



**Number: X-KRŽ-07/430**

**Sarajevo, 19 May 2010**

**IN THE NAME OF BOSNIA AND HERZEGOVINA!**

The Court of Bosnia and Herzegovina, the Panel of the Appellate Division, Section I for War Crimes, comprised of Judges Dragomir Vukoje, as the President of the Panel, and Phillip Weiner and Hilmo Vučinić, as members of the Panel, with the participation of legal advisor-assistant Neira Kožo, as the record-keeper, in the criminal case against the accused Ferid Hodžić, for the criminal offenses of War Crimes against Civilians in violation of Article 173(1)(c) and (e) of the Criminal Code of Bosnia and Herzegovina and War Crimes against Prisoners of War in violation of Article 175(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina, in conjunction with Article 180(2) of the Criminal Code of Bosnia and Herzegovina, deciding upon the appeal of the Prosecutor's Office of Bosnia and Herzegovina, dated 25 September 2009 and the appeal of the aggrieved party Anđa Obradović, dated 28 September 2009, filed from the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/430 of 29 June 2009, following an appellate session held on 19 May 2010, in the presence of the Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina, Sanja Jukić, the accused Ferid Hodžić and his Defense Counsel – Attorney Asim Crnalić, rendered the following

**VERDICT**

The appeals filed by the Prosecutor's Office of Bosnia and Herzegovina and the aggrieved party Anđa Obradović, respectively, **are refused as ill-founded** and the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/430 of 29 June 2009, **is hereby upheld.**

## REASONING

### Procedural History

#### Trial Verdict:

1. By the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/430 dated 29 June 2009, pursuant to Article 284(c) of the Criminal Procedure Code of Bosnia and Herzegovina (CPC BiH), the Accused Ferid Hodžić was acquitted of charges that by the actions described in the Operative Part of the Verdict he committed the criminal offenses of War Crimes against Civilians in violation of Article 173(1)(c) and (e) of the Criminal Code of Bosnia and Herzegovina (CC BiH) and War Crimes against Prisoners of War in violation of Article 175(1)(a) and (b) of the CC BiH, in conjunction with Article 180(2) of the same Code.
2. Pursuant to Article 189(1) of the CPC BiH, the costs of criminal proceedings referred to in Article 185 (2) subparagraphs (a) through (f) of this Code, the necessary costs of the accused, and necessary expenditures and remuneration of the Defense Counsel shall be paid from the budgetary appropriations of the Court.
3. Pursuant to Article 198(3) of the CPC BiH, the aggrieved parties are hereby referred to pursue their potential claims under property law in a civil action.

#### Appeals and Responses:

4. The Prosecutor's Office filed an appeal from this Verdict alleging (a) an essential violation of the criminal procedure provisions set forth in Article 297(1)(k) and (2) of the CPC BiH, and (b) incorrectly and incompletely established facts pursuant to Article 299(1) of the CPC BiH. The Prosecutor asked the Panel of the Appellate Division of this Court to grant the appeal, revoke the Verdict pursuant to Article 315 of the CPC BiH, and order a retrial.

5. Aggrieved party Anđa Obradović also filed an appeal from the Verdict, arguing that certain persons referred to in the Indictment, namely Adem Kostjerevac, Fahrudin Demirović, Šahbaz Sinanović and Muharem Sinanović, have not been brought to justice. She also finds fault with the Verdict since it referred her to pursue her property claim in a civil action, but she has no money to do so. She proposes that the case be remanded for reconsideration.

6. Defense Counsel for the accused Ferid Hodžić, Attorney Asim Crnalić, submitted a response to the Prosecutor's appeal arguing that the matter be refused as ill-founded.

7. A session of the Panel of the Appellate Division was held on 19 May 2010 pursuant to Article 304 of the CPC BiH, when the Prosecutor's Office presented a brief argument on appeal, stating that it entirely maintained the arguments presented in the filed appeal. The Accused and his Defense Counsel gave their comments regarding the appeal.

8. Having reviewed the Verdict with regard to the appellate arguments, the Panel of the Appellate Division renders its decision for the following reasons:

**I. The First Instance Panel Did Not Violate Article 297(1)(k) of the CPC of BiH.**

9. The Prosecutor alleges that the First Instance Panel (also referred to as the Trial Panel) erred in failing to (1) link the testimony to the decisive facts or (2) assess or evaluate the testimony and (3) delete a reference to Article 27 of the Geneva Convention on the Protection of Civilians in Time of War. As a result of these errors, the Prosecutor claims that a contradiction exists between the Trial Verdict's reasoning and operative part.<sup>1</sup>

10. In support of this allegation, the Prosecution argues that the First Instance Panel violated Article 297(1)(k) of the CPC of BiH by not evaluating the testimony relating to the alleged suicide of Dušan Čestić, the poor living situation in Cerska or the lack of any

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<sup>1</sup> Prosecutor's Appellate Brief at pages 2 - 3 (English version).

command structure therein, and did not provide any reasons for finding credible the testimony of the witnesses on those matters.<sup>2</sup>

11. The Defense responded that the Trial Panel described the witness testimony in detail and properly assessed the value and credibility of the evidence.<sup>3</sup>

12. Pursuant to Article 297(1)(k) of the CPC of BiH, an essential violation of the provisions of criminal procedure occurs:

if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts.

13. On appeal, this Panel reviews contentions concerning a violation of Article 297(1)(k) through a *prima facie* analysis of the Verdict, bearing in mind that a non-essential error does not result in revocation of the verdict. The Appellate Panel set out this standard of review for such allegations in *Prosecutor v. Mirko Todorović and Miloš Radić*, X-KRŽ-07/382, Appeal Judgment (23 January 2009) at paragraphs 18-20:

18. The Appellate Panel will review any appeal on the basis of an essential violation of the provisions of criminal procedure under Article 297(1)(k) of the CPC of BiH through a *prima facie* analysis of the Verdict. The Appellate Panel will examine whether, on its face, the wording is incomprehensible, internally contradictory or contradicted the grounds, or has no grounds at all or did not cite reasons concerning the decisive facts. The Appellate Panel 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.

19. The Appellate Panel further notes that the appellant must establish that the alleged formal error invalidates the Verdict. 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.

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<sup>2</sup> Ibid. at pages 2-3.

<sup>3</sup> Defense Appellate Brief at page 2.

20. The Appellate Panel recalls that Article 297(1)(k) of the CPC of BiH is not a valid ground of appeal to contest the accuracy of facts established or not established by the Trial Panel. An error on establishing some decisive fact (incorrectly or incompletely established state of facts) under Article 299(1) of the CPC of BiH is the appropriate ground to contest the Verdict where the accuracy of the facts established or not established by the Trial Panel is contested. Appellants should confine appeals pursuant to Article 297(1)(k) to the formal character of the Verdict and should raise alleged errors of fact under Article 299.

**14.** A prima facie analysis of the Verdict reveals no essential violation of Article 297(1)(k). Rather, in reaching its findings, the Trial Panel complied with the Code in evaluating the evidence, describing the facts upon which it relied, and describing the reasoning in support of the decisive facts. Specifically, the Trial Panel reviewed and assessed the testimony of Prosecution and Defense witnesses, including expert testimony, and the documentary evidence. The Trial Panel evaluated the testimony of these witnesses both individually and in combination with the testimony of other witnesses and the documentary evidence in order to make factual and credibility determinations. When confronted with conflicting testimony, the Trial Panel issued findings on credibility.

**15.** This Panel notes that while the Verdict in places paraphrases some testimony as opposed to quoting it, this does not violate the CPC of BiH. Rather, Article 290(7) of the CPC of BiH requires only that a trial court state the “facts” upon which it relies. An examination of the Verdict indicates that the Trial Panel complied with this Article by either summarizing or quoting in the text or in the footnotes “which facts . . . [it] finds to be proven or unproven.”

### A. The Death of Dušan Čestić

16. This Panel finds that the Trial Panel’s assessment of the testimony was reasonable and supported by the evidence. Since there was no evidence disputing the manner of death of Dušan Čestić, the Trial Panel could not have — and therefore could not have been required to have — furnished “an assessment of the credibility of contradictory evidence.”<sup>4</sup>

17. The testimony heard by the Trial Panel in relation to the death of Dušan Čestić was not conflicting. Prosecution witness Dževad Musić, who served as a guard,<sup>5</sup> testified that he found Dušan Čestić hanging from a cattle pull in the stable. The guard took Čestić’s body down; he was deceased. A piece of cloth had been used for the hanging.<sup>6</sup> Other witnesses, including the guards and police, testified about their learning that Čestić had hanged himself.<sup>7</sup>

18. There was testimony that three individuals — the Civilian Police Commander, a medical professional, and Bećir Mekanić — went to the stable to investigate<sup>8</sup> and concluded that the deceased had committed suicide by hanging.<sup>9</sup>

19. There was also evidence that the deceased was in “poor health,” had kidney problems, and was exhausted.<sup>10</sup> The deceased was depressed when arrested<sup>11</sup> and upon

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<sup>4</sup> Article 290(7) of the CPC of BiH. Compare *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Case No.: IT-98-34-A, Appeals Judgment (03 May 2006) at paras. 405-408 (an allegation that the Trial Court was resolving conflicting evidence without any proper explanation was dismissed since there was no conflicting evidence).

<sup>5</sup> Testimony of Dževad Musić on 28 April 2008 at 1:08:29 to 1:08:39.

<sup>6</sup> *Ibid.* at 1:23:39 to 1:26:53. See also Exhibit T-45 at page 3 (where Samir Musić states “when I entered the barn, I saw a man hanging, hanging on a shirt . . .”).

<sup>7</sup> See, e.g., Testimony of Ismet Hurić on 28 April 2008 at 34:08 to 35:24; Testimony of Nuria Hurić on 15 May 2008 at 26:01 to 27:45; Testimony of Džemil Babić on 23 May 2008 at 2:19:38 to 2:19:52; and Testimony of Esad Maljišević on 13 May 2008 at 2:43:59 to 2:44: 43. See also Exhibits T-11, T-15, T-17, T-21 and T-45.

<sup>8</sup> Testimony of Džemil Babić on 23 May 2008 at 2:19:55 to 2:20:29; Testimony of Ismet Hurić on 28 April 2008 at 35:28 to 35:48 and 42:33 to 42:49; and Testimony of Nuria Hurić on 15 May 2008 at 28:17 to 28:32.

<sup>9</sup> Testimony of Džemil Babić on 23 May 2008 at 2:20:31 to 2:21:28.

<sup>10</sup> Testimony of Rajko Čestić on 18 April 2008 at 2:37:07 to 2:37:36; Testimony of Džemil Babić on 23 May 2008 at 2:18:40 to 2:18:51.

<sup>11</sup> Testimony of Džemil Babić on 23 May 2008 at 2:18:34 to 2:18:41.

arrival at the prison, told Rade Pejić that his kidneys ached and that he was sick and would not survive.<sup>12</sup> He was not held in the prison for a long period of time before he died.<sup>13</sup>

20. The forensic pathologist, Doctor Željko Karan, testified that the remains were exhumed in 2006.<sup>14</sup> He noted that several bones were missing and that others were damaged.<sup>15</sup> Due to the skeletal remains being incomplete, he could not determine a cause of death.<sup>16</sup>

21. In closing argument, the Prosecutor stated that the prosecution “does not dispute” that the witnesses (including prosecution witnesses) “confirmed and said” that the deceased hanged himself.<sup>17</sup>

22. Thus, the testimony concerning the death of Dušan Čestić was consistent that he died by means of hanging himself. There being no contradictory evidence on the matter, this Panel concludes that the Trial Panel’s determination to credit the testimony of the prison guards was reasonable and proper and does not constitute a violation of the CPC of BiH. Therefore, this appellate issue has no merit and is dismissed.

### **B. The Poor Living Conditions in Cerska**

23. The Prosecutor also alleges that the Trial Panel failed to assess and explain its reason for finding credible the testimony as to the poor living conditions in Cerska.<sup>18</sup> This Panel notes that as with the previous issue, there was no dispute in the evidence relating to the living conditions in the village; all of the evidence indicated that the living conditions were poor.

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<sup>12</sup> Testimony of Rade Pejić on 25 April 2008 at 59:34 to 59:51.

<sup>13</sup> Ibid. at 59:52 to 59:56. The Appellate Panel notes that although witnesses could not agree as to the exact time that the deceased spent in captivity, they all agree that the period was brief.

<sup>14</sup> Testimony of Dr. Željko Karan on 13 May 2008 at 13:59 to 14:08.

<sup>15</sup> Ibid. at 16:52 to 18:00, 23:02 to 23:30, 27:24 to 27:46 and 29:12 to 29:20.

<sup>16</sup> Ibid. at 26:49 to 27:52.

<sup>17</sup> Prosecutor’s Closing Argument on 23 June 2009 at 55:09 to 55:22.

<sup>18</sup> Prosecutor’s Appellate Brief at pages 2-3.

24. Specifically, several witnesses testified as to the dire living conditions in Cerska. For example, Bešir Aljukić testified concerning the difficult food situation where the residents were eating oats and boiling water with grass, a flower, or hazel tree.<sup>19</sup> Nuria Hurić, who served as a guard, was living on the upper floor of a stable and there were cattle on the ground floor.<sup>20</sup> Another guard, Ismet Hurić, testified that he lived in a stable with five others, there was not enough food for them, and he went nine months without a bath or shower.<sup>21</sup>

25. Dževad Musić testified that the food situation was “disastrous” in that, due to the arrival of a large number of refugees, there was not a sufficient amount of food. While serving as a prison guard, his weight decreased by approximately twenty (20) kilograms and he became ill. He recalls that he was only able to bathe once every two to three months.<sup>22</sup>

26. In closing argument, the Prosecutor conceded that the prosecution “shall not dispute” that the defense witnesses also lived under poor conditions.<sup>23</sup> The Prosecutor noted that the prosecution did not dispute Sejfudin Hodžić’s testimony concerning the difficult living conditions.<sup>24</sup>

27. This Panel notes that the testimony from Prosecution and Defense witnesses as to the dire living conditions in Cerska was consistent. Accordingly, there being no contradictory evidence on the matter, the Trial Panel’s determination to credit the testimony of these witnesses was reasonable and proper and does not constitute a violation of the CPC of BiH.

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<sup>19</sup> Testimony of Bešir Aljukić on 13 May 2008 at 14:49 to 15:23.

<sup>20</sup> Testimony of Nuria Hurić on 15 May 2008 at 34:49 to 35:28.

<sup>21</sup> Testimony of Ismet Hurić on 28 April 2008 at 37:48 to 38:49.

<sup>22</sup> Testimony of Dževad Musić on 28 April 2008 at 1:44:08 to 1:45:49.

<sup>23</sup> Prosecutor’s Closing Argument on 23 June 2009 at 1:05:53 to 1:06:02.

<sup>24</sup> Ibid. at 1:06:29 to 1:06:47.

### C. Issue Regarding Assessment of Witness Credibility

28. The Prosecutor alleges that the Trial Panel committed an essential violation by failing to analyze the credibility of every witness cited in paragraphs 74, 79, 80, 83, 84, 94, 96 and 98 of the Verdict.<sup>25</sup> The Prosecutor does not, however, identify any Article of the CPC of BiH requiring a credibility analysis for every witness referred to in a Verdict. Nor has the Prosecution, in most cases, questioned the credibility of particular witnesses or alleged that specified portions of their testimony are false or incorrect.

29. There is no requirement in the CPC that a Trial Panel conduct a credibility assessment for witnesses testifying on non-contentious matters. Article 281(2) of the CPC of BiH states in pertinent part that “[t]he Court is obligated to conscientiously evaluate every item of evidence and its correspondence with the rest of the evidence....” Article 290(7) requires that the Court furnish “an assessment of the credibility of contradictory evidence....” Thus, a Trial Panel is not required to issue a finding as to the credibility of every witness cited in a verdict. Rather, it is evident from the context in which the testimony is mentioned that the witness or testimony has been deemed to be reliable.

30. An examination of the witness testimony cited by the Prosecutor indicates that the testimony mainly concerned non-contentious or non-controversial issues, as well as factual matters where others testified consistently.

31. For example, paragraph 74 of the Trial Verdict quotes defense witness Ćamil Talović’s description of the chaos in Cerska and the collapse of authority there. The Prosecutor has not questioned the credibility of this witness and has even cited a portion of his testimony in support of one of their arguments.<sup>26</sup> Further, his testimony concerning (1) the problems in Cerska,<sup>27</sup> (2) other commanders arriving in the area,<sup>28</sup>

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<sup>25</sup> Prosecutor’s Appellate Brief at page 3.

<sup>26</sup> Ibid. at page 10.

<sup>27</sup> See, e.g., Exhibit T-15 at page 5 (where Bešir Aljukić describes the situation in Cerska as being “chaotic and miserable”); and the Testimony of Nuriya Hurić on 15 May 2008 at 10:49 to 10:55 (no military structure in Cerska).

and (3) the eventual collapse of authority<sup>29</sup> is consistent with evidence provided by other witnesses.

32. With regard to paragraphs 79 and 80 of the Trial Verdict, the Trial Panel relied upon the testimony of five witnesses: Bešir Aljukić, Muharem Sinanović, Murat Šiljković, Ejub Hadžić and Fajko Kadrić. Again, the Prosecutor has not questioned the credibility of any of these witnesses (all were Prosecution witnesses except for Fajko Kadrić), and portions of the testimony from four of the witnesses were cited in support of the Prosecutor's appeal.<sup>30</sup> Notably, most of the testimony relating to these witnesses is not contentious and is consistent with the testimony of other witnesses. For example, additional witness testimony corroborated the following factual findings from paragraphs 79 and 80 of the Trial Verdict:

- The Accused, Ferid Hodžić, tried to organize the military units.<sup>31</sup>
- The Accused appointed persons to military positions.<sup>32</sup>
- There were other military leaders having their own units who competed with the Accused.<sup>33</sup>
- The lack of military resources combined with the humanitarian crisis made it difficult to establish a military organization.<sup>34</sup>

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<sup>28</sup> See, e.g., the Testimony of Esad Maljišević on 13 May 2008 at 2:19:40 to 2:20:08; the Testimony of Fajko Kadrić on 22 May 2008 (Tape # 1) at 1:05:26 to 1:05:54 and 1:08:02 to 1:08:56; and the Testimony of Muharem Sinanović on 21 April 2008 at 25:17 to 26:02.

<sup>29</sup> See, e.g., the Testimony of Džemil Babić on 23 May 2008 at 1:48:34 to 1:50:07 (Nurif Rizvanović arrived in Cerska with an undisciplined "gang" and a state of "chaos" ensued); the Testimony of Bešir Aljukić on 13 May 2008 at 2:03:30 to 2:04:30 (by 01 November 1992, people were leaving and there was nothing left to command); and the Testimony of Esad Maljišević on 13 May 2008 at 2:39:31 to 2:41:03 (the witness explains that he left the military in September as the situation was hopeless and when he left the area in October, he did not know whether there was still a command in Ravaši).

<sup>30</sup> Prosecutor's Appellate Brief at pages 4, 6 and 10.

<sup>31</sup> See, e.g., Testimony of Salih Jusić on 21 May 2008 at 25:41 to 27:04; Testimony of Murat Šiljković on 18 April 2008 at 47:25 to 48:06; Testimony of Esad Maljišević on 13 May 2008 at 2:22:50 to 2:23:46; and Testimony of Čamil Talović on 21 May 2008 at 3:09:13 to 3:10:09.

<sup>32</sup> See, e.g., the Testimony of Avdija Omerović 14 May 2008 at 2:39:20 to 2:40:02; and the Testimony of Ilija Jašarević on 14 May 2008 at 2:04:42 to 2:05:12.

<sup>33</sup> In addition to the testimony of the three witnesses relied upon by the Trial Panel in support of the findings (Muharem Sinanović, Murat Šiljković and Ejub Hadžić) there was also Testimony of Esad Maljišević on 13 May 2008 at 2:19:40 to 2:20:08; Testimony of Čamil Talović on 21 May 2008 at 2:56:15 to 2:57:55; Testimony of Džemil Babić on 23 May 2008 at 1:41:41 to 1:43:05; Testimony of Salih Jusić on 21 May 2008 at 1:49:52 to 1:51:12; and Testimony of Fajko Kadrić on 22 May 2008 (Tape # 1) at 45:31 to 47:28.

- Nurif Rizvanović arrived with an armed unit and took control.<sup>35</sup>

33. With regard to paragraphs 83 and 84 of the Trial Verdict, the First Instance Panel cited the testimony of three witnesses: Fajko Kadrić, Sejfudin Hodžić, and Merima Telalović, in support of its factual findings. The Prosecutor alleged that bias and a lack of military experience affected the testimony of Sejfudin Hodžić, but the Prosecutor has not questioned the credibility of the other two witnesses.<sup>36</sup> It should also be noted that the evidence provided by these witnesses is corroborated by the testimony of other witnesses.

34. For example, paragraph 83 of the Trial Verdict concerns the Accused's unsuccessful efforts to establish cooperation between the local units, as well as the Accused losing his command in June 1992. An examination of the evidence indicates that Prosecution and Defense witnesses provided similar evidence.<sup>37</sup>

35. Paragraph 84 of the Trial Verdict concerns the establishment of a War Presidency in Cerska involving Bego Uvalić and Merima Telalović. This factual finding is not being contested by the Prosecutor, who conceded in closing argument that Bego Uvalić had served as President.<sup>38</sup> Several witnesses provided similar testimony concerning the actions of the War Presidency and Bego Uvalić. This evidence corroborates the testimony of Sejfudin Hodžić and Merima Telalović on this matter.<sup>39</sup>

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<sup>34</sup> See e.g., the Testimony of Bešir Aljukić on 13 May 2008 at 1:36:44 to 1:37:50 and 1:58:58 to 1:59:29; Testimony of Adil Omerović on 14 May 2008 at 37:15 to 38:16; and the Testimony of Murat Šiljković on 18 April 2008 at 45:50 to 46:29.

<sup>35</sup> See e.g., the Testimony of Ismet Hurić on 28 April 2008 at 55:12 to 55:36; Testimony of Murat Šiljković on 18 April 2008 at 56:40 to 56:54; Testimony of Čamil Talović on 21 May 2008 at 3:11:37 to 3:12:09; and the Testimony of Fajko Kadrić on 22 May 2008 (Tape # 1) at 1:46:02 to 1:47:01.

<sup>36</sup> Prosecutor's Appellate Brief at pages 4-5.

<sup>37</sup> See, e.g., Testimony of Salih Jusić on 21 May 2008 at 1:50:13 to 1:50:40; Testimony of Murat Šiljković on 18 April 2008 at 55:38 to 56:54 and 1:02:54 to 1:04:01; Testimony of Džemil Babić on 23 May 2008 at 1:45:08 to 1:45:50 and 1:47:53 to 1:48:30; and the Testimony of Bešir Aljukić on 13 May 2008 at 2:01:26 to 2:03:09.

<sup>38</sup> Prosecutor's Closing Argument on 23 June 2009 at 40:00 to 40:13.

<sup>39</sup> See Testimony of Adil Omerović on 14 May 2008 at 32:12 to 32:37 and 1:30:45 to 1:30:50; Testimony of Esad Maljišević on 13 May 2008 at 2:21:52 to 2:22:29; Testimony of Ilijas Jašarević on 14 May 2008 at 2:09:17 to 2:09:27; and the Testimony of Salih Jusić on 21 May 2008 at 2:02:28 to 2:03:02.

36. With regard to paragraphs 94, 96 and 98 of the Trial Verdict, the First Instance Panel relied upon the testimony of six witnesses: Bešir Aljukić, Ismet Hurić, Nuria Hurić, Dževad Musić, Salih Jusić and Merima Telalović. Before this Panel, the Prosecutor has not questioned the credibility of these witnesses except for Salih Jusić.<sup>40</sup> In fact, the Prosecutor cited portions of the testimony of all of these witnesses, with the exception of Salih Jusić, in support of its appeal.<sup>41</sup>

37. As mentioned above, most of the testimony for which these witnesses are being cited is not contentious and other witnesses provided similar or consistent testimony. Specifically, paragraph 94 of the Trial Verdict cites the testimony of three witnesses in finding that Bećir Mekanić went to the prison in response to the death of Dušan Čestić. In addition, Džemil Babić, who was serving as a civilian police officer when the incident occurred, corroborated this by testifying to the arrival of Bećir Mekanić at the prison.<sup>42</sup> This Panel notes that there was no contradictory evidence introduced on this matter and the Prosecutor has not alleged that such action did not occur.<sup>43</sup>

38. Regarding paragraphs 96 and 98, the Trial Panel referred to Salih Jusić's testimony which indicated that the prison warden, who was Muradif Mujanović, supervised the prison guards and issued their assignments. The Trial Panel also referred to testimony that the prison was under the jurisdiction of the Court.

39. The Prosecution has not questioned the reliability of the testimony that Muradif Mujanović was the prison warden, or that he supervised the guards. Notably, this evidence was corroborated by two of the prison guards<sup>44</sup> and by the testimony of Džemil Babić.<sup>45</sup>

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<sup>40</sup> Prosecutor's Appellate Brief at page 5.

<sup>41</sup> Ibid. at pages 4, 6, 8, 9 and 10.

<sup>42</sup> Testimony of Džemil Babić on 23 May 2008 at 2:20:09 to 2:20:25.

<sup>43</sup> In a pretrial statement (Exhibit T-15 on page 5), Bešir Aljukić claims that the suicide occurred "when Bećir Mekanić was the commander."

<sup>44</sup> Testimony of Ismet Hurić on 28 April 2008 at 29:33 to 30:51; and the Testimony of Dževad Musić on 28 April 2008 at 1:13:08 to 1:13:48 and 1:42:29 to 1:43:27.

<sup>45</sup> Testimony of Džemil Babić on 23 May 2008 at 2:18:57 to 2:19:12; see also Exhibit T-45.

40. In paragraph 96 of the Trial Verdict, Salih Jusić indicates that the prison was under the jurisdiction of the Court; in paragraph 98, Merima Telalović indicates that the prison warden was appointed by and filed reports to the Crisis Staff. This Panel notes that the Prosecutor has not contested the issue of who appointed the prison warden, or that the warden filed reports with the Crisis Staff. In fact, Prosecution witnesses testified that members of the War Presidency or Crisis Staff addressed the issue of security at the prison.<sup>46</sup>

41. The Appellate Panel notes that there were differences of opinion as to who had jurisdiction over the prison and its guards. There was, however, a consistent view among the credible witnesses that one of the civilian agencies or departments was in control. Furthermore, testimony from Prosecution and Defense witnesses that the Civilian Police, the Court, and Civilian Protection were involved in prison matters provides additional support for the view that it was a civilian operation. This Panel thus concludes that the Trial Panel could have found these witnesses to be credible due to the overall consistency of the evidence, but still find that this evidence was not sufficient to establish beyond a reasonable doubt which person or department had control over the prison and its guards.

42. Thus, this Panel concludes that the evidence was sufficient to establish the credibility of the witnesses relied upon by the Trial Panel. Specifically, the fact that their testimony was corroborated by and was consistent with other evidence, and in most situations was not contested by the Prosecution, is sufficient to deem it credible. Furthermore, the Prosecutor has not demonstrated how the lack of articulation of credibility of certain witnesses “invalidates the Verdict.”<sup>47</sup> Therefore, this issue is dismissed.

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<sup>46</sup> See e.g., Testimony of Avdija Omerović on 14 May 2008 at 3:00:11 to 3:01:16 and 3:04:02 and 3:04:32; and Testimony of Adil Omerović on 14 May 2008 at 42:31 to 42:52.

<sup>47</sup> *Prosecutor v. Mirko Todorović and Miloš Radić*, supra at para. 19.

#### **D. The Reference to Article 27 of the Geneva Convention**

43. The Prosecutor alleges that the Trial Verdict's reference to Article 27 of the Geneva Convention on the Protection of Civilians in Time of War indicates that the Trial Panel considered charges against the Accused for which he was not indicted. Specifically, the Prosecutor argues that since Article 27 concerns the crime of rape, the Trial Panel's reference to that article indicates that the Accused was acquitted of a crime for which he was not charged.<sup>48</sup>

44. Article 27 of the Geneva Convention on the Protection of Civilians in Time of War protects not only women "against rape, enforced prostitution, or any other form of indecent assault" but also provides that "[p]rotected persons . . . shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof...."

45. The Appellate Panel notes that since the Accused was charged with detaining prisoners in inhumane conditions and subjecting them to inhumane treatment, the provisions of Article 27 are applicable in this case. However, as the Accused has been acquitted, the Appellate Panel did not analyze the applicability of Article 27 to international or non-international armed conflicts, all the more so in view of the fact that the Prosecution did not provide arguments as to the character of the conflict. Therefore, the Prosecutor's allegation lacks merit and is dismissed.

#### **II. The First Instance Panel Did Not Violate Article 297(2) of the CPC of BiH.**

46. The Prosecutor further alleges that the Trial Panel committed an essential violation of the CPC of BiH by not assessing the facts fairly and equally, or alternatively, by only relying upon the exculpatory facts. Specifically, the Prosecution argues that the Trial Panel did not (1) consider evidence of nine witnesses in determining the nature and extent of the Accused's command responsibility; (2) question the credibility of Sejfudin Hodžić and Salih Jusić; (3) consider Sejfudin

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<sup>48</sup> Prosecutor's Appellate Brief at page 2.

Hodžić's inexperience and lack of military knowledge; (4) consider portions of Ćamil Talović's and Esad Maljišević's testimony; and (5) consider the testimony of six witnesses in determining whether the Accused had effective control over the guards. The Prosecution also claims (6) that the Trial Panel relied upon the testimony of Defense witnesses without documentary corroboration.<sup>49</sup>

47. The Defense addressed only two of the allegations and submitted that the First Instance Panel acted properly in assessing the testimony of Bego Uvalić and Seĳudin Hodžić and provided sufficient reasoning in support of its determination.<sup>50</sup>

**A. The Allegation that the Trial Panel did not Consider the Testimony of Nine Witnesses**

48. The Prosecutor contends that the Trial Panel's finding that "[o]nly one witness, Bego Uvalić, gave direct evidence that the Accused was the military commander in Cerska and had command responsibility for the detention stable and its personnel,"<sup>51</sup> did not take into account the testimony of nine witnesses. The Prosecutor argues that these nine witnesses demonstrate "that Bego Uvalić was not the only one who testified on the role Ferid played as the military commander in Cerska."<sup>52</sup>

49. In Paragraph 72 of the Verdict, the Trial Panel made two findings: that Bego Uvalić was the only one who testified that the Accused (1) served as the local military commander and (2) had command responsibility over the prison guards. A review of the testimony cited by the Prosecutor indicates that the nine witnesses described the Accused's role as military commander but did not mention his involvement in relation to the prison. The evidence submitted by the Prosecutor also did not mention either that the guards were subordinates of the Accused or that the Accused had effective control over them. In fact, the only reference to the prison — that Nuriĳa Hurić testified that the

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<sup>49</sup> Ibid. at pages 3-6.

<sup>50</sup> Defense Appellate Brief at page 2.

<sup>51</sup> Trial Verdict at para. 72.

<sup>52</sup> Prosecutor's Appellate Brief at page 4.

Accused assigned him to the position of prison guard<sup>53</sup> — is a misquotation, as the actual testimony refers to another individual having appointed Hurić as a guard.<sup>54</sup>

50. Since the evidence submitted by the Prosecutor does not support the allegation that the Trial Panel acted improperly, this issue must be dismissed.

## **B. Issues Relating to the Testimony of Sejfudin Hodžić and Salih Jusić**

51. The Prosecutor also argues that the Trial Panel did not consider the fact that (1) Sejfudin Hodžić threatened Bego Uvalić; (2) Hodžić was too young to understand the military situation in the area; and (3) Sejfudin Hodžić and Salih Jusić had an interest in helping the Accused.<sup>55</sup> The Defense responds that the threats were never established and that this witness was not an inexperienced “child” during the indictment period.<sup>56</sup>

### 1. Alleged Threats

52. The Trial Panel did not mention the alleged threats as a factor in its decision. It is apparent from the Verdict, however, that the Trial Panel did not find credible Bego Uvalić’s allegations that Sejfudin Hodžić attempted to force him to modify his testimony in relation to the role of the Accused in Cerska. Rather, the Trial Panel found that Bego Uvalić “was untruthful in important aspects of his testimony.”<sup>57</sup> This conclusion was supported by the evidence and by the Prosecutor, who conceded in closing argument that Bego Uvalić was not telling the truth in relation to his role in the Crisis Staff/War Presidency.<sup>58</sup> Therefore, since the Trial Panel did not find Bego Uvalić’s testimony to be reliable, it did not have to credit that testimony. Furthermore, where the Trial Panel found that Bego Uvalić had a motive to blame the Accused and

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<sup>53</sup> Ibid.

<sup>54</sup> See the Testimony of Nuriya Hurić on 15 May 2008 at 14:10 to 15:25 and 57:43 to 58:09 (where the witness testifies about a Captain called “Green Beret” who assigned persons to serve as prison guards).

<sup>55</sup> Prosecutor’s Appellate Brief at pages 4 and 5.

<sup>56</sup> Defense Appellate Brief at page 2.

<sup>57</sup> Trial Verdict at para. 72.

<sup>58</sup> Prosecutor’s Closing Argument on 23 June 2009 at 40:00 to 40:13.

protect himself,<sup>59</sup> the Panel could have also recognized a similar motive that Bego Uvalić had in attacking Sejfudin Hodžić, whose testimony incriminated him.

**53.** This Panel thus concludes that where the Trial Panel did not credit the allegations of Bego Uvalić, it was not a matter for consideration in determining the reliability of Hodžić's testimony. Since the Prosecutor's argument is not supported by the evidence, it is dismissed.

## 2. Age and Inexperience

**54.** Sejfudin Hodžić was given a position of responsibility while he remained in Cerska in 1992. Specifically, he drafted and maintained the records for the local Ministry of Defense.<sup>60</sup> In this capacity, he met with soldiers and refugees and attended Crisis Staff and War Presidency meetings.<sup>61</sup> From his position, Sejfudin Hodžić was able to witness activities occurring in the area.

**55.** With regard to the allegation that Sejfudin Hodžić was too young or inexperienced to understand the military situation, this Panel notes that the witness was not a youth or minor during the period in question, but rather was about 20 years old.<sup>62</sup> Furthermore, although the Prosecution argues that the Trial Panel should not have relied on this witness, it does not argue that such testimony resulted in an erroneous factual finding. Notably, the Prosecution called an even younger witness to testify concerning military issues.<sup>63</sup>

**56.** In each of the findings where the Trial Panel cited the testimony of Sejfudin Hodžić, that testimony was corroborated by other witnesses. In those situations, the testimony of various witnesses was consistent in relation to the factual findings. For example, even though the Trial Panel cited Sejfudin Hodžić's testimony on the issues of

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<sup>59</sup> Trial Verdict at para. 73.

<sup>60</sup> See Testimony of Sejfudin Hodžić on 27 February 2009 at 32:57 to 35:15.

<sup>61</sup> Ibid. at 36:31 to 39:50 (he attended Crisis Staff meetings); 01:02:10 to 01:07:25 (he attended War Presidency meetings and was aware of what the War Presidency was doing).

<sup>62</sup> Prosecutor's Appellate Brief at page 4.

<sup>63</sup> See Testimony of Murat Šilković on 18 April 2008.

(1) the lack of food in Cerska,<sup>64</sup> and (2) persons including Bego Uvalić who served on the War Presidency,<sup>65</sup> there were other witnesses supporting or corroborating this testimony.<sup>66</sup>

57. The witness Sejfudin Hodžić was also cited in the Trial Panel's findings regarding (1) the Accused's authority and attempts to unify the local units,<sup>67</sup> (2) that a Cerska Detachment was established,<sup>68</sup> and (3) that the Accused was eventually marginalized.<sup>69</sup> A review of the Verdict indicates that Sejfudin Hodžić was one of several Prosecution and Defense witnesses who testified on these matters.<sup>70</sup> Since their testimony was consistent with his testimony, the Trial Panel could have properly established these factual findings.

58. This Panel thus concludes that age and a lack of military experience did not preclude the Trial Panel from relying on Sejfudin Hodžić's testimony. Rather, the evidence indicates that the Trial Panel relied on portions of his testimony which were substantially corroborated by other evidence. Therefore, this Panel concludes that the Trial Panel's use of this testimony in its findings was not erroneous, and an essential violation did not occur.

### 3. Motive to help the Accused

59. The Trial Panel found that Avdija Omerović<sup>71</sup> had an interest to limit his own culpability since he had served as the commander of the civilian police. The Prosecutor

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<sup>64</sup> Trial Verdict at para. 59.

<sup>65</sup> Ibid. at para. 84.

<sup>66</sup> With regard to the food issue, see the testimony of Bešir Aljukić, Dževad Musić, and Ismet Hurić. With regard to the members of the War Presidency, see the testimony of Adil Omerović, Ilijas Jašarević, Avdija Omerović, and Džemil Babić.

<sup>67</sup> Trial Verdict at paras. 76 and 83.

<sup>68</sup> Ibid. at para. 86.

<sup>69</sup> Ibid. at para. 85.

<sup>70</sup> With regard to the Accused being marginalized, see, e.g., the Testimony of Džemal Babić and that of Bešir Aljukić on 13 May 2008 at 1:07:40 to 1:07:58 (explaining that the Accused eventually became "irrelevant"); see also the Testimony of Esad Maljišević and Adil Omerović in relation to the establishment of the Cerska Detachment. Witnesses who described how the Accused attempted to unify and coordinate the local military units included Salih Jusić and Bešir Aljukić.

<sup>71</sup> In the Prosecutor's Appellate Brief on page 5, the Prosecutor erroneously refers to Adil, instead of his brother Avdija Omerović, as the commander of the civilian police.

argues that this finding is flawed because the two witnesses relied upon for this finding, Salih Jusić and Sejfudin Hodžić, had an interest in helping the Accused.<sup>72</sup>

60. A review of the Verdict indicates that the Trial Panel did not rely upon the testimony of Salih Jusić and Sejfudin Hodžić in finding that Avdiya Omerović served in a certain capacity or possessed certain authority or responsibilities. Rather, the Trial Panel relied upon the testimony of the three prison guards (Nuriya Hurić, Ismet Hurić and Dževad Musić) and witness Esad Maljisević in arriving at this finding. This Panel thus concludes that since the facts alleged by the Prosecutor do not support the allegation, the issue on appeal is dismissed.

### C. Issues Related to the Testimony of Ćamil Talović and Esad Maljisević

61. The Prosecutor submits that the Trial Panel acted improperly in not considering portions of the testimony of Ćamil Talović and Esad Maljisević that a single command was established in Cerska under the Accused. The Prosecutor argues that while some of their testimony was used in the Verdict, the Trial Panel did not assess significant portions of their evidence.<sup>73</sup>

62. First, this Panel notes that the testimony of Ćamil Talović is not as clear or certain on this issue as alleged by the Prosecutor. Rather, Talović testified that the Accused was one of a number of military commanders in the area; each commander had a group of soldiers loyal to them; the Accused was in command until 15 July 1992 when two “stronger” commanders arrived and forced him out;<sup>74</sup> and the authorities were functioning, but with the arrival of Bećir Mećanić and others “everything collapsed.”<sup>75</sup> With regard to the military, Talović testified that during his stay in Cerska, “there was no hierarchy but anarchy and chaos.”<sup>76</sup>

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<sup>72</sup> Ibid. at page 5.

<sup>73</sup> Prosecutor’s Appellate Brief at page 5.

<sup>74</sup> Testimony of Ćamil Talović on 21 May 2008 at 2:56:17 to 2:58:16.

<sup>75</sup> Ibid. at 3:00:48 to 3:01:23.

<sup>76</sup> Ibid. at 3:10:04 to 3:10:09.

63. This Panel concludes that an examination of Talović's testimony in its entirety and in context indicates that it does not support the allegation of the Prosecutor. Consequently, the Trial Panel did not act improperly in not relying upon it in the manner sought by the Prosecutor.

64. Second, the testimony of Esad Maljišević conflicts with and is consistent with that of Čamil Talović. Maljišević testified that there was a single command until mid-July, when the Cerska Detachment was formed.<sup>77</sup> As noted above, Talović stated that the Accused was one of several commanders in the area and that he lost his command in mid-July.

65. The Verdict indicates that the Trial Panel found that the testimony of the witnesses was conflicting as to the nature, extent, and time period of the Accused's role as commander.<sup>78</sup> The Trial Panel also found that the Accused initially attempted to organize the local units but eventually became marginalized with the establishment of the Cerska Detachment.<sup>79</sup>

66. This Panel concludes, upon reviewing the Trial Verdict, that the First Instance Panel considered the testimony of Čamil Talović and Esad Maljišević. This testimony supports the findings of the Trial Panel – that there was conflicting evidence as to the nature and extent of the Accused's command and that he was eventually marginalized — and was cited no less than four times in the section of the Verdict concerning command responsibility.<sup>80</sup> Therefore, this Panel concludes that the testimony of these witnesses was considered in its entirety and was properly used to support the Verdict.

#### **D. Effective Control over the Prison Guards**

67. The Prosecutor further contends that the Trial Panel did not identify, assess, or evaluate the evidence relating to the Accused's effective control over the prison guards,

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<sup>77</sup> Testimony of Esad Maljišević on 13 May 2008 at 2:21:00 to 2:21:17.

<sup>78</sup> Trial Verdict at paras. 70-71 and 74-75.

<sup>79</sup> Ibid. at paras. 79, 83, 85-86.

<sup>80</sup> See paragraphs 86, 95, 96 and 99 of the Trial Verdict and the related footnotes.

and required the Prosecution, but not the Defense, to support the testimony on this issue with documentation.<sup>81</sup>

**68.** The Trial Panel reviewed and evaluated the testimony of the witnesses in relation to the issue of control over the prison guards. Specifically, the witnesses who testified that the unit securing the prison was subordinated to the Accused<sup>82</sup> (Adil Omerović), and that the Accused appointed persons whom he knew and trusted as guards (Bego Uvalić),<sup>83</sup> were of questionable credibility.<sup>84</sup> A third witness, Bešir Aljukić, testified that the Accused assigned persons to serve as prison guards.<sup>85</sup> Aljukić's testimony, however, was confusing. For example, in one part of his testimony, Aljukić claimed that the Accused appointed the prison guards, but in another part, he could only surmise that the Accused was even aware of the existence of the prison.<sup>86</sup> Aljukić further testified that while the Accused served as commander, his rank meant nothing in the field and he was "impotent" in this role,<sup>87</sup> in that when the Accused held a lineup and issued orders, soldiers laughed at him.<sup>88</sup>

**69.** As previously noted by this Panel, the Trial Panel could have properly found the testimony of Adil Omerović and Bego Uvalić to lack credibility. It could have also found little value in the testimony of Bešir Aljukić due to the equivocal and conflicting nature of his evidence. However, the Trial Panel found the testimony of the three prison guards to be credible,<sup>89</sup> explained how their testimony was consistent,<sup>90</sup> and provided the reasons for crediting their evidence.<sup>91</sup> This Panel notes that the Prosecutor has not questioned the validity of the Trial Panel's finding as to their credibility.

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<sup>81</sup> Prosecutor's Appellate Brief at pages 5-6.

<sup>82</sup> Testimony of Adil Omerović on 14 May 2008 at 21:05 to 21:53.

<sup>83</sup> Testimony of Bego Uvalić on 26 March 1009 at 1:22:22 to 1:23:27.

<sup>84</sup> Trial Verdict at paras. 72-73 and 99.

<sup>85</sup> Testimony of Bešir Aljukić on 13 May 2008 at 1:50:36 to 1:50:47.

<sup>86</sup> Ibid. at 1:09:54 to 1:10:27.

<sup>87</sup> Ibid. at 1:57:51 to 1:59:30.

<sup>88</sup> Ibid. at 1:00:25 to 1:01:17.

<sup>89</sup> Trial Verdict at para. 99.

<sup>90</sup> Ibid. at paras. 94-95.

<sup>91</sup> Ibid. at para. 99.

70. This Panel further notes that in addition to these witnesses, the Trial Panel described the testimony of several other witnesses in its findings on this matter.<sup>92</sup> The Trial Panel could have properly relied upon the testimony of these other witnesses, as it was corroborated by other evidence at trial. For example, a number of Prosecution and Defense witnesses testified to the roles of the civilian authorities,<sup>93</sup> the local police,<sup>94</sup> and the Court<sup>95</sup> in relation to the prison. This Panel notes that since many of the witnesses had a limited role in the case, their knowledge was correspondingly limited to their own role, function, or area of responsibility. Furthermore, the knowledge of certain witnesses was limited in relation to the period of time they spent in the area. As a result, there were witnesses whose credibility was not challenged who provided contradictory evidence as to the person(s) or departments in charge of the prison.

71. Since the Prosecution has the burden of proof, its failure to prove beyond a reasonable doubt that any person or entity was responsible for the control over the prison and its guards left the Trial Panel with no option but to find that this allegation against the Accused had not been established. This Panel thus finds that where the Trial Panel properly assessed and evaluated the evidence and identified the persons whose evidence supported its findings, the Trial Panel did not commit an essential violation as alleged by the Prosecutor.

72. The Prosecutor further argues that the Trial Panel acted improperly by requiring documentary proof to corroborate its witnesses, where it did not place the same burden on the Defense.<sup>96</sup> An examination of the Verdict, however, indicates that the Prosecutor has taken the language in paragraph 92 out of context in constructing this argument.

73. In the Verdict, at paragraphs 91 and 92, the Trial Panel refers to the contradictory evidence relating to the person or entity responsible for running the prison,

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<sup>92</sup> Trial Verdict at paras. 93 - 99.

<sup>93</sup> See the testimony of Esad Maljišević, Dževad Musić, and Džemil Babić.

<sup>94</sup> See the testimony of Bešir Aljukić, Nuria Hurić, and Čamil Talović.

<sup>95</sup> See the testimony of Sejfidin Hodžić, Salih Jusić and Avdija Omerović (in the Testimony of Avdija Omerović on 14 May 2008 at 3:00:38 to 3:01:16, the witness stated that the Judge was in charge of dealing with the security issue at the prison).

<sup>96</sup> Prosecutor's Appellate Brief at pages 5-6.

noting, in the last sentence of paragraph 92, that there were no documents tendered providing any insight on this matter. By this notation, the Trial Panel was neither implying that documentary evidence was required to support witness testimony, nor was it imposing any additional requirements on the Prosecution beyond those prescribed in the CPC or Criminal Code. Rather, the Trial Panel was simply indicating that insufficient evidence had been presented and that pertinent documentary evidence would have been of assistance to the Panel. Compare *Prosecutor v. Fatmir Limaj et al.*, Case No.: IT-03-66-T, Judgment (30 November 2005) at para. 618 (Trial Chamber faced with contradictory evidence could not accept certain testimony “in the absence of independent confirmation”). See *Prosecutor v. Zejnil Delalić et al.*, Case No.: IT-96-21-T, Judgment (16 November 1998) at para. 749 (Trial Chamber relied upon an ICRC document in determining that Zdravko Mucić served as the commander of the Čelebići Prison).

74. This Panel therefore concludes that the Prosecutor’s allegation must be dismissed.

**E. The Alleged Failure to Evaluate the Testimony of Six Witnesses**

75. The Prosecutor argues that the Trial Panel did not evaluate the testimony of six witnesses, namely Ismet Hurić, Esad Malješević, Avdija Omerović, Adil Omerović, Nuria Hurić and Bešir Aljukić, contending that their testimony would have proved that the Accused had effective control over the guards at the prison. The Prosecutor then identifies portions of the testimony which it claims were not considered.<sup>97</sup>

76. Cited portions of the testimony of several of these witnesses relate directly or indirectly to Avdija Omerović. Specifically, witnesses Ismet Hurić, Esad Malješević and Nuria Hurić were assigned to guard duty or received their orders from Avdija Omerović or the police. The Trial Panel noted that witnesses testified that Avdija Omerović gave orders to the prison guards.<sup>98</sup> There was also testimony that he served

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<sup>97</sup> Ibid. at page 6.

<sup>98</sup> Trial Verdict at paras. 94-95.

as the Civilian Police Chief<sup>99</sup> and that the prison was under his command.<sup>100</sup> The Prosecutor then linked this testimony to the evidence of the Omerović brothers that the Accused was their superior.<sup>101</sup> With regard to the testimony of the Omerović brothers inculping the Accused, the Trial Panel noted that there were questions of credibility as to Avdija Omerović's testimony as he was attempting to shift responsibility away from himself.<sup>102</sup> This Panel notes that, where the Trial Panel had concerns about the reliability of this evidence, it was not required to rely upon it. Therefore, the Trial Panel could properly determine that the portions of the testimony from these first five witnesses cited by the Prosecutor were of no consequence.

77. With regard to the testimony of the sixth witness, Bešir Aljukić, this Panel has previously noted that it was contradictory and equivocal. Moreover, this witness did not testify as to who was responsible for the prison or had effective control over the guards. As a result, the Trial Panel did not have to rely upon or credit his testimony.

78. Notably, none of the quoted testimony addresses the issue of effective control over the prison guards. Factors for consideration in determining the existence of effective control are set out in *Prosecutor v. Enver Hadžihasanović et al*, Case No.: IT-01-47-T, Judgment (15 March 2006) at paras. 82-83. There, the Trial Chamber stated that there are:

several elements which make it possible to establish whether there is effective control including: the official position of an accused, even if actual authority, however, will not be determined by looking at formal positions only; the power to give orders and have them executed . . . the authority to apply disciplinary measures, the authority to promote or remove soldiers; and the participation of the Accused in negotiations regarding the troops in question.

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<sup>99</sup> See, e.g., Testimony of Esad Maljišević on 13 May 2008 at 2:43:00 to 2:43:12 and 2:47:27 to 2:47:56; and Testimony of Ćamil Talović on 21 May 2008 at 3:07:28 to 3:07:33.

<sup>100</sup> Testimony of Ćamil Talović on 21 May 2008 at 3:06:29 to 3:07:13.

<sup>101</sup> Prosecutor's Appellate Brief at page 6.

<sup>102</sup> Trial Verdict at para. 99.

79. This Panel further notes that the testimony of the six witnesses does not concern the issue of whether the Accused had effective control over the persons who attacked the prisoners; nor does the Prosecutor refer to any testimony or evidence which was not properly considered on this issue.

80. In conclusion, this Panel states that the Trial Panel properly considered and evaluated the limited testimony on the issue of effective control, and that the Trial Panel was not required to adopt testimony where there were concerns over credibility. Therefore, the Prosecutor's allegation of error is dismissed.

### **III. The Trial Panel Did Not Erroneously Establish Certain Facts in Violation of Article 299 of the CPC of BiH.**

81. The Prosecutor argues that the Trial Panel erroneously and incompletely established facts relating to (1) the death of Dušan Čestić; (2) the Accused's ordering the imprisonment of civilians; (3) the nature of the armed conflict; and (4) the command responsibility of the Accused.<sup>103</sup> The Defense responded to only two of these allegations, contending that based on the evidence at trial the Trial Panel properly found that it could not be established that the Accused was the Commander of all units in the area or ordered the arrests of civilians.<sup>104</sup>

82. On appeal, in determining whether there were incorrect or incomplete facts in a 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. *Prosecutor v. Mirko Todorović and Miloš Radić*, supra at paras. 85-88 (describing standards for reviewing allegations of incorrectly or incompletely established facts pursuant to Article 299 of the CPC of BiH). There, the Chamber held:

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

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<sup>103</sup> Prosecutor's Appellate Brief at pages 6-11.

<sup>104</sup> Defense Appellate Brief at pages 2-3.

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."

As discussed below, this Panel concludes that the Trial Panel made no error with respect to facts relating to the death of Dušan Čestić; the Accused's ordering the imprisonment of civilians; the nature of the armed conflict; or the command responsibility of the Accused, such that the Verdict should not be disturbed.

**A. Issues Relating to the Death of Dušan Čestić, Unlawful Confinement, and the Nature of the Armed Conflict**

83. The first three issues raised by the Prosecutor allege certain violations of the laws of war committed by the Accused while allegedly having command responsibility over both the prison guards and the persons who committed the crimes in the prison. The second issue (unlawful confinement) specifically requires that the Accused possess the power or authority to release the detainees.<sup>105</sup> In the Verdict, however, the Trial Panel found that the Accused did not have effective control over either the prison guards or the persons who assaulted the prisoners, and thus had no command responsibility

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<sup>105</sup> *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Appellate Judgment (20 February 2001) at paras. 378 – 379.

over these persons.<sup>106</sup> On appeal, the Prosecutor has not established that the Trial Panel's conclusion was erroneous or unsupported by the evidence. Therefore, since the factual pre-requisite of command responsibility for conviction of these violations has not been established, this Panel need not address these issues, as any determination would not affect the Trial Verdict. Even if an error was established regarding these three issues, without proof of command responsibility, any such error would still not affect the Verdict.<sup>107</sup> Therefore, the first three allegations of error in this section of the Prosecutor's Appeal are dismissed.

**B. The Alleged Failure To Consider Evidence Relating to Command Responsibility**

1. The Witnesses

84. The Prosecutor submits that the Trial Panel erroneously and incompletely established the facts on the issue of command responsibility by not considering the testimony of fourteen witnesses. The Prosecutor identifies both the witnesses and the specific portions of the testimony it claims that the Trial Panel did not evaluate.

85. An examination of these portions of the testimony indicates that at least twelve of the fourteen witnesses referred to the Accused's military role.<sup>108</sup> Three of the witnesses also referred to the Accused's knowledge of the prisoners,<sup>109</sup> and one witness of the three testified that the Accused appointed the prison guards.<sup>110</sup> Although Adil Omerović stated that the prison was under the jurisdiction of the First Platoon Commander who was subordinated to the Accused,<sup>111</sup> there were questions as to his

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<sup>106</sup> Trial Verdict at paras. 102 - 103.

<sup>107</sup> *Prosecutor v. Mirko Todorović and Miloš Radić*, *supra* at para. 86. See also *Prosecutor v. Enver Hadžihasanović, et al.* IT-01-47-A, Appellate Judgment (22 April 2008) at para. 10 ("Only an error of fact which has occasioned a miscarriage of justice will cause the Appeals Chamber to overturn a decision by the Trial Chamber.").

<sup>108</sup> The Prosecutor cites portions of the testimony of Esad Malješević, Bešir Aljukić, Adil Omerović, Ismet Hurić, Dževad Musić, Ilija Jašarević, Nurija Hurić, Muharem Sinanović, Murat Šiljković, Fajko Kadić, Merima Telalović and Atif Sirčo. Prosecutor's Appellate Brief at pages 9-10.

<sup>109</sup> The Prosecutor cites portions of the testimony of Bešir Aljukić, Adil Omerović and Ćamil Talović. Prosecutor's Appellate Brief at pages 9-10.

<sup>110</sup> The Prosecutor cites a portion of Bešir Aljukić's testimony. Prosecutor's Appellate Brief at page 9.

<sup>111</sup> Prosecutor's Appellate Brief at page 9.

credibility. The Trial Panel therefore could have properly rejected this portion of the witness's testimony on the ground that the witness was motivated to assist his brother Avdija who was alleged to have supervised the prison guards.<sup>112</sup>

**86.** Further, the cited testimony neither concerns the Accused's effective control over the prison guards or the perpetrators of the crimes, nor indicates that the Accused had any role or took any action in relation to the daily activities of the prison or its guards. The testimony does not refer to the perpetrators of the crimes and their relationship to the Accused.

**87.** The Prosecutor's contention is further weakened by the fact that six of the witnesses testified either that the Accused was replaced as the commander<sup>113</sup> or was not the sole commander in the area.<sup>114</sup> Five of the witnesses testified that they did not know who controlled the prison and its guards,<sup>115</sup> or that the prison was under the jurisdiction of an agency or department other than the military.<sup>116</sup>

**88.** In summary, the Prosecutor's argument mainly concerns the military role of the Accused, does not describe his effective control over either the prison guards or the perpetrators of the crimes, and includes conflicting or equivocal evidence. This Panel thus concludes that the cited testimony does not support the Prosecutor's allegation that the Trial Panel's findings concerning command responsibility were plainly unreasonable.

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<sup>112</sup> Trial Verdict at para. 99.

<sup>113</sup> See Testimony of Ćamil Talović on 21 May 2008 at 2:56:25 to 2:56:40; Testimony of Ismet Hurić on 28 April 2008 at 17:11 to 17:53; Testimony of Dževad Musić on 28 April 2008 at 1:30:52 to 1:33:11; and the Testimony of Murat Šiljković on 18 April 2008 at 55:40 to 56:54.

<sup>114</sup> See Testimony of Muharem Sinanović on 21 April 2008 at 25:25 to 26:35; and Testimony of Fajko Kadrić on 22 May 2008 (Tape #1) at 1:46:28 to 1:48:30.

<sup>115</sup> See the Testimony of Murat Šiljković on 18 April 2008 at 51:41 to 51:59; and the Testimony of Bešir Aljukić 13 May 2008 at 1:37:53 to 1:38:04

<sup>116</sup> Testimony of Ćamil Talović on 21 May 2008 at 3:06:30 to 3:07:14; Testimony of Dževad Musić on 28 April 2008 at 1:12:58 to 1:13:39; see also the Testimony of Merima Telalović on 24 April 2009 at 45:45 to 46:09.

## 2. The Documents

**89.** The Prosecutor alleges that the Trial Panel improperly evaluated two documents, introduced into evidence as Exhibits T-32 and T-35. Specifically, the Prosecutor submits that the findings in paragraph 87 of the Verdict that (1) Exhibit T-32 does not support that the Accused appointed Bečir Mekanić; and (2) Exhibit T-35 is evidence of a lack of military hierarchy existing in August 1992, are erroneous.<sup>117</sup>

**90.** Exhibit T-32 is a report on the size and strength of the various military units in northeastern Bosnia. This exhibit/report does not indicate either the nature of these units or the persons who served as their commanders. Thus, it sheds little, if any, light on the issue of effective control. While both exhibits concern the military situation in Cerska, they are unrelated to whether the Accused possessed effective control over the prison guards or the persons who perpetrated the crimes. It is well-established that “[i]n determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.”<sup>118</sup>

**91.** Exhibit T-35, “A Report on combat readiness,” is undated, but refers to the period of “after five months of war.”<sup>119</sup> This exhibit/report notes that (1) a unified system of command has not been established; (2) there are no means of communication; and (3) the intelligence and security sector is not cooperating with the command.<sup>120</sup> Based on this, the Trial Panel reasonably found that the report did not support the Prosecutor’s allegation of effective control, instead indicating a “lack of a command hierarchy.”<sup>121</sup>

**92.** Accordingly, this Panel concludes that the Trial Panel’s finding that these documents had limited value in relation to the issue of command responsibility is proper and reasonable. Therefore, this issue is dismissed.

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<sup>117</sup> Prosecutor’s Appellate Brief at pages 10-11.

<sup>118</sup> *Prosecutor v. Zejnil Delalić et al.*, *supra* at para. 197.

<sup>119</sup> Exhibit T-35 on page 1.

<sup>120</sup> *Ibid.* at pages 1-2.

<sup>121</sup> Trial Verdict at para. 87.

**C. The Reasonableness of the Trial Panel's Conclusion on Command Responsibility**

93. Last, the Prosecutor claims that the Trial Panel erroneously and incompletely established the facts on the issue of command responsibility; however, the Prosecutor has not explained, as it must, why the Trial Panel's conclusion was unreasonable. Given this, the Prosecutor's claim fails to rise to the level of appellate argument. In *Prosecutor v. Mirko Todorović and Miloš Radić*, supra at para. 94, the Appellate Chamber, faced with a similar situation, explained:

that the Defense has merely recited certain evidence and contended that it is incomprehensible that the Trial Panel did not accept that evidence or reach the conclusion suggested by the Defense. However, in order to establish an error of fact, the Defense must in addition specifically address the evidence upon which the Trial Panel relied and the Trial Panel's reasoning, clearly showing how the Trial Panel's factual conclusion was unreasonable. Where the Defense fails to do so, the Defense merely provides an alternative view of the facts and reargues its position at trial. As the Trial Panel's factual conclusions are accorded deference on appeal, the Appellate Panel will not evaluate the positions of the parties at trial, but will only consider arguments that the Trial Panel's factual conclusions are unreasonable. By failing to identify and argue how the Trial Panel's factual conclusions are unreasonable, the Defense has failed to properly raise the issue on appeal.

94. Regardless, after reviewing the record and the Trial Panel's findings, this Panel concludes that the Trial Panel's determination that the Accused lacked command responsibility over the prison guards and the persons who perpetrated the crimes was reasonable and proper. The Trial Panel evaluated the extensive testimony relating to the command over both the military units in Cerska and the prison, much of which was conflicting, equivocal, or derived from witnesses with limited knowledge of the circumstances.

95. This Panel further concludes that the Trial Panel heard very little, if any, credible evidence regarding the existence of a superior-subordinate relationship between the Accused and the prison guards or the persons who committed the crimes (which would warrant a finding of effective control). Specifically, there was no evidence adduced at

trial describing the power or authority possessed by the Accused to prevent or punish crimes.<sup>122</sup> Nor were any circumstances described where the Accused punished or disciplined a guard at the prison.<sup>123</sup> Nor were any documents introduced describing the nature and extent of the Accused's powers or authority in relation to the prison.<sup>124</sup> The Prosecutor did not introduce testimony describing the types of orders issued by the Accused in relation to the prison or its guards,<sup>125</sup> or introduce any expert testimony describing the Accused's role in relation to the prison and its guards or powers he possessed.<sup>126</sup>

96. This Panel thus concludes that, based on the lack of credible evidence on the issue of effective control, and recognizing the contradictory evidence on the issue of command, the Trial Panel's finding that the Prosecutor did not establish the Accused's command responsibility for the prison guards and the perpetrators of the crimes was clearly reasonable. "[N]othing in the evidentiary record raises doubts concerning the reasonableness of the Trial Panel's conclusion."<sup>127</sup> Therefore, this allegation of error is dismissed.

#### **IV. The First Instance Panel Did Not Violate The Rights Of The Injured Party Anđa Obradović.**

97. Anđa Obradović, an injured party, argues that the Verdict did not (1) address crimes committed by persons other than the Accused, or (2) consider her situation in regard to property claims. After carefully reviewing these arguments, this Panel concludes that they must be dismissed.

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<sup>122</sup> Contrast *Prosecutor v. Kronjelac*, Case No.: IT-97-25-T, Trial Judgment (15 March 2002) at paras. 97 and 102 (where evidence was introduced describing the extensive powers of the accused who served as a prison camp warden).

<sup>123</sup> Contrast *Prosecutor v. Zejnil Delalić et al.*, *supra* at para. 767 (where there was evidence describing the measures taken to discipline guards).

<sup>124</sup> Contrast *Mitar Rašević and Savo Todorović*, X-KR-06/275 (Ct. of BiH), First Instance Verdict (28 February 2008) at pages 147-148 (where the Trial Panel relied upon a document which provides the hierarchical structure at a prison camp as well as the responsibilities of various personnel); and *Prosecutor v. Nikola Andrun*, X-KRŽ-05/42 (Ct. of BiH) Second Instance Verdict (19 August 2008) at pages 20-21.

<sup>125</sup> Contrast *Prosecutor v. Pavle Strugar*, IT-01-42-T, Judgment (31 January 2005) at paras. 395-397 (where evidence was introduced as to the various orders issued by the accused).

<sup>126</sup> *Ibid.* at paras. 399, 403-404, and 407-408 (where the Trial Court relies upon expert testimony on the issue of effective control).

<sup>127</sup> *Prosecutor v. Mirko Todorović and Miloš Radić*, *supra* at para. 99.

98. The Injured Party has identified four individuals whom she claims committed war crimes but were not included in the Indictment, and argues that the Verdict should have contained a discussion of their criminal activity. This Panel disagrees. Article 290 of the CPC of BiH prescribes the contents of a verdict; a verdict need not include a determination of whether crimes were committed by persons other than the accused. Article 35(2)(a) of the same Code, which sets out the rights and duties of the Prosecutor, requires the Prosecutor to investigate a matter whenever “there are grounds for suspicion that a criminal offense has been committed.” Without making any determination regarding the culpability of any other persons, this Panel notes that, based on the CPC, if the Injured Party is in possession of information relating to war crimes committed in Vlasenica or surrounding municipalities, the Prosecutor’s Office should be notified.

99. With regard to the second issue raised by the Injured Party, this Panel notes that when an accused is acquitted of charges, the trial court “shall instruct the injured party that he may pursue his claim under property law in a civil action.”<sup>128</sup> Since the Trial Panel acted in accordance with the CPC of BiH by giving such an instruction, no error was committed and this issue must also be dismissed.

100. Pursuant to Article 310(1) and, in conjunction with Article 313 of the CPC of BiH, it has been decided as set out in the operative part of the Verdict.

**Record taker:**

Neira Kožo

**PRESIDING JUDGE:**

**Dragomir Vukoje**

**LEGAL REMEDY INSTRUCTION: No appeal lies from this Verdict.**

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<sup>128</sup> Article 198(3) of the CPC of BiH.