowledge of the plan and that the members of the 2nd Special Police Šekovići

Detachment, on 12 and 13 July 1995, escorted the captured Bosniak men to the Farming Cooperative Kravica Warehouse whom they, together with other captured Bosniak men who had been bussed to the Warehouse and whose number totalled more than one thousand, detained in the Farming Cooperative and, having learned that the killings of the captives commenced in early evening hours, as he was present on the spot at the time of the actions described and the conduct of his subordinate police officers, among whom there were also Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević, Branislav Medan and Petar Mitrović, and prior to their taking these actions, he failed to take the necessary and reasonable steps to prevent them from carrying them out and force them to obey him as their commander, nor did he, after the events during which most of the captives had been executed, take any action to punish his subordinate police officers who had committed the criminal offence,

thus, in his capacity as their superior, having had the knowledge of the plan of his subordinates to commit the criminal offence, he failed to take the necessary and reasonable measures to prevent them from committing it and, in the aftermath of the events, he failed to take the necessary measures to punish them accordingly,

by doing so, he would have committed the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article 180(2) of the CC of BiH.

Pursuant to Article 189(1) of the CPC of BiH, the Accused has been relieved of the duty to reimburse the costs of criminal proceedings and they shall be paid from budget appropriations of the Court of BiH.

R E A S O N I N G

Procedural History

1. Deciding upon the Indictment of the Prosecutor's Office of BiH number: KT-RZ-10/05 of 12 December 2005, which was confirmed on 19 December 2005, the Trial Panel of the Court of BiH rendered a Verdict number: X-KR-05/24 of 29 July 2008 by which, under sections 1 and 2 of the wording of the Verdict, the Accused Milenko Trifunović, Brano Džinić, Aleksandar Radovanović, Slobodan Jakovljević and Branislav Medan, were found guilty of the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article (29) and (180) of the CC of BiH, the Accused Stupar of the criminal offence of Genocide in violation of Article 171(a) in conjunction with Article 180(2) of the CC of BiH while, by the same Verdict, Milovan Matić, Velibor Maksimović and Dragiša Živanović were acquitted of the charges that they had committed

the criminal offence of Genocide in violation of Article 171 of the CC of BiH in conjunction with Articles 29 and 180(1) of the CC of BiH. Pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (CPC of BiH), with the application of Articles 39, 42 and 48 of the CC of BiH, the Court sentenced the Accused to the long-term prison sentence as follows: the Accused Miloš Stupar to 40 years imprisonment, the Accused Milenko Trifunović to 42 years imprisonment, the Accused Brano Džinić to 42 years imprisonment, the Accused Aleksandar Radovanović to 42 years imprisonment, the Accused Slobodan Jakovljević to 40 years imprisonment and the Accused Branislav Medan to 40 years imprisonment.

2. Deciding upon the appeals, the Appellate Panel granted the appeal by the Defence Counsel for the Accused Miloš Stupar, therefore, with regard to this Accused, the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 of 29 July 2008 was **revoked** and, in that part, a trial was scheduled to be held before the Appellate Panel of the Court of Bosnia and Herzegovina.[1]

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[1] By the Verdict number: X-KRŽ-05/24 of 9 September 2009, the appeal by the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina was dismissed as ungrounded and the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 dated 29 July 2008 with regard to the Accused Milovan Matić was upheld. **The same Verdict granted in part the appeals filed by** the Defence Counsels for the Accused Milenko Trifunović, Brane Džinić, Aleksandar Radovanović, Slobodan Jakovljević, and the Accused Branislav Medan in person, and the Verdict of the Court of Bosnia and Herzegovina number: X-KR-05/24 of 29 July 2008 with regard to the referenced Accused persons was **revised to find the Accused Milenko Trifunović a.k.a. Čop**, **Brano Džinić a.k.a. Čupo**, **Aleksandar Radovanović a.k.a. Aca**, **Slobodan Jakovljević a.k.a. Boban**, **Branislav Medan a.k.a. Bane** guilty of the actions thoroughly described in the operative part of the Verdict (by killing the members of a group of Bosniaks, they aided in destruction of the group in part as a national, ethnic and religious group), who **thus** committed the criminal offence of **Genocide in violation of Article 171(a) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 31 of the same Code,** therefore, pursuant to referenced legal regulations, Article 39, 42 and 48 of the Criminal Code of Bosnia and Herzegovina and Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina, the Court sentenced them to the long-term prison sentence as follows:

- the Accused MILENKO TRIFUNOVIĆ to the long-term prison sentence of 33 (thirty three) years;
- the Accused ALEKSANDAR RADOVANOVIĆ to the long-term prison sentence of 32 (thirty two) years.
- the Accused BRANE DŽINIĆ to the long-term prison sentence of 32 (thirty two) years
- the Accused SLOBODAN JAKOVLJEVIĆ to the long-term prison sentence of 28 (twenty eight) years
- the Accused BRANISLAV MEDAN to the long-term prison sentence of 28 (twenty eight) years.

Pursuant to Article 56 of the CC of BiH, the time that the Accused spent in custody until the referral to serve the sentences shall be credited towards the sentence of imprisonment, pursuant to the respective Decisions of the Court. The Decision on claims under the Property Law and the costs of the first-instance criminal proceedings against these Accused remained unmodified.

3. By the amended Indictment of the Prosecutor's Office of BiH number: KT-RZ-05/10 of 4 March 2010, the Accused Miloš Stupar was charged with the criminal offence of Genocide in violation of Article 171(a) of the CC of BiH in conjunction with Article 180(2) of CC of BiH. The charges against the Accused indicate that he, in his capacity as Commander of the Special Police Šekovići Second Detachment, that is, as their superior officer, having had the knowledge of the plan of his subordinates to **commit a criminal offence, failed to take the necessary and reasonable measures to prevent them from committing it and, in the aftermath of the events, he failed to take the necessary measures to punish them accordingly.**

BAN *REFORMATIO IN PEIUS*

4. By the Trial Verdict, the Accused Miloš Stupar was **found guilty of failing to take the necessary and reasonable measures to punish** the perpetrators of the criminal offence as described in the Indictment. However, the amended Indictment of the Prosecutor's Office of BiH of 4 March 2010 charged the Accused under the principle of command responsibility wherein he **failed to prevent the perpetration of the criminal offence and to punish the perpetrators thereof.** The proceedings have been reopened after the Appellate Panel granted the appeal by the Defence Counsel for the Accused Stupar, revoked the Trial Verdict in that part and scheduled a trial.

5. The Court finds it necessary to point at the explicit ban *reformatio in peius* as referred to Article 307 of the Criminal Procedure Code of BiH: "If an appeal has been filed only in favour of the accused, the verdict may not be modified to the detriment of the accused". The ban *reformatio in peius* constitutes a legal rule under which the legal remedy claimed in favour of the Accused cannot lead to the Court's decision which is more detrimental to him than if it had not been claimed at all. It follows from the quoted legal provision that such a case will only exist if the Prosecutor did not appeal at all, or if he did not appeal with that regard, which is the case here.

6. This rule applies to the occasion wherein a decision on the appeal is to be rendered at the Panel session, or a hearing to be held upon the Verdict revocation. Therefore, the Appellate Panel would not be obliged to consider the evidence that possibly refers to the obligation of the Accused to prevent the perpetration of the criminal offence by the members of the 2nd Detachment.

HEARING BEFORE THE PANEL OF THE APPELLATE DIVISION

7. Pursuant to Article 317 of the CPC of BiH, a hearing was held before the Panel of the Appellate Division and, during the evidentiary procedure, the evidence presented in the first instance proceedings were re-adduced by re-play the audio-video recording pertaining to the testimonies of the following witnesses: Snežana Sokić, Dražen Erkić, Milovan Vukajlović, Milenko Borovčanin, Tomislav Kovač, Momčilo Vlačić, Goran Matić, Miodrag Josipović, Zora Lukić, Zoran Tomić, Milomir Trifunović, Marko Aleksić, Milenko Pepić, Nedeljko Sekula, Danilo Zoljić, Nikola Milaković, Đorđe Vuković, Slobodan Stjepanović, Dragomir Stupar, Mirko Trifunović, Jovan Nikolić, Duško Mekić, Živojin Milošević, and protected witness S4.

8. The Appellate Panel granted the motion by the defence to adduce new evidence, that is, to directly examine the witness Radoslav Stuparević, which motion had also been filed by the defence for Stupar during the previous proceedings. However, just before the witness hearing, the Prosecutor drew the attention of the Court to the fact that this witness had the status of a Suspect and, pursuant to Article 89 of the CPC of BiH, this witness should not take the oath or affirmation.[2] Having learned about the suspect status of the witness, the defence for the Accused Stupar gave up on hearing the witness.

9. The Appellate Panel also reviewed the documentary evidence presented during the Trial proceedings, with special reference to the following:

10. MUP RS Sarajevo, Decision of 24 February 1994, number 09-6539 on the appointment as Commander of the Šekovići Police Detachment, Special Police Brigade, Exhibit 96; MUP RS Bijeljina, Decision of 10 March 1993 number 09-4231 on the appointment as Deputy Commander of the company within the Police Detachment - Romanija-Birač PSC Sarajevo, Exhibit 95; MUP RS, Decision of 23 August 1995, number 08/1-120-3474 on the appointment of Miloš Stupar a Head of the Anti-terrorism Department, Exhibit 94; Special Police Šekovići Second Detachment, Dispatch number 01/1-1-4/2-62 of 18 July 1995, Exhibit 101; Special Police Šekovići Second Detachment, Consent for Milutin Kandić to return items issued, number 01/1-8-372/94 of 16 November 1994, Exhibit 100; Special Police Šekovići Second Detachment, Notification of return items issued to Slaviša Jurošević, number 01/1-8-305/94 of 8 September 1994,

[2] Article 89 of the CPC of BiH, **Individuals who may not take the Oath or Affirmation**: „*The individuals who may not take the oath or affirmation are persons who are minors at the time of examination, those for whom it has been proved that there is a grounded suspicion that they have committed or participated in commission of an offense for which they are being examined or those who due to their mental condition are unable to comprehend the importance of the oath or affirmation.*“

Exhibit 99; Employment Record Booklet for Miloš Stupar, Exhibit 98; MUP RS, Decision of 3 March 1997 to assign Miloš Stupar to a position of a counter-intelligence officer in the Bijeljina Operations Centre, Intelligence and Counter-Intelligence Sector, Exhibit 97; Personnel questionnaire for the establishment of a rank of the authorised officer (for Miloš Stupar), Exhibit 93; MUP RS, Special Police Šekovići Second Detachment number: 01/1-1-4/2-229/95 of 5 July 1995 – Report on activities of the Special Police Šekovići Second Detachment in the II quarter of 1995, Exhibit O-259; MUP RS, Special Police Šekovići Second Detachment number: 01/1-1-4.2-287/95 of 14 August 1995, Request for transfer of the conscript Nenad Protić to the Special Police Šekovići Second Detachment, Exhibit 262; Special Police Šekovići Second Detachment, Dispatch number 01/1-14/2-293 of 16 August 1995, Exhibit: O-263; MUP RS, Special Police Šekovići Second Detachment number: 01/1-1-4/2-230/95 of 5 July 1995, Semi-annual Report of the Special Police Šekovići Second Detachment for the first half of 1995, Exhibit 183; On 17.11.1995, decorated with the RS medal Order of the Karađorđe's Star with Swords of III class, by the RS President, Radovan Karadžić, Ph.D., Exhibit 109; Order number 64/95 of 10 July 1995 (Exhibit: O-I-01), Act of the Supreme Command Staff of the Sarajevo armed forces, strictly confidential, number: 02/227-1 of 10 February 1993 (Exhibit O-I-36), Notification of the results of Srebrenica demilitarisation negotiations, number 02/520-2 of 20 April 1993, (Exhibit O-I-39), General Staff of the Army of BiH, strictly confidential, number 1/1-941 of 30 July 1996, (Exhibit O-I-42), Drina Corps Command, strictly confidential, number 03/2-205 of 5 July 1995 – Regular Combat Report (O-I-21), Supreme Command of the RS armed forces, number 2/2-11 of 8 March 1993 (Exhibit O-I-31), Act-consent of the Special Police Šekovići Second Detachment Commander, Miloš Stupar number: 01/1-8-372/94 of 15 November 1994s (O-100).

11. The prosecution referred to Exhibit O-258 – Report of Ljubiša Borovčanin (O-258), while the defence referred to the evidence including a newspaper article of Ljubiša Milutinović: *In memory of a hero Rade Čuturić from Stupari* (O-I-13a); A copy of the *Drinski* newspaper number 23 (O-I-13b).

12. At the trial before the Panel of the Appellate Division, the prosecution moved the Court to adduce new evidence, as follows: examination of the witness Jefto Doder, who was supposed to testify about the circumstances surrounding the presence of Miloš Stupar in Potočari on 12 July 1995 and adduction to evidence of the transcript of the testimony by Graham Alister, Investigator, who took the statement of Ljubomir Borovčanin.

13. Having considered the motion by the prosecution, the Appellate Panel dismissed it on the following grounds. Article 295(4) of the CPC of BiH

allows for the presentation of new facts and evidence which, despite due attention and cautiousness, could not be presented at the main trial. In the process, the appellant must cite the reasons why he did not present them previously.[3] The Court is also obliged to evaluate whether the new facts and/or evidence are important and have influence on rendering a proper decision. The same principle applies to the trial before the Appellate Panel upon the revocation of the Trial Verdict. Being mindful of the foregoing, the Appellate Panel found that the Prosecutor had failed to state the adequate reasons for not being capable of examining the witness Jefto Doder during the Trial proceedings. The fact that the Prosecutor, upon completion of the Trial proceedings, learned about the existence of this witness, cannot in itself justify the presentation of new evidence, particularly not if it is known that this witness would give his testimony about a circumstance that had already been clarified during the Trial proceedings (the presence of the Accused in Potočari on 12 July 1995), in relation to which circumstance the Trial Panel had heard and this Panel re-heard the testimonies of a larger number of witnesses for the prosecution.

14. The Appellate Panel also dismissed the motion to adduce into evidence the transcripts of the testimonies by Graham Alister and Ljubomir Borovčanin. Specifically, according to the Appellate Panel, the Trial Panel erred in adducing into evidence the testimonies of the Suspect Ljubomir Borovčanin. Article 5 of the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BIH (Law on Transfer of Cases) stipulates the possibility that transcripts of testimony of a witness given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY Rules of Procedure and Evidence (Rulebook) are used.[4]

15. The ICTY RoPe makes a clear distinction between the witness examination (Rule 90 – "Testimony of Witnesses") and suspect questioning (Rule 42 – "Rights of Suspects during Investigation") which clearly indicates the warnings which the Suspect must receive from the Prosecutor during questioning and his rights thereof. Also, the Rulebook includes special rules pertaining to depositions (Rule 71).

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[3] See Article 295 of the CPC of BiH, Contents of Appeal and Removing the Shortcomings of the Appeal: „*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.*"

[4] Law on Transfer of Cases, Article 5: **Evidence provided to ICTY by witnesses:**„*(1) Transcripts of testimony of witnesses given before the ICTY and records of depositions of witnesses made before the ICTY in accordance with Rule 71 of the ICTY RoPE, shall be admissible before the courts provided that that testimony or deposition is relevant to a fact in issue*; See Rule 71 – Depositions, ICTY Rules of Procedure and Evidence;

16. The testimony Ljubomir Borovčanin gave to the ICTY Investigators was given in his capacity as Suspect, not as a witness, therefore, cannot be used under Article 5 of the Law on Transfer of Cases, as it does not satisfy the requirements foreseen.

17. The use of this testimony does not satisfy the requirements under Article 7 of the Law on Transfer of Cases either, since this Article clearly refers to the application of the requirements as referred to in Article 273 of the CPC of BiH. Considering that this Panel did not accept this testimony, it also proved to be unnecessary and irrelevant to summon the Investigator who had taken the referenced testimony in the case against Ljubomir Borovčanin during the investigation phase.

18. As proposed by the defence, Ljubomir Borovčanin was also cross-examined and heard by the Court before the Trial Panel in this case on 21 May 2007, in his capacity as witness. During the proceedings, the Appellate Panel, re-heard and evaluated his testimony, being mindful of this specific situation of the witness, being an Accused on a similar charge, at the time of giving of his testimony. The outcome of this testimony was not diminished by the fact that he had not been directly examined by the Prosecutor who explained that, the fact that this witness's testimony given in his capacity as "suspect" in the course of the investigation conducted against him before the ICTY, the Trial Panel accepted as direct examination. Specifically, notwithstanding such procedural situation, the Prosecutor had the possibility to additionally examine the witness so as to corroborate his arguments, which he failed to do, nor did he move the Appellate Panel accordingly.

GENERAL CONSIDERATIONS

19. In the further course of this document, the Court will reason the grounds leading it to render an acquitting verdict, therein substantiating these facts which constitute the grounds for rendering a decision to acquit the Accused of the charges pursuant to Article 284(c) of the CPC of BiH.

BURDEN OF PROOF

20. The burden of proof of the essential elements of the criminal offence and the elements of the criminal responsibility of the Accused, in this particular case – the elements required for proving command responsibility, lies with the Prosecution. The evidence tendered by the Prosecutor's Office in order to prove the guilt of the Accused on the basis of the command responsibility doctrine, and other presented evidence cannot lead this Panel to the conclusion that the Accused Stupar, has committed the criminal offence as charged beyond any reasonable doubt.

Thus the Court was obliged to render a Verdict acquitting the Accused of the charges brought against him.

21. The Court is obliged to render an acquitting verdict, not only in the case of proven innocence of the Accused, but also in the case of reasonable doubt as to the guilt of the Accused as well. Any doubt in the existence of some legally relevant fact must undoubtedly favour the Accused. The facts *in peius* in relation to the Accused must be established with absolute certainty and beyond any reasonable doubt. If any doubt does exist these facts cannot be considered as proven, and should be deemed unproven instead and consequentially ignored.

22. Another rule concerns the facts which militate in favour of the Accused, that is, the facts *in favorem*. These facts are considered to be proven even if they are only probable, in other words even if their existence is doubtful, but tend to favour the Accused[5] It follows that, pursuant to Article 281(2) of the CPC of BiH, the Court is obliged to, conscientiously, evaluate each piece of evidence in isolation and in conjunction with the rest of the presented evidence and, based on such an evaluation, to conclude whether a fact has been proven or not.[6]

23. The Appellate Panel is satisfied that the evidence presented at the main trial and at the hearing before the Appellate Panel is not sufficient to create an inference as to the existence of all of the legally relevant facts, as stated in the description of the criminal offence, from which the legal elements of the criminal offence result, and based on which criminal responsibility is to be established. Thus, pursuant to Article 284(c) of the CPC of BiH, the Panel has rendered the Verdict acquitting the Accused of the charges on the following grounds:

COMMAND RESPONSIBILITY

23. Article 180(2) of the CC of BiH stipulates that „*the fact that any of the criminal offences referred to in Article 171 through 175 and Article 177 through 179 of this Code was perpetrated by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*"

[5] Commentary to the criminal legislation of Bosnia and Herzegovina, Joint project of the Council of Europe and the European Commission, page 50

[6] Article 281(2) of the CPC of BiH: „*The Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence and, based on such evaluation, to conclude whether the fact(s) have been proved.*"

24. The core of the concept of command responsibility is that it is an *indirect mode of responsibility*. This type of command responsibility only exists in cases of omission and concerns the liability of the superior for the acts committed by his subordinates.

25. In defining command responsibility, it is primarily necessary to establish the essential elements of command responsibility at law.

26. **The first requirement** is that a person, several persons or a certain unit having a subordinate status relative to a recognized individual, **committed a criminal offence** as referred to in Article 171 through 175 of the CC of BiH and Article 177 through 179 of CC of BiH. This concerns the specific implementation of the accessory principle wherein the liability of a superior is conditioned to the fact that a subordinate had taken an action as referred to in under Article 180(1) of the CC of BiH.

27. **The second requirement is the existence of the subordinate/superior relationship** and that the superior held some degree of authority over his/her subordinate/s and supervised his/her/their actions.

28. In this context, it is also necessary to establish whether **the superior had knowledge or could have had knowledge** that his subordinate had planned to commit the criminal offence or had already committed the criminal offence and, if regardless of being aware of these circumstances, the superior failed to perform his duty and take adequate actions, in other words, failed to take the necessary and reasonable measures which are expected of him.

29. The command responsibility doctrine is defined by the commander's authority to control the actions of his subordinates. It is essential that **the commander has effective control and responsibility over the persons who are guilty of a breach of international humanitarian law**. He must be in a position to substantially be capable of punishing the perpetration of such actions. Such authority may be both of a *de facto* and a *de iure* nature. The superior must be in effective command or authority and supervision and supervision, wherein *effective command or authority* must be interpreted in such a manner that, besides the existence of "de jure" authority, the existence of "de facto" command or authority must also be proved to exist as an essential element of this .

30. Also, in addition to satisfying the foregoing requirements, it should also be proved that a superior knew or could have known that the criminal offence had been committed. The subjective element of command responsibility is the so called *effective knowledge*, that is, awareness of the act. It is an intellectual component that must be proved. Knowledge means awareness

of the criminal offence having been committed by the subordinates. Another type of responsibility pertains to an Accused responsibility for unintentional acting (*could have known*) and concerns involuntary negligence whereby the superior is not aware of his subordinate's actions of which he is obliged to be aware. In determining these categories, a decisive issue is whether the superior held certain information, based on which he could have known about the commission of the criminal offence by his subordinates.[7]

DE IURE

31. A *de iure* superior-subordinate relationship, for the purpose of the doctrine of superior responsibility, means that the superior has been appointed, elected or otherwise assigned to a position of authority *for the purpose of commanding or leading* other persons who are, thereby, to be legally considered to be his subordinates.[8]

32. The mere position of holding a power or hierarchy title, in itself, may not suffice "per se" to establish that someone is a *de iure* superior, unless such an enabled person also exercises effective power and authority of which such a position is characteristic.[9] The fact that someone is in the possession of *de jure* power, in itself, may not suffice for the finding of command responsibility if it does not manifest in effective control.[10]

33. The brigade commander holding that title, but without authority accompanying that role, cannot be considered *de iure* commander of the members of that brigade in terms of attributing the superior responsibility to him.

DE FACTO

34. A *de facto* relationship of command may be defined as a relationship in which one party – the superior – has acquired over one or more people enough authority to prevent them from committing crimes or to punish them when they have done so. The origin or basis for such *de facto*

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[7] See: Commentary to the criminal legislation of Bosnia and Herzegovina, Joint project of the Council of Europe and the European Commission, page 597

[8] Guenael Mettraux, *„The Law of Command Responsibility"*, Open Society Fund of Bosnia and Herzegovina, Humanitarian Law Fund of Serbia, Sarajevo 2010 (hereinafter: G. Mettraux, *The Law of Command Responsibility*), page 139

[9] *See* Appeals Judgement in *Čelebići,* par. 197. Also see Judgement in *Rašević i Todović,* 171-172 and the stated reference;

[10] *See*: IT-96-21-A, Prosecutor v. Zejnil Delalić et al. (hereinafter: *Čelebići*), Appeals Judgement of 20 February 2001 (hereinafter: Appeals Judgement) para. 197; Also *see*: *Galić*, Trial Judgement of 5 December 2003, para. 173.

authority may be diverse, but it must be such that there is an expectation of obedience to orders, on the part of the superior, and a parallel expectation of subjection to his authority on the part of those who are under his authority.[11]

35. The Appellate Panel is of the view that the possibility of exercising effective control is an essential element to establish whether the superior may be held liable, under the principle of superior responsibility, on the basis of his *de facto* position of authority. With the caveat that such authority can have dual "*de facto*" as well *as* "*de iure*" character, it is necessary to establish that he did exercise a certain degree of control over his subordinates or other similar authority to control them. Only then can the superior be held responsible "*de facto*" for the acts of his subordinates. The doctrine of command responsibility is, ultimately, dependant upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power in order to prevent and repress any crimes about to be committed by his subordinates, and a failure by him to punish them for a committed offence in a diligent manner, is sanctioned by the imposition of individual criminal responsibility. It follows therefore that there exists a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly cannot, properly, be considered as their superiors. In order for the principle of superior responsibility to be applicable, it is, thus, essential that the superior has effective control over the persons committing the underlying violations of international humanitarian law, with the specific understanding that they must have the material ability to prevent and punish the commission of these offences.[12]

EFFECTIVE CONTROL

36. As stated above, in order for the principle of superior responsibility to be applicable, it is necessary that the superior has effective control over the persons allegedly committing the underlying crime, in the sense of having the material ability to prevent and punish the commission of these offences. Effective control may be defined as the power and the possibility to take effective measures to prevent the commission of a crime and punish the crimes others, subordinate to you, have committed or plan to commit.[13]

37. The essential factor that must be established to find a superior-subordinate relationship is that the superior had "effective control" over the person or

[11] G. Mettraux, *The Law of Command Responsibility*, page 142
[12] Ibid and *Čelebići*, Trial Judgement of 16 November 1998. (hereinafter: Trial Judgement) par. 377-378
[13] See: *Čelebići*, Trial Judgement, para. 354

persons in question, namely those persons committing the offences. "Substantial influence" over subordinates that does not meet the threshold of "effective control" is not a sufficient basis for imputing criminal liability to an accused under customary law. A commander vested with *de jure* authority alone who does not, in reality, have effective control over his or her subordinates will not incur criminal responsibility pursuant to the doctrine of command responsibility, while a *de facto* commander, who lacks formal letters of appointment, superior rank or commission but does, in reality, have effective control over the perpetrators of offences could incur criminal responsibility under the doctrine of command responsibility.[14]

THE ACCOUNT OF FACTS - EVALUATION OF THE ADDUCED EVIDENCE

38. The accused Stupar can only be held criminally liable under the command responsibility concept if he was incorporated in the relevant chain of command as a superior officer to whom the perpetrators of the criminal offence were subordinated, either *de iure* or *de facto*. Also, his position, in this said chain of command, must be such as to empower him to punish his subordinates for the criminal offences they may have committed.

39. With regard to the first requirement stipulated under Article 180(2) of the CC of BiH, that *an offence prescribed under Articles 171 through 175 and Article 177 through 179 of this law was perpetrated by a subordinate*, the Appellate Panel notes that the individuals, who were allegedly subordinated to the accused Stupar[15] as argued in the Indictment, were convicted under a final verdict of the criminal offence of Genocide in violation of Article 171, in conjunction with Article 31 (Accessory) of the CC of BiH. There is no doubt that the crime did take place in the Kravica Cooperative Farm, as established under the final verdict No. X-KRŽ-05/24 rendered by this Court on 9 September 2009.

40. However, the Appellate Panel maintains that the fact that the five accused individuals were ("*de iure*" *and/*or "*de facto*") subordinated to the accused Miloš Stupar has not been proved beyond any reasonable doubt, nor has it been proved that he had effective control over the 2nd Šekovići Special Police Detachment at the time of the commission of the offence.

[14] Case number IT-02-60-T, Prosecutor versus Vidoje Blagojević et al., Trial Judgement of 17 January 2005 (hereinafter: *Blagojević,* Trial Judgement), para. 791

[15] *See the second instance Verdict in the case No. X-KRŽ-05/24 relevant to the convicted Milenko Trifunović, Aleksandar Radovanović, Slobodan Jakovljević, Brane Džinić, Branislav Medan and the second instance verdict in the case No. X-KRŽ-05/24-1 relevant to the convicted Petar Mitrović*;

41. The Appellate Panel has, duly, evaluated the evidence presented at the main trial following the revocation of the First Instance verdict. In addition, with the consent of the parties, the Panel has evaluated all the other evidence presented during the First Instance proceedings which was relevant to the accused Miloš Stupar. On the ground of this evidence, the Appellate Panel cannot establish that the accused Stupar was a *de iure* and/or a *de facto* commander of the 2nd Šekovići Special Police Detachment on 12 and 13 July 1995. Also on these grounds, the Appellate Panel cannot establish the accused had effective control over the members of the Detachment at the time.

42. An evaluation of all the relevant evidence indicates minor inconsistencies and contradictions. Nonetheless, all presented evidence must be evaluated also in its entirety and not only individually. When evaluating evidence individually, each piece of evidence must be weighed as part of a whole and no portion, or portions, thereof, which seem to be intrinsically relevant at first glance, may be taken out of the full context.

43. The Appellate Panel holds that the noted inconsistencies are minor and mainly occur as a consequence of the passage of time, different individual perceptions and general and imprecisely formulated questions made to the witnesses, mainly during the investigation.

DE IURE

44. It follows from the relevant evidence presented that the accused Stupar was, temporarily, assigned to the position of commander of the 2nd Šekovići Special Police Detachment in February 1994[16] and was replaced in mid June 1995 by Rade Čuturić a.k.a. *Oficir*. Rade Čuturić took over command immediately before the detachment left for the field mission in Srednje and was in command also on 13 July 1995, when he arrived with the Detachment at the Sandići – Kravica site, specifically at the Cooperative Farm in Kravica, where he was eventually wounded, that is, injured.

45. The witnesses who were involved in issuing the decision to relieve Stupar of his command duties (Borovčanin, Sarić and Kovač) describe this sequence of events and are corroborated also by the witnesses who were members of the 2nd Detachment.

46. Having evaluated the testimony of witnesses Mladenko Borovčanin, Ljubiša Borovčanin, Goran Sarić and Tomislav Kovač, in relation to each other, the Appellate Panel has found them to be completely consistent about the fact that

[16] See Exhibit No. 96, MUP RS Sarajevo, Decision No. 09-6539 of 24 February 1994 Assigning Miloš Stupar as Commander of the Šekovići Police Detachment, Special Police Brigade.

the accused Stupar had been relieved of his duties and that Čuturić had taken command.

47. In his testimony, witness Mladenko Borovčanin gives a detailed account of events which preceded Stupar being relieved of duty and Rade Čuturić's take over of command. This witness had conveyed to Goran Sarić his observations about the pertaining situation and the existing division within the Detachment. It follows from the testimony given by witness Sarić, the then commander of the RS Special Police Brigade, that it was agreed that Rade Čuturić would take over command. This witness, however, does not remember precisely when the take-over took place, but was positive that Čuturić commanded over the detachment in the Sarajevo combat zone.

48. According to witness Tomislav Kovač, the then RS Minister of Internal Affairs, Stupar was the commander of the 2nd Detachment in the first half of 1995, but the procedure of his replacement was underway as a young officer was to take over his position. Kovač approved the replacement.[17]

49. Witness Ljubomir Borovčanin, the then deputy commander of the RS MUP Special Police Brigade also stated in his testimony that the replacement took place and he explained how the accused Stupar handed over the command to Čuturić.[18]

50. The Appellate Panel has found the testimony given by these witnesses to be consistent and credible, complementing each other when explaining how Čuturić was introduced as the commander of the 2nd Detachment and how Stupar was relieved of his duties.

51. Notwithstanding that pursuant to the Decision of 23 August 1995 the accused Miloš Stupar was assigned as Head of the Zvornik Department of the Anti-Sabotage Administration as of 21 August 1995, this fact alone cannot be taken

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[17] Witness **Tomislav Kovač**, case No. X-KR-05/24, transcript of 15 November 2007, page 68: Question: "A*ccording to your information, Miloš Stupar was not commander at any time during 1995?*
Witness Kovač: *No, according to my information, he was commander in the first half of '95. So, he was the commander in the first part of the year and the procedure of replacement was underway, I wish to be precise, it was a process in which he was relieved of duty and replaced by a young officer Čuturić, who took over and was introduced to that position (...)* ***Witness Kovač:*** *Well, the best time estimate, I think he could ... around ... sometime in late May, well, it was in late May or in early June when he took over, when he took over the detachment, as far as I can remember it."*

[18] Witness **Ljubomir Borovčanin**, case No. X-KT-05/24. transcript of 21 May 2007, page 39: "*I know for sure that Rade Čuturić was commander of the detachment. This is a de facto situation, as it was in the field, I also know that Miloš Stupar had some problems with the Brigade Command or with one part of the Brigade Command and that he was disfavoured in a way, so to say, they were rather unfair to him and he simply withdrew at his own initiative fairly long before these events took place and started to hand over his duties, it was obvious that those unsettled relationships could affect the combat readiness of the detachment, particularly its internal relations, since the composition of that detachment was atypical. So, he was in a way angry and I would say even a bit humiliated by being treated like that. And, given that he was a man of principle and dignity, he did not want to be used for settling someone else's accounts.*

to conclude that Stupar exercised the duty of commander of the 2nd Detachment the entire time up to that date. The Panel has established that, from the moment Čuturić took over as the commander (in mid June 1995) up to 21 August 1995, Stupar had remained a member of the 2nd Šekovići Special Police Detachment, without having any specific assignment. In other words, he was assigned no post, with the exception of the period between 15 July to 18 July 1995, when he substituted for Čuturić, who was unable to exercise his duties because of the injuries sustained precisely on 13 July 1995.

52. The Appellate Panel holds that the documentary evidence in which the accused is referred to as the commander, is not, in itself, sufficient to conclude that the accused was the *de iure* commander. The reason the Appellate Panel has taken this stance is because a number of these documents do not bear the signature of Miloš Stupar[19], while other documents bear signatures the authenticity of which is dubious. Two reports of the 5 July 1995 have the signature of Miloš Stupar affixed, but they pertain to the period before this stated date, when Miloš Stupar was actually the commander of the Detachment. There is not a single document amongst those presented which could be taken to establish beyond any reasonable doubt that the accused was the *de iure* commander of the Detachment, given that none of these documents amount to an effective order. Neither does it stem from any of these documents that the accused had any sort of official authority.

53. Given that Rade Čuturić was in the field with the other members of the Detachment, it is logical and likely to assume that the accused may have signed certain documents as a commander, but these documents cannot be considered as legally relevant to establish the *de iure* superior-subordinate relationship. The relevance and importance of documentary evidence must be evaluated in the context of all the presented evidence and primarily the testimony of those witnesses who had the authority to make decisions and who, actually, issued the decision to relieve the accused Stupar of duty. There is no doubt that the period, commencing when Čuturić joined the detachment, up to the moment the detachment left for the field mission in Srednje, represented a transitional period for the unit during which Čuturić was taking over command of his detachment. The accused was relieved of his duties, however, it must be understood that this relief was not intended to sanction or punish the accused, so that, while awaiting a new assignment, he merely remained in the detachment as an ordinary member and continued receiving the same salary he had before being relieved of duty.[20] Although the accused

[19] See Exhibit 101: 2nd Šekovići Special Police Detachment, Dispatch No. 01/1-1-4/2-62 of 18 July 1995, Exhibit O-263: 2nd Šekovići Special Police Detachment, Dispatch No. 01/1-14/2-293 of 16 July 1995.

[20] Witness **Goran Sarić**, transcript of 22 August 2007, case No. X-KR-05/24, page 14: „*Miloš Stupar's relief from duty was agreed upon among the Minister, Miloš Stupar and Rade Čuturić. So, it was not a usual type of relief from duty due to insubordination, negligence or something like that, it was agreed to relieve Mišo Stupar of duty so that he could get some rest and reassigned to another position.*"

did not have the necessary educational background to be a commanding officer, he was, nevertheless, appreciated not only by his superiors, but also by those individuals who had previously been subordinated to him. This was, precisely, why he was ordered, by Borovčanin, to substitute for Čuturić, to attend the meeting of 15 July 1995 in Zvornik and to take members of the 2nd Detachment to Baljkovica afterwards.

54. The Appellate Panel is of the opinion that the adduced evidence strongly suggests that the accused was verbally relieved of his command over the 2nd Detachment. In a time of war, many orders are executed verbally and this fact, in itself, cannot be ignored. Therefore, an official document on the assignment of an individual to a position does not necessarily have to mirror the real situation, particularly after a certain period had elapsed.[21] The evidence of the assignment is not sufficient to apply the concept of command responsibility to the accused.[22]

55. Therefore, the Appellate Panel is of the opinion that every document must be evaluated in the context of all the presented evidence and not only *"per se"*, as a matter of form. For these reasons, both the employment and service records cannot, *per se*, be taken as the absolute grounds to claim that the accused was the commander of the 2nd Detachment. Viewed in this context, it cannot be overlooked that relieving the accused of his command did not amount to a disciplinary measure and, in fact, he remained in service. The relief of the accused from his position of commander must, actually, be seen as a better utilisation of resources, more precisely, an internal reassignment of personnel,

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[21] Ibid.: „**:** *I still maintain that Mr. Rado Čuturić was commander of the detachment. However, it may happen that all the papers were not completed in formal legal terms and Rado Čuturić certainly wrote this, I guess, and signed on behalf of Miloš Stupar, since Miloš Stupar did not exercise the duty of commander of the detachment at that time, but looking from a formal legal perspective, the decision issued by the Ministry of Internal Affairs assigning Rado Čuturić as commander of the detachment was not received yet, although he already exercised the duty of the commander of the detachment. He did not receive the decision yet, which means that he exercised the duty of the commander, notwithstanding that he had a decision assigning him as deputy commander of the detachment."*

[22] See: G. Mettraux, *The Law of Command Responsibility,* footnote 18: "See, in particular, *Orić* Appeal Judgment, pars 91-2, footnotes omitted ('91. It is well established that the Prosecution must prove effective control beyond reasonable doubt in establishing a superior-subordinate relationship within the meaning of Article 7(3) of the (ICTY) Statute. For that purpose, *de jure* authority is not synonymous with effective control. Whereas the possession of *de jure* powers may certainly suggest a material ability to prevent or punish criminal acts of subordinates, it may be neither necessary not sufficient to prove such ability. If *de jure* powers always results in a presumption of effective control, then the Prosecution would be exempted from its burden to prove effective control beyond reasonable doubt. The Appeals Chamber is therefore unable to agree with the Prosecution's proposed legal presumption. 92 (…) the Prosecution still bears the burden of proving beyond reasonable doubt that the accused had effective control over his subordinates. The possession of de jure authority, without more, provides only some evidence of such effective control. Before the International Tribunal there is no such presumption to the detriment of an accused.'); *Hadžihasanović* Appeal Judgment, pars 20-1; *Halilović* Appeal Judgment, par 85 ('In fact, (de jure power) may not in itself amount to (effective control)'); *Nahimana* Appeal Judgment, pars 625, 787, in particular footnote 1837; *Bagilishema* Appeal Judgment, pars 50 and 56. See also, *Halilović* Appeal Judgment, pars 211 and 214, concerning the evidential relationship between a position of *de facto* authority and the issue of 'effective control'."

rather than a disciplinary measure. The fact that the accused continued to receive the same amount of salary even after Rade Čuturić took over the position of commander, cannot, by itself, be taken to reach a conclusion of his *de iure* or *de facto* command responsibility, or of his effective control over the members of the 2nd Detachment.

56. Based on the foregoing, the Appellate Panel has found that the presented evidence cannot be of detriment to the Accused since it does not amount to the standard required to consider certain fact as proved *beyond any reasonable doubt*. Guided by the *in dubio pro reo* principle, the Panel has concluded that Miloš Stupar was not the *de iure* commander of the 2nd Šekovići Special Police Detachment during the period covered by the Indictment (10th to 14th July 1995) and immediately before that.

***DE FACTO* AND EFFECTIVE CONTROL**

57. The Appellate Panel also concludes that it has not been proved, beyond any reasonable doubt, that the accused, Miloš Stupar, was the *de facto* commander of the 2nd Šekovići Special Police Detachment, nor has it been proved that he had effective control over the detachment as of mid June 1995 already, therefore on the 12th and 13th of July 1995. The evidence produced throughout the trial suggests that it was Rade Čuturić, a.k.a. *Oficir* who was the *de facto* commander of the 2nd Special Police Detachment in July 1995, with the exception of the period from 15 July to 18 July because he was injured at the Kravica Cooperative Farm, precisely when the relevant incident took place.

58. The evidence does not indicate that the accused had the effective control over the members of the 2nd Detachment.

59. It follows from the testimony given by the witnesses: Snežan Sokić, Zoro Lukić, Miodrag Josipović, Dražen Erkić, Milovan Vukajlović, Momčilo Vlačić, Goran Matić, Nedeljko Sekula, Danilo Zoljić, Nikola Milaković, Đorđe Vuković, Duško Mekić, Jovan Nikolić, Slobodan Stjepanović and Mirko Trifunović, that Rade Čuturić a.k.a. *Oficir* took over command before their departure to the field mission in the area of Srednje. According to some of these witnesses, the unit was lined up in front of the hotel immediately before leaving for Srednje. Witness Dražen Erkić gives a detailed account of the line up and of what the accused said to the members of the 2nd Detachment. It was at that moment when Stupar informed them that *Oficir* would take over command from him. This evidence is corroborated by the testimony of witnesses Marko Aleksić, Nedeljko Sekula, Zoran Tomić and Zoro Lukić.[23]

[23] Witness **Erkić Dražen**, transcript of 5 December 2007, case No. X-KR-05/24, page. 38: „*They went out of the hotel together. We were ..., someone ... we were told to line up, late* Oficir *went out, I mean Rado Čuturić,*

60. Notwithstanding the fact that all these witnesses could not be specific as to precisely when Rade Čuturić took over command, they all confirm that Čuturić was in command of the detachment in the area of Srednje, namely that he took over command immediately before their departure to that specific field mission and that he was in the field with the detachment all the time during this field mission.[24]

61. According to Danilo Zoljić, the accused, personally, complained to him that he no longer had control over the detachment and that it was Rado Čuturić who was, in fact, in command from May or June 1995. Therefore, the accused Stupar did not go to field missions with the detachment during this period, but it was Čuturić who commanded over the Detachment.[25]

62. The Court has found the testimony of these witnesses completely credible, considering that they are consistent and compatible, so that when examined in their entirety they make one whole. These witnesses give a clear account of why and how their commander (the accused Stupar) was relieved of command because he did not have the necessary educational background. They further relate that a trained military professional had joined them and had gradually taken over the command of the detachment, obviously referring to Rade Čuturić. The Appellate Panel is satisfied that Čuturić took over command prior to the departure to the field mission in the area of Srednje, in mid June.

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went out, we were around the hotel and inside the hotel and someone told us to go for a line up. So we went out to line up and it was then when Miloš Stupar went out of the hotel, he was in civilian clothes, and Rado Čuturić, late Oficir*, as we called him, he went out in standard uniform, so the two of them came in front of the line. Then, Miloš Stupar told us to … as he said, maybe I could quote his words: "As of today, I am no longer your commander. As of today, Rado Čuturić is your commander. Obey him, as you obeyed me. I will always be at your disposal. I will always be here for you. If I did any harm to anyone, I am sorry. I did not mean to do it", and things like that, maybe few other words. After that, he personally shook hands with each of us, then he raised his hand and left through the gate in the direction of the centre of Šekovići.*";
Witness **Zoro Lukić**, transcript of 17 October 2007, case No. X-KR-05/24, page 22: „*No one could tell, I don't know the precise date of the line up, it could be in June, mid June, meaning that Mišo Stupar told us 'as of today I am no longer your commander', he handed over his duty to Rado Čuturić called Oficir. So, it was then when that happened, he was no longer commander as of that moment."*

[24] See: Witness **Goran Sarić** (commander of the Special Police), page 33: „ (...) but Rado Čuturić was the commander of the Detachment with me during the combat operations in the area of Sarajevo" and "In mid June '95, we left to, to Sarajevo. So it was 15th, 16th, 17th of June when we arrived, when the Sarajevo offensive started".

[25] Witness **Danilo Zoljić**, transcript of 15 September 2006, case No. X-KR-05/24, page 17: „*Well, the first reason why .. in the month of May … I spoke with Mišo Stupar, who expressly told me, actually complained that he no longer had control over the detachment, that he could no longer be in command, that he did not want to be in command any longer, he called the minister and talked to him, asking to be relieved of duty. That is one thing. Another thing is the departure of the 2nd Detachment to the field mission,… as of May, June, that whole period the Detachment was led by Rado Čuturić. I know that because during the Army of Bosnia and Herzegovina offensive on the Srednje-Semizovac-Nabožić line, that area … I used to go there and Rado Čuturić commanded over the Detachment. You see, that means that during those two months … whenever I … if units encountered, special units, … that there was a company anywhere in the field where special forces were deployed during that period, I never saw Miloš Stupar anywhere in the field at that time.*"

63. The Panel is also satisfied that Miloš Stupar was never with the Detachment during the relevant period, up to the 14th of July 1995, when Krsto Dragičević had got killed at the Kravica warehouse on the 13th of July, and Stupar was involved in the arrangement for the transportation of his body and for his funeral at the express request of Ljubomir Borovčanin. After a meeting held on the 15th of July 1995 in Zvornik, the accused Stupar took over the command of the 2nd Detachment and received his first military assignment (to go to Baljkovica).

64. It results from the presented evidence that the accused Stupar, together with Momčilo Vlačić, visited members of the 2nd Detachment when they were in the area of Srednje, and even brought them presents since St. Vitus' Day and Army Day, both being days of celebration in the army, were approaching. This is further confirmed by members of the 2nd Detachment in direct testimony. The Appellate Panel is convinced that the accused did not, in any way, participate in the activities of the detachment during the unit's permanence in the area of Srednje. This is further corroborated by the testimony of Živojin Milošević who testified that he had asked for leave to attend a celebration when he was on active service in Srednje. At the time both Čuturić and Stupar were together, the witness does not know the date, but it cannot be ruled out that it happened during the visit, which took place ahead of St. Vitus Day, as it has already been stated, but that it was Čuturić who gave him the permission.[26]

65. A number of witnesses, including: Ljubiša Bečarević, Nikola Milaković, Milenko Pepić, Duško Mekić, Predrag Celić, Slobodan Stjepanović, Nedeljko Sekula and Marko Aleksić, stated under investigation that the accused was the commander of the detachment up to the point of their deployment to Srednje. The testimony of these witnesses is inconsistent as to when the replacement in command occurred and they refer to a period of several months apart. However, they are all in agreement that this change occurred before their departure to the field mission in Srednje. This Panel holds that the inconsistencies in this testimony were minor and primarily due to the passage or different perception of time, but also to the fact that not all these witnesses had learned at the same time that Stupar had been relieved of his duty. In addition, it is evident that Stupar had been gradually relieved of duty and Čuturić had gradually taken over command, so that the Panel can only conclude that the departure to Srednje was the turning point since when the accused could not have been said to have had either *de iure* or *de facto* authority. Rade Čuturić was the *de facto* commander of the 2nd Detachment also after its return from the area of Srednje to Bratunac.

[26] Witness **Živojin Milošević**, case No. X-KR-05/24, page 86, transcript of 24 August 2006.

66. All evidence presented during the trial points to the fact that it was Rade Čuturić who, on orders of the MUP, left for Bratunac with the members of the 2nd Detachment on 11 July 1995, arriving there in the early morning hours of 12 July 1995. The first assignment the detachment received was to "search the terrain" in the village of Budak and round up whomever they found in Potočari.

67. Witness S4 testifies both in the investigation and at the main trial about the incidents which took place between 12 and 14 July, as did many other witnesses, including: Marko Aleksić, Slobodan Stjepanović, Milenko Pepić, Ljubiša Bečarević, Zoro Lukić, Zoran Tomić and others. According to the prosecution witness Marko Aleksić, Čuturić tasked them with forming the front line in the area of Gornji Potočari to prevent an armed column of Bosniaks, which was moving through the forest, from passing through. Milenko Pepić testifies that they were deployed along the road, while witness S4 states that their task was to capture those Bosniaks who would eventually reach them, knowing that they were coming from the direction of Srebrenica. They were to escort them to the meadow.

68. Čuturić deployed members of the 2nd Detachment along the Bratunac – Konjević Polje road in the Kravica – Sandići section. Moreover, it was Čuturić who was present at the Cooperative Farm and actively participated in the incident described by the witnesses, when one of the captured Bosniaks seized a rifle from a guard and killed Krsto Dragičević. Then, Čuturić wrenched it from his hands and sustained burns to his hands in so doing. It is this incident which preceded the killing of more than 1000 Bosniaks in the Kravica Cooperative Farm warehouse.

69. The accused Miloš Stupar was noticed on the Bratunac – Konjević Polje route on 13 July 1995. However, not one single witness has ever suggested that the accused participated in the actions taken by the 2nd Detachment from 12 to 15 July '95 or that it was he who issued orders to its members, or even that he was in direct contact with Čuturić. From the statements of the witnesses it has been established that the accused wore civilian clothes at the relevant time, which, as opposed to the statements given by some witnesses that it was the privilege of officers, additionally substantiates the conclusion reached by the Panel that the accused was not the commander at the relevant time, nor was he assigned any specific task as part of the various military activities taking place at the time. In addition, there is no doubt about the fact that all militarily engaged people wore uniforms, as well as highly ranked officers who were seen on the meadow in Sandići (Mladić and Borovčanin).

70. It has been fairly established by witness S4 in his testimony that it was *Oficir* who was with the 2nd Detachment and not Stupar, who was only noticed in the vicinity passing by, driving on the road in a car. The Appellate Panel can

neither conclude that Stupar was present when General Mladić arrived nor when this same General addressed the captured people on the Sandići meadow.

71. It can be indisputably concluded on the grounds of the testimony of witness S4 that the order to kill all able bodied men and to escort the remaining civilians was received from Rade Čuturić. Rade Čuturić was also among those who led the column when escorting the captured Bosniaks from Sandići meadow to the warehouse in Kravica. The Panel finds the testimony of this witness entirely credible because he gives a detailed and chronological account of how the incident unfolded from the moment the detachment left to the area of Srednje, all the way through to the killing of Bosniak men which took place in the warehouse in Kravica. The witness names the perpetrators and above all testifies about the participation of his superiors, Ljubomir Borovčanin and Rade Čuturić, in the commission of this crime. The testimony of this witness was so convincing that this Panel finds that his credibility has not been compromised in any way. Bearing in mind that his testimony has incriminated a number of members of the 2nd Detachment and that he, himself, has been criminally prosecuted, in the Panel's mind there is no fact or circumstance which could possibly indicate that his testimony has been aimed at exonerating Stupar from criminal responsibility.

72. The mere presence of the accused in the vicinity of the area in which the relevant incident happened may not, on its own, be taken to conclude that he was the assigned commander of the Detachment. His presence in the area, dressed in civilian clothes must be examined in the broader context of everything that was going on, including the context of his personal status at the time – relieved of duty as commander, but still a member of the 2nd Detachment. In such state of matters, the accused may have been present as a conscript, but this alone cannot be taken to conclude that he enjoyed command responsibility.

73. After Čuturić was injured at the Kravica complex, Ljubomir Borovčanin requested Miloš Stupar, whom he saw at the Health Centre in Bratunac, to organize the transportation and funeral of Krsto Dragičević. He was also to contact his family who had learnt of his death since Stupar personally knew the deceased Krsto and his family[27]. These actions, taken by Stupar

[27] **Witness Borovčanin**, case No. X-KR-05/24, transcript of 21 May 2008*: ..."I tried to get some information from Stupar, Miloš Stupar, at the health centre in Bratunac, but since Čuturić was being given first aid, he told me,. he started telling me ... but he said that Čuturić could give me precise and complete information and he just went out and told me what I partly told you (...) Čuturić was injured and his capacity for work was reduced, but I did not ask Stupar anything other than ... the situation was that the a soldier of the Skelani Platoon was killed, he was pronounced dead and there was a problem with his transport to Skelani, organisation of funeral and usual things in such situations and I had a problem to single out someone from the command staff who was in the field, since I myself was in a difficult situation with regard to combat readiness or utilisation of the unit and I think that ... that I wanted him to get involved in the transport, funeral*

immediately after the incident in the warehouse in Kravica, do not amount to actions that could, in any way, be interpreted as exercising the duty of commander.

74. Stupar was subsequently called by Ljubomir Borovčanin to attend a meeting of the 15th of July 1995 in Zvornik. Witnesses Zoljić, Vasić, Borovčanin and Obrenović confirm the presence of the accused at this meeting. The accused took the members of the 2nd Detachment to the area of Baljkovica during the period between 15th to 18th July 1995 because Čuturić had sustained the described hand injuries immediately before the execution of the captured Bosniaks commenced at the warehouse. However, he exercised this duty of commander for a very short period of time until Čuturić recovered.

75. Witness Nikola Milaković accompanied the accused Stupar to Zvornik on the day when the accused attended this meeting with Ljubomir Borovčanin, Dragomir Vasić, Danilo Zoljić and Dragan Obrenović. Although witness Milaković was a driver assigned to the 2nd Šekovići Special Police Detachment, it results from his testimony that he did not go to Zvornik in his official capacity as his personal driver. He testified that he had met Stupar and requested him for help concerning a personal problem relating to his brother. Stupar had informed him then that he also had to go to Zvornik. The Appellate Panel has concluded that Milaković did not take Stupar to Zvornik in his capacity of commander. The Accused took command of the second Detachment at the above mentioned meeting, when he was specifically ordered to go to Baljkovica. According to the testimony of Milaković, he learned, after this meeting, that Stupar had retaken command.

76. The witness provides a detailed account of how they both arrived at the Public Security Centre in Zvornik which was where this meeting was scheduled and which Stupar attended. This portion of Milaković's testimony is completely consistent with the testimony given by witnesses Ljubomir Borovčanin and Danilo Zoljić who both confirmed the presence of Stupar at the meeting of the 15th of July 1995 in Zvornik.

77. In addition, Milaković describes how one part of the 2nd Šekovići Special Police Detachment gathered around 5 or 6 o'clock[28] that day, and later left for a field mission in the area of Baljkovica. He also explains, in detail, how he drove Stupar to the field and describes a car incident in which he was

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and contacts with his family, because those are moments when you always needed someone to inform the family in an appropriate manner and, unfortunately, Stupar had certain experience in that respect because a number of members of his former unit lost their lives or were seriously wounded."

[28] **Witness Milaković**. case No. X-KR-05/24, transcript of 28 April 2006: „*That day, sometime before it got dark, maybe at 5 or 6 o'clock, our unit, that whole unit of ours came to Zvornik. The whole unit, but I don't know how many of them, when I say the whole unit, I mean that there was a number of them, they arrived and we met at the parking lot, all of us were there later on. I was with them"*

involved. He also testifies to have spent 24 hours with the accused Stupar in the area. This witness expressly testifies that it was Miloš Stupar who was in command over the unit while they were in Baljkovica[29] and that he did not see Rade Čuturić until his return to Šekovići. Ljubomir Borovčanin and Danilo Zoljić[30] corroborate that one part of the 2nd Šekovići Special Police Detachment left to Baljkovica on 15 July 1995, together with Stupar.

78. Having evaluated the testimony of these witnesses in their entirety, the Appellate Panel has determined that Stupar was, temporarily, the commander of the 2nd Šekovići Special Police Detachment after the meeting held in Zvornik, on the 15th of July 1995, and that he had exercised that duty while members of the 2nd Detachment were in the field in Baljkovica, up to the 18th of July 1995.

79. Therefore, the accused cannot be held criminally liable for his failure to punish his subordinates for criminal offences perpetrated before his temporary take-over, namely while they were under the command of Rade Čuturić and no matter whether the accused Stupar had learned about the crime and the perpetrators thereof before he took over the command. The presented evidence indisputably establishes that the accused Stupar took over the command temporarily and that it was limited to the specific assignment he was given at the meeting in Zvornik – field mission to Baljkovica with members of the 2nd Detachment.

80. Effective control must be proved to have existed precisely at the alleged time of the commission of the crime.

81. "To hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander."[31]

82. The ICTY Appeals Chamber in *Hadžihasanović* was satisfied that, under customary international law, effective control must have existed at the *time*

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[29] Ibid, **witness Milaković**: *„Mišo Stupar was in control in Baljkovica, Miloš Stupar."*

[30] **Witness Zoljić**, case No: X-KR-05/24, transcript of 15 September 2006: *„Lines were being established in the area Baljkovica, as far as I know, 2nd detachment, 1st company were brought to Parlog in the evening hours of the 15th, they were brought to the line in Baljkovica."* **Witness Borovčanin**, case No. X-KR-05/24, transcript 21 May 2008, page 88*: "Since, well, that 15th up to 18th July, Miloš Stupar commanded over the unit, but only during that period, he commanded over one part of the 2nd Detachment, but not at his own initiative, not independently and not in the passing, but officially, yet I have to tell you this ... one does not have to be a commander of the detachment officially, to be in command of the detachment. It could happen that a commander was injured or killed, then an inspector of the Police Administration would take over the command over the detachment ... to receive such an order from the minister."*

[31] *See* Mettraux, *The Law of Command Responsibility*, pages179-180, and footnote 215

when the crimes are alleged to have been committed.[32] Therefore, it is not sufficient to only establish that at a certain point in time, prior or after the commission of the underlying crime, the Accused was capable of exercising effective control over the perpetrators.[33] There must exist perfect time overlapping between the time when the alleged perpetrators committed the crime constituting the ground for the prosecution and the time when the superior-subordinate relationship existed between the Accused and the perpetrator. Therefore, "although the duty to prevent and the duty to punish may be split, both of them overlap with the commander's mandate".[34] The commander cannot be charged on this ground for the crimes committed prior to his taking the office or after he left the position.[35]

83. The burden of proof lies with the prosecution, which must prove the essential elements of the alleged criminal offence. In this case the prosecution must prove the elements of command responsibility. However, the Panel has determined that the evidence tendered by the Prosecution in attempting to prove that the accused was guilty under the command responsibility doctrine, and all other tendered evidence, has failed to establish, beyond any reasonable

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[32] Ibid, page 190, Appeals Chamber Decision under Article 7(3) in *Hadžihasanović,* para 37 (ff). This position has been repeatedly stated at a later point in time in various decisions and judgements of Tribunal for the Former Yugoslavia and the Tribunal for Ruanda. *See* also the Trial Judgement in *Kunarac,* para. 399, 626-8; Appeals judgement in *Aleksovski,* para. 76: "This certainly implies that a superior must have such power prior to failing to exercise it", "Trial Judgement in *Naletilić,* para. 160; Trial Judgement in *Hadžihasanović,* para. 1485.

[33] Prior to rendering a conclusion that could be derived from the evidence, the Court will have to take into account all of the circumstances relevant to that time, that could threaten or weaken such a relationship at that time, or as a result of the crimes committed.

[34] Appeals Chamber Decision under Article 7(3) in *Hadžihasanović,* para 55.

[35] *Ibid*, para. 37(ff) and 45:"there is no example from the [state] practice [to be relevant for customary international law], nor is there any evidence concerning *opinio iuris* to corroborate the claim that the commander may be held responsible for the criminal offence committed by his subordinates prior to his taking the command over those subordinates", and para. 51: "Having considered the foregoing sources, the Appeals Chamber infers that the Accused cannot be charged under Article 7(3) of the Statute for the crimes committed by his subordinate prior that taking the command over that subordinate". The same reasoning was also applied by the Trial Chamber in *Kvočka* (Trial Judgement in *Kvočka,* para. 349 and the reference thereof), and was adopted by the Appeals Chamber (in particular, see Appeals Judgement in *Kvočka,* para. 251-2). Also see Trial Judgement in *Hadžihasanović,* para. 1485. Under that jurisprudence, the fact that the soldiers could be subordinate to a commander only for a certain period of time does not exclude the possibility that he could be held responsible for their actions, if at the *time when the crimes as charged were committed,* these persons were under his effective control. See, for example, the Trial Judgement in *Kunarac,* para. 399 i 626-8. As soon as those units were back to their usual chain of command, the duty of commission of the *temporary* commander cease to exist, that is, his continued failure to act (if any) cannot be taken into account in deciding whether that commander exercised his duty or not, and whether he is therefore responsible as commander. Also see the Appeals Judgement in *Čelebići,* para. 198. The period of time during which the commander was in charge of the soldiers will evidently be relevant for ordering measures that could be "necessary and reasonable". The duration of the time within which those soldiers were under his command - prior to committing the crimes – will also be evidentiary relevant for the establishment of the extent to which the commander would be capable of imposing his effective control over these soldiers at the relevant period of time. *See next*, before the Special Tribunal for Sierra Leone: Trial Judgement in *Fofana,* para. 240; Trial Judgement in *Brima,* para. 1673 (about the crimes committed before than the Accused assumed the command over the perpetrators) and para. 1725 (about sporadic, unlike constant exercise of effective control).

doubt, that the accused, Stupar, is guilty as charged under the amended Indictment. Because of these reasons, the Court has no other alternative but to acquit the accused of charges.

84. Given that the Appellate Panel is not satisfied that the accused Stupar held the status of a superior, and/or that he was *de iure and/*or *de facto* commander of the 2nd Detachment, it is pointless to examine the evidence relevant to the other elements of command responsibility, namely the knowledge/awareness of the superior that his subordinates committed the criminal offence, or whether the accused took the necessary and reasonable measures to punish his subordinates who perpetrated the criminal offence.

Costs of the criminal proceedings

85. Pursuant to Article 189 of the CPC of BiH, since a verdict is rendered that acquits the accused, the costs of the criminal proceedings under Article 185(2), sub-paragraphs a) through f) of the CPC and the necessary expenditures of the accused and his defence attorney and the remuneration for the defence attorney shall be paid from within budget appropriations.

Record-taker
Sanida Vahida Ramić

PRESIDING JUDGE
Azra Miletić

LEGAL REMEDY: No appeal lies from this Verdict.