**COURT OF BOSNIA AND HERZEGOVINA**

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**Number:** **S1 1 K 015222 14 Krž**

**Date:** **11 April 2014**

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**Before the Appellate Panel composed of:** **Judge Dragomir Vukoje, Presiding**
**Judge Tihomir Lukes, Reporting Judge**
**Judge Redžib Begić, Panel member**

**CASE OF PROSECUTOR'S OFFICE OF BOSNIA AND HERZEGOVINA**

**v.**

**THE ACCUSED NOVAK ĐUKIĆ**

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**SECOND-INSTANCE VERDICT**

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**Prosecutors of the Prosecutor's Office of Bosnia and Herzegovina:**
**Mirko Lečić and Sead Đikić**

**Defense Counsel for the Accused Novak Đukić:**
**Attorneys Nebojša Pantić, Milorad Ivošević, Slobodan Bilić, Milorad Konstantinović and Jadranko Hadžisejdić**

**Number: S1 1 K 015222 14 Krž**
**Sarajevo, 11 April 2014**

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

The Court of Bosnia and Herzegovina, Section I for War Crimes, in the Panel of the Appellate Division composed of Judge Dragomir Vukoje as the Presiding Judge and Judges Tihomir Lukes and Redžib Begić as the Panel members, with the participation of legal advisor Medina Džerahović as the record-keeper, in the criminal case against the Accused Novak Đukić charged with the criminal offense of War Crimes against Civilians under Article 173(1)(a) and (b) of the Criminal Code of Bosnia and Herzegovina (the CC of BiH), in conjunction with Article 180(1) of the CC of BiH, deciding on the appeals from the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/394 of 12 June 2009 filed by the Prosecutor's Office of Bosnia and Herzegovina and the Defense Counsel for the Accused Novak Đukić, attorney Nebojša Pantić, following the Decision of the Constitutional Court of Bosnia and Herzegovina, number AP 5161/10 of 23 January 2014, at the session held in the presence of Prosecutor of the Prosecutor's Office of Bosnia and Herzegovina Sead Đikić, the Accused Novak Đukić and his Defense Counsel, attorneys Milorad Ivošević, Slobodan Bilić, Milorad Konstantinović and Jadranko Hadžisejdić, on 11 April 2014 rendered the following

**VERDICT**

**I** The Appeal of the Prosecutor's Office of Bosnia and Herzegovina **is dismissed as unfounded**, while the Appeal of the Defense for the Accused Novak Đukić **is partially granted** in the way that the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/394 of 12 June 2009 **is revised** with respect to the applicable criminal code and the decision on criminal sanction. Under the present revised Verdict, the crime of which the Accused Novak Đukić has been found guilty is now legally qualified as War Crimes against the Civilian Population under Article 142(1) of the Criminal Code of the Socialist Federal Republic of Yugoslavia (the CC of SFRY), and based on this statutory provision and pursuant to Articles 38 and 41 of the CC of SFRY, the Appellate Panel **sentences** him to imprisonment for the term of twenty (20) years. Under Article 50 of the CC of SFRY, the time the Accused spent in custody from 8 November 2007 until 9 September 2010 and the time spent serving the sentence under the Verdict of the Court of Bosnia and Herzegovina, number X-KR-07/394 of 12 June 2009, from 10 September 2010 until 14 February 2014, shall be credited towards his sentence of imprisonment.

**II** The first-instance Verdict shall remain unchanged in other parts.

## REASONING

## I. PROCEDURAL HISTORY

### A. VERDICTS OF THE COURT OF BIH AND THE DECISION OF THE CONSTITUTIONAL COURT OF BIH

1. Under the Verdict of the Court of Bosnia and Herzegovina, number: X-KR-07/394 of 12 June 2009, the Accused Novak Đukić was found guilty that in the manner described in paragraph (1) of the operative part of the contested Verdict he committed the criminal offense of War Crimes against Civilians under Article 173(1)(a) and (b) of the CC of BiH, in conjunction with Article 180(1) of the same Code.

2. Pursuant to Article 285 of the Criminal Procedure Code of Bosnia and Herzegovina (the CPC of BiH) and having applied Articles 39, 42 and 48 of the CC of BiH, the Trial Panel sentenced the Accused Đukić to a long-term imprisonment for the term of twenty-five (25) years.

3. Pursuant to Article 56 of the CC of BiH, the time the Accused Đukić spent in custody under the relevant Trial Panel's Decision starting from 8 November 2007 was credited towards the sentence of imprisonment, while, pursuant to Article 188(4) of the CPC of BiH, he was relieved of the duty to pay the costs of the criminal proceedings and it was decided that they would be borne by the budget of the Court. Under Article 198(2) of the CPC of BiH, all aggrieved parties were instructed to pursue their property law claims by taking civil action.

4. Pursuant to Article 284(1)(c) of the CPC of BiH, the Accused Novak Đukić was acquitted of the charge that he committed the criminal offense described in paragraph (2) of the operative part of the first-instance Verdict.

5. Accordingly, under Article 189(1) of the CPC of BiH the costs of the criminal proceedings and scheduled amounts were borne by the budget of the Court, while all aggrieved parties were instructed to pursue their property law claims by taking civil action in accordance with Article 198(3) of the CPC of BiH.

6. Pursuant to Article 296(1)(d) and Article 300(1) and (2) of the CPC of BiH, the Prosecutor's Office of Bosnia and Herzegovina (the Prosecution) appealed this Verdict with respect to decisions on criminal sanction and the costs of the criminal proceedings, moving the Appellate Panel to grant the appeal in its entirety and revise the contested Verdict in the parts concerning the decision on criminal sanction and the decision on the costs of the criminal proceedings by imposing on the Accused Novak Đukić a longer sentence of long-term imprisonment and obliging him to pay the costs of the criminal proceedings.

7. Defense Counsel for the Accused Novak Đukić, attorney Nebojša Pantić, also appealed this Verdict, invoking essential violations of the criminal procedure provisions under Article 297(1) and (2), subparagraphs (i), (j) and (k) of the CPC of BiH, violation of the criminal code to the detriment of the Accused and, finally, incorrectly and incompletely established facts, moving the Appellate Panel to grant the appeal, revise the contested Verdict and acquit the Accused, or to revoke the first-instance Verdict and hold a retrial that would result in the acquittal of the Accused.

8. The Prosecution and Defense responded to each other's appeals, moving the Appellate Panel to dismiss the motion of the other party as unfounded.

9. Having reviewed the appeals and having held a session of the Panel, pursuant to Article 304 of the CPC of BiH, the Panel rendered the second-instance Verdict, number X-KRŽ-07/349 of 6 April 2010, in which it upheld the first-instance Verdict, number X-KR-07/394 of 12 June 2009, dismissing both the Prosecution and Defense appeals as unfounded.

10. Through his Defense Counsel, attorney Dušan Tomić, the Accused Novak Đukić filed an Appeal from the first- and second-instance Verdicts of the Court of BiH with the Constitutional Court of Bosnia and Herzegovina, invoking a violation of rights guaranteed under Article 6(1) and Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention, ECHR), Article 2(1) of the Protocol no. 7 to the ECHR, the right to a fair trial under Article II/3.e) of the Constitution of Bosnia and Herzegovina, as well as violation of Article 14(1) and (2) and Article 15 of the International Covenant on Civil and Political Rights (the ICCPR) and Article 11 of the Universal Declaration of Human Rights (the UDHR).

11. Deciding on the Appeal at its session held on 23 January 2014, the Constitutional Court of BiH rendered the Decision on Admissibility and Merits in the case number AP 5161/10 in which it granted the Appeal, having established a violation of Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7 of the ECHR. As a result, the Constitutional Court of BiH quashed the Verdict of the Court of Bosnia and Herzegovina, number: X-KRŽ-07/394 of 6 April 2010, referring the case back to the Court of Bosnia and Herzegovina. In its Decision the Constitutional Court of BiH ordered the State Court of BiH to *"employ an expedited procedure and take a new decision in line with Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms"*, adding that its decisions are final and binding. A Separate Dissenting Opinion of Judge Seada Palavrić was appended to the Decision of the Constitutional Court of BiH in the case number: AP 5161/10 of 23 January 2014.

12. In response to the Constitutional Court's Decision, this Panel established that following the quashing of the second-instance Verdict of the Court of Bosnia and Herzegovina, this case found itself at the stage that preceded the rendering of the second-instance Verdict, that is, the stage of deciding on appeals from the first-instance Verdict.

## B. PROCEEDINGS BEFORE THE APPELLATE PANEL

13. Acting on the instructions of the Constitutional Court of BiH, the Appellate Panel held a public session on 11 April 2014 to consider the appeals filed by the Prosecution and Defense. At the session, parties were informed of the nature and scope of the new proceedings that would be conducted in accordance with findings and instructions from the above-mentioned decision of the Constitutional Court of BiH. More specifically, parties and defense counsel were informed that the Panel's session was scheduled for the purpose of implementation of the Constitutional Court's Decision that quashed the earlier second-instance Verdict and that, as a result of that, the case is now at the stage that preceded the rendering of the second-instance Verdict, that is, the appellate stage of the proceedings. Therefore, in the present proceedings the Appellate Panel will review again the arguments raised on appeal, specifically in relation to the violation established by the Constitutional Court, leaving out other violations alleged in the appeals as they have not been addressed, or found, by the Constitutional Court in the relevant decision. The parties and defense counsel were given the opportunity to present their appeals again, notwithstanding the fact that the Constitutional Court found a violation of Article 7(1) of the ECHR and that, accordingly, the parties should focus their presentations on the issues of applicable law and the decision on criminal sanction.

14. It follows from the reasoning of the Constitutional Court's Decision that the only violation that was established concerned Article 7(1) of the ECHR, and that it was on this basis that the Constitutional Court quashed the second-instance Verdict in the present case.

15. The convicted person-appellant Novak Đukić did not receive an adjudication of his claim with respect to the alleged violation of his right from Article 6 of the ECHR. The Constitutional Court of BiH noted in this respect: *"Given the conclusion relating to the violation of Article II/2 of the Constitution of Bosnia and Herzegovina and Article 7 of the European Convention, the Constitutional Court holds that there is no need to consider separately the alleged violations of Article II/3(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention, Article 14(1) and (2) and Article 15 of the International Covenant on Civil and Political Rights and Article 11 of the Universal Declaration of Human Rights."* In the view of this Panel, this issue should have been resolved primarily, because removing the violation of Article 7 of the ECHR has no bearing on potential violation of Article 6 of the ECHR, which was not found by the Constitutional Court.

16. This Panel does not have the authority to review second-instance verdicts rendered by another Appellate Panel of this Court in the parts in which they have not been questioned by decisions of the Constitutional Court. The guilt of the accused-appellant Novak Đukić and the established state of facts have not been questioned by the Decision of the Constitutional Court, nor did the Constitutional Court issue any orders in that regard, which is why this Panel cannot consider these grounds of appeal and review the findings made by the previous Appellate Panel of this Court in that regard. Accordingly, this Panel

notes that the Accused Đukić may appeal the present Verdict to the Constitutional Court, or file an application directly with the European Court of Human Rights (the ECtHR). In addition, the proceeding following the Constitutional Court's Decision is not the one initiated upon extraordinary legal remedy provided under Article 327 of the CPC of BiH, "Reopening the Proceedings for the Benefit of the Accused". The Criminal Procedure Code of Bosnia and Herzegovina does not contain provisions that would apply and that would regulate the procedure following the quashing of the final verdict of the Court of BiH in regular proceeding.

17. The CPC of BiH, Article 327, provides for the possibility of reopening the proceedings for the benefit of a convicted person, as an extraordinary legal remedy, in cases when *"[a] criminal proceeding... was completed by a legally binding verdict"* provided that specific conditions listed in this article have been met, including under subparagraph (f) wherein it is stated that the proceedings may be reopened "*if the Constitutional Court of Bosnia and Herzegovina, the Human Rights Chamber or the European Court of Human Rights establish that human rights and basic freedoms were violated during the proceeding and that the verdict was based on these violations."*

18. The general requirement that has to be met in the context of reopening the proceedings is the existence of "a legally binding verdict" rendered upon completion of the criminal proceedings. In addition, in order to allow reopening the proceedings for the benefit of the convicted person, it is required that one of the courts noted above **establishes a violation of rights and freedoms** and that the verdict is based on these violations. In the *Case of Maktouf and Damjanović v. Bosnia and Herzegovina*[1], the ECtHR established that the final verdicts in the criminal proceedings conducted before the Court of BiH in the cases against these two applicants resulted in the violation of Article 7 of the ECHR. In finding this violation, the ECtHR only notes the violation and orders that it be removed, without disturbing the verdict itself. Based on this decision by the ECtHR, in response to motions to reopen the proceedings by the Defense for Damjanović and Maktouf, the Court allowed the reopening of the proceedings for the benefit of convicted persons in accordance with Article 327(1)(f) of the CPC of BiH.

19. By applying provisions that relate to reopening the criminal proceedings, in cases when the final verdict is not revoked or quashed, the Court is obligated to remove the established violations of the rights of convicted persons and to render a verdict in the reopened proceedings thereby setting aside (revising) the final verdict, either entirely or partially in the relevant part, or alternatively leaving it in effect. However, it is clear in the present case that this is not a situation prescribed under Article 327 of the CPC of BiH, that is, extraordinary legal remedy in the form of reopening the proceedings for the benefit of the convicted person, given that the Constitutional Court deviated from the procedure foreseen under Article 327(f) of the CPC of BiH, which stipulates that in case it established a violation of human rights and basic freedoms, as is the case here, it should have noted the violation leaving it to the Court of BiH to remove the established violation in the

[1] Applications nos. 2312/08 and 34179/08, Judgment of 18 July 2013.

reopened proceedings. If this were the case, the proceedings would go back to the stage following the confirmation of the indictment. However, given that the Constitutional Court, by its Decision, determined the stage of the proceedings in advance, this Panel acted in accordance with its instruction.

## C. PROSECUTION AND DEFENSE ORAL ARGUMENTS

20. The Prosecution maintained the arguments presented in the appellate brief, adding that it is not in a position to respond to Defense oral arguments given that the purpose of the present proceedings is not to reopen the proceedings, but to remove the violation established in the Constitutional Court's Decision. The Prosecution moved the Appellate Panel to impose a sanction on the Accused Đukić in accordance with the law.

21. In spite of the caution to the parties and defense counsel concerning the nature and scope of the present proceedings, for the sake of transparency of the proceedings the Presiding Judge allowed the Defense to present and elaborate on the grounds of appeal relating to essential violations of the criminal procedure provisions and incorrectly and incompletely established facts. Defense Counsel Milorad Ivošević, Slobodan Bilić, Milorad Konstantinović and Jadranko Hadžisejdić divided between them the presentation of Defense arguments concerning evidentiary proceedings, the right to a fair trial, the analysis of command responsibility, and finally the presentation of facts and new evidence concerning the firing of the artillery projectile on the critical day. The Accused Đukić agreed with the presentation of his Defense Counsel, moving the Appellate Panel to establish material truth for his personal sake and for the sake of all the victims. The Accused Đukić partially maintained his arguments presented in the Appeal of 19 October 2009.

22. In light of the nature of the present proceedings, the Appellate Panel refused the presentation and showing on the ELMO of new material evidence – photographs of victims from the explosion site suggesting that they sustained injuries in the lower parts of their bodies.

## D. POSITION OF THE APPELLATE PANEL

23. In light of all the above, the Appellate Panel limited itself in the present proceedings to review of the appeal arguments concerning the application of criminal code and accordingly the decision on criminal sanction, while the part of the earlier second-instance Verdict related to the ruling on alleged essential violations of the criminal procedure provisions and incorrectly and incompletely established facts, which was not questioned in the Constitutional Court's Decision, is entirely preserved and interpreted in the present Verdict.

## II. GENERAL CONSIDERATIONS

24. Prior to providing reasoning for individual grounds of appeal, the Appellate Panel notes that pursuant to Article 295(1)(b) and (c) of the CPC of BiH the appellant must include in the appeal both the legal grounds for contesting the verdict and the reasoning behind the appeal.

25. Since pursuant to Article 306 of the CPC of BiH the Appellate Panel reviews the verdict only within the limits of the grounds of appeal, the appellant is obliged to draft the appeal in such a manner that it can serve as the basis for reviewing the Verdict.

26. In this respect, the appellant must identify the grounds on which he contests the appeal, specify which part of the verdict, evidence or action of the Court he contests, and present clear arguments in support of his claim.

27. A mere arbitrary indication of the grounds of appeal, like indicating the alleged irregularities in the course of the first instance proceedings without specifying the ground of appeal that the appellant invokes does not constitute a valid ground to review the first instance verdict. Therefore, the Appellate Panel dismissed as unfounded all unreasoned and unclear grounds of appeal.

## III. ESSENTIAL VIOLATIONS OF THE CRIMINAL PROCEDURE PROVISIONS UNDER ARTICLE 297 OF THE CPC OF BIH

### A. STANDARDS OF REVIEW

28. The essential violations of the criminal procedure, as grounds of appeal, are prescribed under Article 297 of the CPC of BiH.

29. Given the gravity and importance of violations of the procedure, the CPC of BiH differentiates between the violations which, if their existence is established, create an irrefutable assumption that they negatively affected the validity of the rendered Verdict (absolutely essential violations) and the violations for which the Court evaluates, in each specific case, whether the established violation had or could have negatively affected the validity of the verdict (relatively essential violations).

30. Absolute essential violations of the CPC of BiH are listed in Article 297(1) subparagraphs a) through k) of the CPC of BiH.

31. Should the Panel establish an essential violation of the provisions of the criminal procedure, the Panel must revoke the first instance verdict pursuant to Article 315(1)(a) of the CPC of BiH.

32. Unlike the absolute violations, relatively essential violations are not specified in the law. These violations arise *"... if the Court has not applied or has improperly applied some provisions of this Code during the main trial or in rendering the verdict, and this affected or could have affected the rendering of a lawful and proper verdict."* (Article 297(2) of the CPC of BiH).

33. Defense for the Accused Đukić contests the first-instance Verdict because of the alleged essential violations of the criminal procedure provisions under Article 297(1) and (2) of the CPC of BiH. Having reviewed the arguments raised by the Defense on appeal, the Appellate Panel concludes that they are unfounded for the reasons noted below.

## 1. Essential violations of the criminal procedure provisions under Article 297 of the CPC of BiH

34. The Defense objected to an expert examination conducted upon the Order of the Prosecutor's Office, claiming that it was conducted by persons to whom the Order for Expert Examination did not refer and who then produced a Report based on this evidence. The Defense argues that this evidence was therefore unlawfully obtained, and that the Court erred in admitting and basing the Verdict on it as crown evidence.[2]

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

36. It is also not disputable that Dr. Zečević had the assistance of the aforementioned persons who did not provide their own findings and opinion, but simply assisted Dr. Zečević in compiling his Findings. The Trial Panel could have found that the assistance of other persons ensured a thorough analysis. The assistance Dr. Zečević had does not bring into question his Findings or opinion because he was the one in charge of all actions undertaken by Order of the Prosecutor's Office. It should also be noted that Dr. Zečević was examined before the Court as to his Findings and Opinion.

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

[2] Defense Appeal at p. 2.

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

39. The Defense also argued on appeal that the reconstruction of events by Dr. Zečević had not been ordered by the Prosecutor's Office, and was therefore unlawful and in contravention of Article 93(1) of the CPC of BiH. The Defense argued that the admission of the Report containing this evidence constituted an essential violation of criminal procedure provisions under Article 297(1)(i) of the CPC of BiH.[3]

40. This Panel concludes that the action the Defense calls "reconstruction" does not constitute "reconstruction" as contemplated by Article 93 of the CPC of BiH,[4] and that the Trial Panel properly evaluated the issue. This Panel concludes that Dr. Zečević could, as part of his evaluation and absent a court order, visit the site to verify information to improve the quality of his Findings. Therefore, this appellate grievance lacks merit.

41. The Defense also argued that the "reconstruction" (on which his Findings and conclusions are based) and the expert's Findings and Opinion were prearranged with the Prosecutor's Office to help prove the Prosecution theory that the shell that exploded at the Kapija Square was fired from a 130 mm caliber gun located in the village of Panjik.[5]

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

43. The Defense also argued that the Verdict as a whole is accusatory in that it contains information in excess of that regarding the charged crimes, which constitutes an essential violation of criminal procedure provisions under Article 297(1)(j) of the CPC of BiH. Specifically, the Defense argues that if the Accused's order regarding the shelling of Tuzla had been part of the Indictment, he would have defended himself from such accusations, whereas, since that was not so, he was deprived of his right to present a defense. He also argues that the operative part of the Verdict and reasoning are contradictory because the operative part mentions Kapija Square, while the Order does not mention it, which constitutes an essential violation under Article 297(1)(k). The

[3] Defense Appeal at p. 15.
[4] Article 93 of the CPC of B-H provides in full: "(1) In order to verify the evidence presented or to establish facts that are important to clarify matters, the body in charge of the proceedings may order a reconstruction of the event. The reconstruction shall reproduce the actions or situations with the conditions under which the event occurred according to the evidence presented. If statements by individual witnesses or the suspects or the accused describing the actions or situations are inconsistent or contradictory, the reconstruction shall, as a rule, reproduce each version of events. (2) A reconstruction shall not be performed in such a manner as to violate public peace and order or morality or endanger human life or health. (3) Certain evidence may be presented again if necessary during the reconstruction."
[5] Defense Appeal at p. 15.

Defense argues that no firing at any civilian target was ordered, particularly not in the indiscriminate manner as stated in the Verdict.[6]

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

45. In the deliberation process, this Panel adhered to the following principles: when deciding on the Appeal, the obligation of the Appellate Panel is to examine whether the wording of the verdict is incomprehensible, internally contradictory or contradicted the grounds of the verdict, or has no grounds at all, or did not cite reasons concerning the decisive facts; the Appellate Panel will not consider whether the Trial Panel committed an error of fact or law as part of the analysis, but will only ensure that the Verdict formally contains all necessary elements for a well-reasoned and comprehensible verdict; and the appellant must establish that the alleged formal error, stated in the Appeal, invalidates the Verdict. We note that a non-essential violation does not invalidate the conclusion and reasoning of the Trial Panel and thus will not result in the revocation of the Verdict.[7]

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

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

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

[6] Defense Appeal at p. 26.
[7] *Mirko Todorović and Miloš Radić,* No. X-KRŽ-07/382, Appeals Judgment (23 January 2009) at paras. 18-19.

49. On appeal, the Defense also argued that language in Paragraph 119 of the Verdict contravenes the principles of the CPC of BiH in that the Court declares itself contrary to the obligations set out in Article 14(2) of the CPC of BiH,[8] thus confirming the Court's bias and that it acted *in dubio contra reum*.[9]

50. The Appellate Panel notes that the criminal procedure does not set out formal procedural rules, and that it prescribes that the evaluation of the existence or non-existence of facts shall not be related or limited to special formal evidentiary rules. Free evaluation of evidence, however, naturally does not imply arbitrariness in the evaluation of evidence as it has to be based on logic, specific rules that apply to some professions and real-life cause and effect relationships.

51. In view of the above, the Appellate Panel holds that contrary to the defense arguments, the language from the cited paragraph is nothing more than a clumsy formulation by the Trial Panel, the part in which it stated: *"The Panel reviewed every document in this case in order to decide on its reliability and probative value and concluded that the Prosecution proved their credibility beyond reasonable doubt. However, it needs to be stressed here that the Panel shall not deal equally with every piece of evidence from the case file, which is a matter of Panel's discretion, but shall explain only those conclusions that are important for establishing the guilt of the Accused."*

52. Such a conclusion by the Appellate Panel is supported by language in Paragraph 125 of the Verdict: *"The task of the Panel is to truthfully and completely establish both inculpating and exculpating facts. The standard applied when establishing the state of facts is to establish whether a reasonable trier of fact would reach that conclusion beyond reasonable doubt."*

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

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

55. The Defense also submitted that language in Paragraph 108 of the Verdict was contradictory "primarily because it is impossible to deem someone honest yet find him

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

biased at the same time."[10] The Defense further argued that it follows from Paragraph 109 that the Trial Panel determined that certain witnesses were not credible and discounted their evidence without considering the substance of their testimony or even comparing it to the testimony of other witnesses.[11]

56. This Panel initially notes that the Defense has failed to specify any witness whose testimony was allegedly improperly analyzed. Furthermore, in developing this argument, the Defense has taken out of context portions of the Verdict. The Verdict describes a sophisticated method of analysis in sixteen paragraphs (paragraphs 105 through 120). The Defense, however, has failed to mention this fact or even refer to paragraph 110, where the Trial Panel noted that even when a witness is found not to be honest, portions of his testimony may still be accepted as reliable. The Trial Panel also noted that on several occasions it "believed some of a witness's testimony without necessarily believing it all."[12] Compare *Prosecutor v. Mile Mrkšić et al.*, Case No. IT-95-13/1, Trial Judgment (27 September 2007) at paras. 15, 297 (Trial Court may accept some portions of testimony and reject others as unreliable).

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

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

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

60. The fact that the Trial Panel approached the evaluation of witnesses' testimonies in a comprehensive and serious manner is evident in Paragraph 115 of the Verdict, which provides that the Panel observed "first-hand the witnesses, their demeanor, their tone of voice, their attitude, their physical and emotional reactions to the questions, their

[10] Defense Appeal at p. 3.
[11] Defense Appeal at p. 3.
[12] Trial Verdict at para. 114.

nonverbal conduct in relation to the parties and counsel, and the atmosphere within which they gave their testimony. The Panel was always mindful that this case presented factors which made credibility decisions more difficult and was always aware that because of the seriousness of the charges these assessments had to be made with diligence."

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

## IV. INCORRECTLY OR INCOMPLETELY ESTABLISHED FACTS UNDER ARTICLE 299 OF THE CPC OF BIH

### A. STANDARDS OF REVIEW AND DEFENSE APPEAL

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

63. On appeal, in determining whether there were incorrect or incomplete facts in the Verdict, this Panel considers only whether "any reasonable trier of fact" could have found such facts, bearing in mind that this Panel defers to the Trial Panel regarding factual findings in that the Trial Panel is charged with making credibility determinations and weighing evidence. The case of *Prosecutor v. Mirko Todorović and Miloš Radić*, Appeals Judgment (23 January 2009) at paras. 85-88, sets out standards for reviewing allegations of incorrectly or incompletely established facts pursuant to Article 299 of the CPC of BiH. There, the Court held:

> "85. The standard of review in relation to alleged errors of fact to be applied by the Appellate Panel is one of reasonableness.
>
> 86. The Appellate Panel, when considering alleged errors of fact, will determine whether any reasonable trier of fact could have reached that conclusion beyond reasonable doubt. It is not any error of fact that will cause the Appellate Panel to overturn a Verdict, but only an error that has caused a miscarriage of justice, which has been defined as a grossly unfair outcome in judicial proceedings, as when an accused is convicted despite a lack of evidence on an essential element of the crime.
>
> 87. In determining whether or not a Trial Panel's conclusion was reasonable, the Appellate Panel shall start from the principle that findings of fact by a Trial Panel should not be lightly disturbed. The Appellate Panel recalls, as a general principle, that the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the discretion of the Trial Panel. Thus, the Appellate Panel must give a margin of deference to a finding of fact reached by a Trial Panel.

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

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

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

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

67. Pursuant to Article 295(4) of the CPC of BiH,[13] this Panel concluded that the Accused did not meet the requirements under the given provision and that the proposed Defense evidence would not be taken into consideration.

68. The Defense did not convince this Court that despite due attention and cautiousness the additional evidence could not have been secured during the first-instance proceedings, and that such evidence would have in any way affected the Verdict even if it had been considered in the course of the trial.[14]

69. We note that, at trial, the Trial Panel was presented with the Prosecution exhibit Findings and Opinion of Expert Witness Prof. Berko Zečević, PhD, which was adduced into evidence, and the Defense exhibit Findings and Opinion of Expert Witness Vlado Kostić, MSc. Both expert witnesses were subjected to direct and cross examination before the Panel. Further, the Prosecution and Defense expert witnesses were subjected to confrontation in view of their opposite positions regarding the same issue. Thereby, the

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

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

Trial Panel clarified the disputed issues in all their bearings and, on that basis, reached a proper and legitimate decision.

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

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

72. The Defense also argued that the premise that the Main Staff Command of the Army of Republika Srpska (VRS) authorized retaliation against UNPROFOR and civilian targets is erroneous, because no evidence was submitted on this point, and because there was no such order and no such order was designated in the Verdict.[15]

73. This Panel concludes that the Trial Panel properly found that following NATO warnings to the Army of Republika Srpska (VRS) that it should withdraw its weaponry from the non-exclusion zones around Sarajevo, NATO decided to conduct airstrikes against VRS positions in Bosnia and Herzegovina (BiH)[16], which was done on 25 and 26 May 1995. The Main Staff of the Army of Republika Srpska consequently issued a level of full combat readiness.[17] The Army of Republika Srpska also took several UN soldiers as hostages, which was aired on Serb TV and followed by a public statement by Radovan Karadžić that all NATO and UNPROFOR soldiers would be made prisoners until the end of the war.[18]

74. These factual findings are further supported by the testimony of witness Manojlo Milovanović, who stated that the airing of hostages prompted a chain reaction that was impossible to stop, while witness Charlef Brantz stated that he believed the shelling of Tuzla on 25 May 1995 was a consequence of NATO airstrikes.[19]

[15] Defense Appeal at p. 11.
[16] Testimony of Witness Manojlo Milovanović, 5 May 2009; T-161 (Order of the Main Staff of the RS Army dated 25 May 1995, signed by Manojlo Milovanović).
[17] T-161 (Order of the Main Staff of the RS Army dated 25 May 1995, signed by Manojlo Milovanović).
[18] Testimony of Witness Manojlo Milovanović, 5 May 2009.
[19] T-26 (Witness Examination Record for Charlef Brantz, made in the Prosecutor's Office of Bosnia and Herzegovina dated 5 December 2007) at p. 3.

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

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

77. Besides, the Verdict contains all details relating to the general military circumstances on 25 May 1995, set out under the heading "Situation on 25 May 1995", and these factual findings are corroborated by both documentary and testimonial evidence.

78. The Defense also argues that the Trial Panel's conclusion, in Paragraph 226 of the Trial Verdict, is in contravention of the testimony of witness Ljubiša Čorsović.[20]

79. In order to better understand this argument, we quote paragraph 226 in full: *"Several witnesses explained that a certain captain 'Omega', from the Ozren Tactical Group command, was often issuing orders to the 130 mm Gun Platoon command.[21] For example, witness Ljubiša Čorsović, who was the Deputy Commander of the 130 mm Gun Platoon, explained that 90 percent of the orders were coming from 'Omega'.[22] Written orders contained a Greek letter 'Omega' at the bottom.[23] Captain 'Omega' was the Chief of Artillery of the Ozren Tactical Group[24]; his real name was Boro Maksić.[25] However, the Panel finds that the Chief of Artillery did not have the authority to issue orders directly. In the present case, he was merely conveying orders he received from the commander of the Ozren Tactical Group, Novak Đukić. The Panel thus finds that the Accused was the person issuing the orders to his subordinate units, including to the 130 mm Gun Platoon."*

80. Witnesses Slavko Stojanović, Goran Mrzić, Dragan Babić and Ljubiša Čorsović stated that a certain Captain 'Omega' from the Ozren Tactical Group Command was often

[20] Defense Appeal at p. 11.
[21] T-11 (Witness Examination Record for Slavko Stojanović, made by the State Investigation and Protection Agency dated 28 November 2007) at p. 5; T-8 at p. 5; Testimony of witness Goran Mrzić, 20 May 2008; Testimony of witness Dragan Babić, 20 May 2008; Testimony of witness Ljubiša Čorsović, 10 June 2008.
[22] Testimony of witness Ljubiša Čorsović, 10 June 2008.
[23] T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency dated 27 November 2007) at p. 4.
[24] Testimony of witness Goran Mrzić, 20 May 2008; Testimony of witness Ljubiša Čorsović, 10 June 2008.
[25] T-87 (Reply to the Request by the MoI of the R B-H, Command of the 2nd Corps Tuzla, commander Sead Delić number 08/426-1, dated 7 July 1995); O-4 (Motion to Take-Over the Case number KT-RZ-169/07 of 8 June 2007).

issuing orders to the 130 mm Gun Platoon Command.[26] The Appellate Panel therefore accepts this factual finding as proper and sufficiently reasoned.

81. The Defense challenges this finding on the ground that it is contrary to the testimony of Ljubiša Čorsović, despite the fact that it is supported by the testimony of several witnesses. We note that witness Ljubiša Čorsović was clear in his statement, given during the investigation, that: *"I recall that most frequently received orders from the Tactical Group Command were by a certain Captain who went by the nickname Omega and this is how he introduced himself over the phone. He was originally somewhere from Ozren Mountain and I believe he was a reserve Captain. In addition to him, sometimes, on very rare occasions, some other officer from the Tactical Group Command called and conveyed orders but I believe that 90 percent of orders were issued by Omega. After the activities of our artillery pieces we informed the command that issued the order about the mission completed."*[27]

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

83. Milovanović, who is knowledgeable of the command and control system in the Army of Republika Srpska, testified on this issue.[28] Milovanović provided a clear explanation of the then-applicable unity of command principle, that is, the principle of subordination in the Army of Republika Srpska. Further, documentary evidence as well as regulations in force at the relevant time corroborate Milovanović's testimony that the Army of Republika Srpska functioned in accordance with the strict vertical chain of command. Given this, a commander would be the only person authorized to issue orders. While the Chief of Artillery may position artillery to be used, he cannot order its firing and may only convey an order received from the unit commander.

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

85. The Defense further contends that everything related to the alleged incriminating order is abstract and vague, because the Tactical Group Commander does not issue

[26] T-11 (Witness Examination Record for Slavko Stojanović, made by the State Investigation and Protection Agency dated 28 November 2007) at p. 5; T-8 at p. 5; Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Dragan Babić, 20 May 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008.
[27] Witness Examination Record for Ljubiša Čorsović, No. 17-04/-2-04-2-1152/07, made by the State Investigation and Protection Agency dated 29 November 2007.
[28] Testimony of Witness Manojlo Milovanović, 5 May 2009.

orders to the Platoon Commander, but to the Tactical Group as a whole and brigades within it.[29]

86. This Panel concludes that this issue is ungrounded where the Accused was the only person authorized for firing a 130 mm caliber gun, and this order was most frequently conveyed by Captain *Omega* who was Chief of Artillery of the Ozren Tactical Group.[30] The Verdict also properly established that the testimonies of witnesses Nenad Čolić, Slavko Stojanović and Goran Mrzić are consistent in that they all claim that a 130 mm caliber gun could not have been fired without the order of the Ozren Tactical Group Commander which contained all necessary elements for targeting.[31]

87. It was further established below that the commander of Artillery Platoon and, in his absence, the deputy commander or target analysis officer,[32] forwarded the order received via field phone from the Ozren Tactical Group Command to the Commander of the Artillery Squad who would then execute the order.[33]

88. In addition, the Verdict explained that the aim of creating a tactical group was to have a more efficient command structure and reduce the chain of command, so that the commander of an operative group did not have to issue orders to each brigade commander. The tactical group was composed of several brigades located in the same area of responsibility; the commander of the tactical group would become the superior of these united brigades and could issue orders to them.[34]

89. It should be highlighted that the Ozren Tactical Group was composed of artillery support units[35] that were under the direct command of the Ozren Tactical Group Commander, that is, the Accused.[36] Artillery support units had 130 and 155 mm caliber guns.[37] One of these artillery units was the 130 mm Gun Platoon at Panjik on the Ozren Mountain.[38]

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[29] Defense Appeal at p. 12.
[30] Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008.
[31] Testimony of Witness Nenad Čolić, 13 May 2008; Testimony of Witness Slavko Stojanović, 20 May 2008; Testimony of Witness Goran Mrzić, 20 May 2008.
[32] Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008.
[33] Testimony of Witness Nenad Čolić, 13 May 2008; Testimony of Witness Goran Mijatović, 13 May 2008; Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Milan Đurić, 13 May 2008; T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency dated 27 November 2007) at p. 5; T-12 (Witness Examination Record for Dragan Babić, made by the State Investigation and Protection Agency dated 28 November 2007) at p. 5.
[34] Testimony of Witness Manojlo Milovanović, 5 May 2009.
[35] Testimony of Witness Dragan Jovanović, 18 March 2008.
[36] The testimony of Witness Manojlo Milovanović, 5 May 2009, and the Order signed by the Accused clearly show that he commanded artillery support units: T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995).
[37] T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995); T-117 (Combat Order for Defense and Attack, Ozren Tactical Group Command, Commander Novak Đukić, strictly confidential No. 017275-1 dated 5 June 1995).
[38] Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008; Testimony of Witness Mile Savić, 8 April 2008.

90. These facts are confirmed by the orders signed by the Accused which show that the commanders of combat brigades could obtain the support of heavy artillery pieces of 130 and 150 mm, but had to request such support from the Ozren Tactical Group Commander.[39]

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

92. The Defense further argues that Paragraph 230 of the Verdict is contradictory regarding whether anyone confirmed that Tuzla had been marked as a target on any military map.[40] The Defense questions why the Prosecution did not tender into evidence the original of the working map of artillery of the 2nd Ozren Light Infantry Brigade generated in April 1994, but only a photocopy, the authenticity of which it proved by a video recording of the captured working map.[41]

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

94. In light of this, the Accused knew that at least the majority of Tuzla's population was composed of civilians and that they were to be spared from any military violence. Despite that fact, the Accused ordered a shell to be fired on Tuzla on 25 May 1995, which resulted in the death of 71 persons,[42] and injuries to more than 130 persons.[43]

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

96. Furthermore, the Verdict correctly states that no witness who was a member of the Army of Republika Srpska testified that Tuzla was marked as a target on any military map or in the tables of targets. Witnesses Dragan Vasiljević and Goran Mrzić avoided

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[39] T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995); Testimony of Witness Mladen Dostanić, 10 February 2009.
[40] Defense Appeal at p. 13.
[41] Defense Appeal at pgs. 13-14.
[42] Findings and Opinion of Expert Witness Vedo Tuco dated 24 December 2008 (T-158); Medical documentation for all killed persons (T-48); Record of the External Examination and Identification of the Killed Persons in the Massacre in Tuzla on 25 May 1995 along with Photo-Documentation No. 20-1/02-3-9-7-175/95 (T-47**);** List of the Persons Who Were Killed During the Shelling of Tuzla made by an investigative judge of the Higher Court in Tuzla No. Kri 29/95 dated 26 May 1995 (T-50); Report on War Damage, Tuzla Municipal Commission for the Registration and Assessment of War Damage dated 10 July 1995 (T- 74).
[43] Findings and Opinion of Expert Witness Vedo Tuco dated 24 December 2008 (T-158); List of Persons Who Were Seriously Injured at Kapija During the Shelling of Tuzla on 25 May 1995 and Who Were Kept in Tuzla KMC for Medical Treatment, made by an investigative judge of Tuzla Higher Court No. Kri 29/95 dated 26 May 1995 (T-49**)**.

responding to this question,[44] while witness Dragan Babić stated that several targets were marked in the area of Tuzla and its surroundings.[45] Babić further stated that members of the 130 mm gun squad confirmed to him when he returned to his post in Panjik that they had opened fire on Tuzla on 25 May 1995. The Trial Panel also considered the fact that Babić was not explicit regarding this issue in his testimony; we conclude that this shows that the Trial Panel comprehensively analyzed and evaluated all of the testimony.

97. The working artillery map of the 2nd Ozren Light Infantry Brigade[46] indicates that several places in the downtown area of Tuzla were marked as targets for a 130 mm gun which could be hit at the request of the 2nd Ozren Light Infantry Brigade. Witness Mile Savić[47] testified that a working map is not a "realization" map because a target marked on a working map will not necessarily be hit. Hence, the Trial Panel's conclusion that the targets marked on this map were only places which the Army of Republika Srpska had the capability of striking is correct, as is their conclusion that the map was not sufficient to prove that a place had actually been hit. This is supported by the map detailing the *Sadejstvo '95* operation[48], as confirmed by the testimony of witness Nijaz Vrabac[49] which the Trial Panel found credible. Thus, it can be legitimately concluded that Tuzla was a potential target of the 130 mm gun at Panjik in May 1995.

98. The Trial Panel established with certainty that the 130 mm Gun Platoon at Panjik was composed of three gun squads, meaning there were usually three guns located at Panjik.[50] One of the three 130 mm guns was facing the town of Lukavac,[51] which means that it was also facing Tuzla since both towns are in the same alignment.[52]

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

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

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[44] See, for example, testimonies of witnesses Dragan Vasiljević and Goran Mrzić who stated in the Court that their colleagues told them that Tuzla was not within their range.
[45] T-12 (Witness Examination Record for Dragan Babić, made by the State Investigation and Protection Agency dated 28 November 2007), p. 6.
[46] T-95 (Artillery Working Map of the RS Army, 2nd Ozren Light Infantry Brigade dated 29 April 1994)
[47] Testimony of Witness Mile Savić, 16 December 2008.
[48] T-180 (Maps of the operations *Sadejstvo 95* and *Štit 94/95*).
[49] Testimony of Witness Nijaz Vrabac, 31 March 2009.
[50] Testimony of Witness Goran Mrzić, 20 May 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008; Testimony of Witness Mile Savić, 8 April 2008.
[51] T-10 (Witness Examination Record for Goran Mrzić, made by the State Investigation and Protection Agency dated 27 November 2007), p. 6; Testimony of Witness Ljubiša Čorsović, 10 June 2008.
[52] See T-23 (map of the town of Tuzla showing the projectile drop angle).

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

102. The Defense further argues that although the Panel concludes that the Accused was the last person in the vertical chain of command who was authorized to issue firing orders to the Gun Platoon at Panjik, this is incorrect and arbitrary because there was a whole chain of command between the Commander and the Platoon, the Commander does not issue orders to the Platoon, and the Platoon at Panjik is not mentioned in the commands or combat orders.[53]

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

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

105. The Verdict correctly establishes that the Accused was the *de jure* Commander of the Ozren Tactical Group, which was confirmed by witness Manojlo Milovanović, and by documentary evidence, that is, the orders signed by the Accused in his capacity as the Ozren Tactical Group Commander.[54]

[53] Defense Appeal at p. 14.
[54] Testimony of Witness Manojlo Milovanović, 5 May 2009. Orders signed by the Accused also clearly show that he commanded over the artillery support units: T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995).

106. The Trial Panel also provided comprehensive reasoning of the evidence that shows that the Accused was *de facto* commander of the 130 mm Gun Platoon at Panjik. There is abundant evidence showing that the Accused regularly issued orders and instructions to the Gun Platoon and the other brigades located in his area of responsibility[55]; he was informed of the execution of those orders[56]; and he received daily reports on the military activities in his area of responsibility.[57] Following this, the Trial Panel correctly concluded that the soldiers in Panjik were obeying orders issued by the Accused through the chain of command.

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

108. The Defense also claims that Panjik is more than 27,000 meters from the scene of explosion, and that the Joint Commission established that the distance was 21,000 meters. The Defense also claims that the Defense evidence on this does not mention the position of the gun in Panjik, whereby the Defense challenges the Findings and Opinion of the Prosecution expert witness Dr. Zečević.[58]

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

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

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

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[55] T-113 (Order for Defense, Ozren Tactical Group Command, Novak Đukić, strictly confidential No. 01/26-1 dated 21 January 1995); T-115 (Order for Defense, Ozren Tactical Group Command, Commander Novak Đukić, No. 01/175-1 dated 25 April 1995); Testimony of Witness Mladen Dostanić, 10 February 2009; Testimony of Witness Manojlo Milovanović, 5 May 2009; Testimony of Witness Dragan Jovanović, 18 March 2008; Testimony of Witness Ljubiša Čorsović, 10 June 2008.

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

[57] T-114 (Order fort Attack, issued by the Ozren Tactical Group Commander Novak Đukić, strictly confidential No. 01-128-1 dated 28 March 1995); T-117 (Combat Order for Defense and Attack, Ozren Tactical Group Command, Commander Novak Đukić, strictly confidential No. 017275-1 dated 5 June 1995).

[58] Defense Appeal at p. 14.

112. We note that Dr. Zečević is respected in his field,[59] and has testified before this Court twice, and five times before the International Criminal Tribunal for the former Yugoslavia (ICTY) at The Hague.[60] This is not to say that the Defense expert Vlado Kostić, MSc, was not credible,[61] but only to stress part of the reason why the Trial Panel properly credited Dr. Zečević. The Trial Panel, after hearing the testimony of the expert witnesses, as well as their confrontation, could have properly credited Dr. Zečević's evidence.

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

114. Consequently, we hold that the Trial Panel properly credited Dr. Zečević's Findings and Opinion as objective and made in a highly professional manner, based on scientific research and professional experience. We note that the Verdict gave a clear and detailed assessment of Dr. Zečević's Findings and Opinion.

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

116. To determine the position of an artillery piece, it is necessary to analyze the crater caused by a shell fired from that weapon, variations in the angle of ballistic drop, fragment traces on the surface caused by the projectile explosion, and the trajectory and time of fuse activation.[62]

117. Having analyzed and assessed these elements, and using firing tables for a 130 mm M46 gun, Dr. Zečević determined that the distance of the firing position for the tabular conditions and the mentioned ballistic drops to be 26,500 meters ≤Xvp≤ 27,480 meters.

118. Dr. Zečević reached this conclusion based on data on the distance of the firing position and the known azimuth, which he transferred to the topographic map. He established that in close vicinity to this point there was a communication road and Panjik village, in whose vicinity there were two villages, Nešići and Blagojevići.[63] In order to establish the narrow zone of the location of the firing position of the 130 mm M46 gun as specifically as possible, Dr. Zečević used special software with original ballistic coefficients from the firing tables for the gun with full charge, also taking into account available data from the hydro-meteorological institute regarding the weather on 25 May 1995.

[59] Expert Witness Berko Zečević, transcript of 15 April 2008, p. 3 and 4.
[60] Expert Witness Berko Zečević, transcript of 15 April 2008, p. 4.
[61] Expert Witness Vlada Kostić, transcript of 3 March 2009, p. 5.
[62] Findings and Opinion of Expert Witness Prof. Berko Zečević, PhD, p. 44.
[63] Image 87 of the Findings and Opinion of Expert Dr. Zečević.

119. The Trial Panel thus justifiably accepted the conclusion of Dr. Zečević, who, based on the conducted analysis,[64] established that the minimum distance of the firing position was Xvp = 27,100 ± 360 meters.

120. In considering possible zones, Dr. Zečević took into account the weight of the guns towed, and concluded that the firing position must be in a close vicinity of a communication road.[65] Thereafter, Dr. Zečević went to Panjik and noticed that an area on the road to the left, several hundred meters from the school in Panjik, could accommodate such a gun. At that location Dr. Zečević saw wheel tracks and signs of an artillery weaponry having been dug in, which confirmed his thesis about the place from which the projectile had been fired.[66]

121. Defense expert Kostić, upon conducting the analysis, considering that this was a 130 mm projectile fired from the 130 mm M46 gun, taking into account the meteorological conditions on 25 May 1995, and using a drop angle of 43 degrees, also established the distance of the firing position to be between 11,770 ± 240 meters and 21,170 ± 229 meters.[67]

122. As to the direction and distance between the firing position and the explosion site, Kostić concluded that the projectile arrived from the east and established the distance without indicating a specific location. He did not, however, go to the site in order to see if a suitable location existed at that distance. This makes his findings questionable, particularly considering Charlef Brantz's statement given during the investigation,[68] from which it follows that the Army of BiH was deployed east of the frontline. Witness Manojlo Milovanović confirmed that the Army of BiH did not have a 130 mm gun.

123. Additionally, the record of the on-site investigation concluded that the projectile was fired from a point on Mt. Ozren, in Vrbak, Cerovo Brdo, which is 21 km from the explosion site as the crow flies.[69] The Joint Commission Report stated that with the maximum charge, the 130 mm M46 gun is usually used for ranges between 17 and 27 km. The Commission established that in the instant case, based on the calculated azimuth and the smallest drop angle, **the shortest distance** from which the shell was fired would be between 20 and 21 km.[70]

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

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[64] Ibid, pgs. 74-76.
[65] Ibid, p. 79.
[66] Ibid, p. 79, Image 96.
[67] Findings and Opinion of Expert Witness Vlado Kostić, MSc, pgs. 19 and 40.
[68] T-26 (Witness Examination Record for Charlef Brantz, made in the Prosecutor's Office of Bosnia and Herzegovina dated 5 December 2007).
[69] Record of Crime-Scene Investigation, made on 25 May 1995, number Kri 29/95 (T-62).
[70] Report of the Joint Commission of 26 May 1995 (T-18).

125. In his testimony, witness Charlef Brantz said: *"It is true, I changed one thing before submitting the report, which is the position where we thought the artillery weapons could be positioned, I deleted it and you can see that on the map and I added that later when the report was submitted to people in Tuzla and the commander and I did not want, actually I did not want that, I deleted it because I did not want them to use this map in order to plan the attack on the positions, in order for B-H Army to plan the attack on new positions, that is why I deleted it, but that is the original document."*[71]

126. The conclusion that the projectile arrived from the west, not from the east as the Defense argues on appeal, is also supported by the Official Note made by an employee of the PSS, First Police Station: *"On the same day around 20:55 hours, while we were at Trg oslobođenja, we heard a sharp sound of a shell flying from the west (Ozren) towards the downtown and immediately thereafter a strong detonation from the direction of the center of the town."*[72]

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

128. The Defense also argues that in responding to the defense counsel's question on cross examination, Dr. Zečević was clear that a furrow visible on photo-documentation was derived from fragments and not from the fuse, which, according to the Defense, is contrary to the laws of physics and logic.[73]

129. Defense expert Kostić pointed out in his findings that the direction of the projectile was determined based on the position of the crater and the furrow of the fuse, and thus also the firing position from which it was launched.[74] He concluded that the activation of the projectile with the contact fuse causes material from the surface to be ejected in the direction of the flight of the projectile.[75] This totally denies Dr. Zečević's thesis that the furrow, which is located by the crater, was caused by projectile fragments.

130. Based on his own reconstruction and the firing tables for the 130 mm M46 gun,[76] Dr. Zečević concluded that the angle of ballistic drop of high explosive (HE) projectiles of 130 mm caliber was between $62^0 \leq 0 \leq 67^0$ and 41'.

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

[71] Testimony of Witness Charlef Brantz, transcript of 17 June 2008, p. 10 and 11.
[72] T-66 (Official Note dated 26 May 1995, made by the employees of the First Police Station Tuzla).
[73] Defense Appeal at p. 20.
[74] Ibid at p. 14.
[75] Findings and Opinion of Expert Witness Vlado Kostić, p. 29.
[76] Findings and Opinion of Expert Witness Berko Zečević, at pgs. 63-64.

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

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

134. By contrast, Dr. Zečević established with certainty, based on the analysis of fragments from two separate regions of projectile bodies, that the fragments found at the explosion site originated from an HE projectile 130 mm M79, which is launched from an 130 mm M46 artillery gun.[77]

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

136. Dr. Zečević provided a very detailed explanation as to the cause of a large number of casualties, noting that the detonation of a standard artillery projectile would have primary effects such as kinetic energy of fragments and secondary effects such as a blast wave impact (overpressure). Furthermore, Dr. Zečević noted that during the natural projectile fragmentation, the projectile body would be broken into a large number of fragments of different weights and shapes, and that in this specific case 4,000 to 6,800 fragments were formed from the HE 130 mm M79 projectile body.[78]

137. Additionally, Dr. Zečević noted that the characteristics of the ground had an important effect in this case as it was paved with granite blocks. Because granite is very hard, fragments that hit the blocks ricocheted and passed through human bodies again, which would not have been the case had the ground been of soil, sand, or asphalt. When the fragments hit the granite, they eroded it and granite fragments were created which inflicted considerable injury to the victims.[79]

138. Based on the foregoing, this Panel concludes that the Trial Panel properly accepted the conclusions of Dr. Zečević, and that the evidence supported that it was not possible to shoot at individual targets in urban areas without causing collateral damage to the civilian population.[80]

139. The Defense further argues that the Trial Panel erred in concluding that Dr. Zečević's findings corresponded to other reports, which is not true, because according to this expert witness, the angle of ballistic drop was twice as big as the angle established by the Joint Team of the UNPROFOR and Sarajevo MUP.[81]

[77] Findings and Opinion of Expert Witness Berko Zečević, p. 68.
[78] Findings and Opinion of Expert Witness Berko Zečević, p. 70.
[79] Findings and Opinion of Expert Witness Berko Zečević, p. 71.
[80] Findings and Opinion of Expert Witness Berko Zečević, p. 85.
[81] Defense Appeal at p. 21.

140. Dr. Zečević concluded that the probable projectile trajectory was Az = $271^0$ ± 2.5. We conclude that the Trial Panel correctly relied on his analysis. Dr. Zečević provided an acceptable explanation that the angle of ballistic drop corresponded with the results of the Joint Commission, which established that the angle was $270^0$ ± 10, and that any difference is reflected in a reduction of the width of the projectile trajectory zone.[82]

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

142. The Defense argues on appeal that there is no *intent* in the definition of the crime, and for it to exist there must also be direct malice, not indirect malice that cannot be motivated by intent.[83]

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

144. Therefore, one of the essential elements of the offense was satisfied, that is to say, the Accused committed the offense with intent.

145. Further, as correctly stated in the Verdict, the Accused committed the offense with indirect intent, regardless of the fact that in some segments of the Verdict the Trial Panel indicated with some qualifications that a person who orders an act or omission, must do that either with direct intent or with an awareness of the substantial likelihood that a crime will be committed in the execution of that order.[84]

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

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

[82] Findings and Opinion of Expert Witness Berko Zečević, p. 59.
[83] Defense Appeal at p. 27.
[84] See *Prosecutor v. Kordić and Čerkez*, Appeals Judgment, at para. 30 and *Prosecutor v. Blaškić*, Appeals Judgment, at paras. 41-42.

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

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

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

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

152. For these reasons, the Appellate Panel finds that the Verdict correctly found the existence of *mens rea* in the attack directed against civilians and the indiscriminate attack. In analyzing the appellate arguments in terms of the incorrectly and incompletely established state of facts, we conclude that the Trial Panel, based on the evidence, reliably established all decisive facts, and correctly concluded that the Accused, by his actions, as described in Part I of the operative part of the Verdict, satisfied all legal elements of the criminal offense of War Crimes against Civilians. Consequently, we conclude that the Defense arguments on appeal are ill-founded.

## V. VIOLATIONS OF THE CRIMINAL CODE UNDER ARTICLE 298 OF THE CPC BIH

153. The Defense argues that in the Verdict the Court applied the BiH CC (enacted in 2003), thus breaching Articles 3 and 4.[85] The Defense also argues that the Accused's sentence could not have been imposed under the SFRY CC, hence, regarding the

[85] Defense Appeal at p. 4.

sanction, the criminal code was breached to his detriment. The Defense argues that the Verdict in this respect is erroneous.[86] The Defense cites *Zijad Kurtović* case[87], where neither BiH CC nor Article 173 of the Code applied.[88]

154. Given that the Criminal Code of SFRY that was adopted based on the Law on Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of SFRY (the adopted SFRY CC)[89], as the law in effect at the time relevant to the Indictment, and the CC of BiH codify the identical criminal offense with identical legal elements (War Crimes against Civilians), the Defense considers the adopted SFRY CC to be more lenient to the Accused as it stipulates a lower maximum sentence for the same offense – as is the case in the criminal legislation of the Republic of Croatia and Serbia where a maximum sentence provided under the law for this offense is imprisonment for the term of 20 years – while the CC of BiH stipulates the sentence of imprisonment of not less than 10 years or a long-term imprisonment. This Panel now turns to the Decision the Constitutional Court rendered on the Accused's Appeal in relation to the issue of application of the law, that is, violation of Article 7 of the European Convention.

155. The Appellate Panel initially stresses that, in line with its right to an independent judicial opinion, it does not share the legal opinions presented in the Decision of the Constitutional Court. However, in compliance with the Constitutional Court's decision, which is final and binding under Article VI/5 of the Constitution of BiH, the Panel granted the Defense Counsel's Appeal that there was an error in the application of the Criminal Code, in the contested Verdict to the detriment of the Accused, that is, that the law most lenient to the Accused was not applied.

156. As noted earlier, the Decision of the Constitutional Court of BiH is binding on this Court and it is a duty of the Appellate Panel in these proceedings to remedy the established violation. However, given that the matter of a retroactive application of law, that is, evaluation which law is more lenient to the perpetrator, is a matter of major legal importance repeatedly reviewed in several decisions of the Constitutional Court of BiH and the European Court of Human Rights (ECtHR) that have direct implications on the cases conducted before this Court, the Appellate Panel finds it necessary to outline the conclusions from the relevant decisions of these courts.

157. The ECtHR's Judgment in the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*[90] preceded the Decision on Appeal filed by the Accused Đukić, and the Constitutional Court based its own decision on the conclusions in that Judgment. When

[86] Defense Appeal at p. 8.
[87] The Court of Bosnia and Herzegovina, Appeals Verdict, Case No. X-KRŽ-06/299, dated 25 March 2009.
[88] Defense Appeal at p. 10.
[89] Decree with the Force of Law on the Application of the Criminal Code of the Republic of Bosnia and Herzegovina and the Criminal Code of the Socialist Federal Republic of Yugoslavia that was adopted as the Republic law during the state of immediate threat of war or the state of war (Official Gazette of RBiH, 6/92) and the Law on Confirmation of Decrees with the Force of Law (Official Gazette of RBiH, 13/94)
[90] Judgment of 18 July 2013, Applications nos. 2312/08 and 34179/08.

evaluating whether a retroactive application of the CC of BiH to war crimes cases intrinsically constitutes a violation of Article 7 of the Convention, the ECtHR expresses its position in paragraph 65:

> "At the outset, the Court reiterates that it is not its task to review *in abstracto* whether the retroactive application of the 2003 Code in war crimes cases is, *per se*, incompatible with Article 7 of the Convention. This matter must be assessed on a case-by-case basis, taking into consideration the specific circumstances of each case and, notably, whether domestic courts have applied the law whose provisions are most favourable to the defendant (see *Sccopola*, cited above, § 109)."

158. Therefore, based on this view, it is clear that the ECtHR assessed a violation of Article 7(1) of the European Convention only with respect to the circumstances of the specific case, emphasizing that there should not be any generalization when assessing the matter of a more lenient law and the matter of retroactivity. Also, it is clear from the referenced ECtHR's Judgment that the assessment of a more lenient law within the framework of the circumstances of that case was made comparing the respective minimum sentences, that is, that it pertained to the criminal offense that could not have been considered as the most grave kind of war crimes. Paragraph 69 of the Judgment, therefore, reads:

> "... the Court notes that only the most serious instances of war crimes were punishable by the death penalty pursuant to the 1976 Code... As neither of the applicants was held criminally liable for any loss of life, the crimes of which they were convicted clearly did not belong to that category. Indeed, as observed above, Mr Maktouf received the lowest sentence provided for and Mr Damjanović a sentence which was only slightly above the lowest level set by the 2003 Code for war crimes. In these circumstances, it is of particular relevance in the present case which Code was more lenient in respect of the minimum sentence, and this was without doubt the 1976 Code."

159. We note that the Court of BiH took an absolutely identical position with respect to the application of the law in several cases even before the rendering of the referenced Judgment of the ECtHR, as observed in paragraph 29 thereof.[91]

160. Following the jurisprudence of the ECtHR in this Judgment, the Constitutional Court noted in the case on the Appeal of Zoran Damjanović (Decision on Admissibility and Merits, No. AP 325/08, 27 September 2013) that, as regards both the factual substrate and the legal issue, the case was not different from the referenced *Maktouf and Damjanović* case, and established the identical violation of Article 7(1) of the ECHR as did the ECtHR. It follows clearly from the referenced decision that, when establishing which law is more

[91] *Kurtović*, Verdict of the Court of B-H, No. X-KRŽ-06/299 dated 25 March 2009; *Novalić*, Verdict of the Court of B-H, No. X-KRŽ-09/847 dated 14 June 2011; *Mihaljević*, Verdict of the Court of B-H, No. X-KRŽ-07/330 dated 16 June 2011; *Lalović*, Verdict of the Court of B-H, No. S1 1 K 002590 11 Krž4 dated 1 February 2012; *Aškraba*, Verdict of the Court of B-H, No. S1 1 K 005159 11 Kžk dated 18 April 2012; *Osmić*, Verdict of the Court of B-H, No. S1 1 K 003429 12 Kžk dated 28 June 2012.

lenient to the perpetrator, the Constitutional Court was guided by the criterion of the lowest punishment, given that the Appellants were sentenced to imprisonment for a term of five years *(Maktouf)*, as the lowest possible punishment under the CC of BiH (the punishment that can be pronounced with the application of provisions on punishment reduction), that is, for a term of 11 years *(Damjanović)*, as the punishment slightly above the lowest punishment of 10 years under the same Code.

161. Contrary to this, in the Decision on Appeal filed by the Accused Đukić, the Constitutional Court, referring to the aforementioned decisions, established that in the case at hand it was necessary to determine which law set forth a more lenient maximum punishment, having in mind the long-term imprisonment for the term of 25 years that the Accused was sentenced to under the previous second-instance Verdict, which, by its type, is the punishment set forth for the most serious kinds of offenses in the CC of BiH that carried the death penalty under the law in effect at the time of the perpetration (the adopted CC of SFRY). Therefore, in paragraph 46 of the Decision, No. AP 5161/10, the Constitutional Court states:

> "... Considering this, the Constitutional Court points out that, unlike the cases where it was being established which law was more lenient regarding the minimum punishment, in the present case it is necessary to establish which law is more lenient to the appellant regarding the maximum punishment prescribed."

162. Under the second-instance Verdict, the Accused was found guilty that, by the acts described in paragraph 1 of the operative part of the contested Verdict, he committed the criminal offense of War Crimes against Civilians under Article 173(1)(a) and (b) of the CC of BiH, in conjunction with Article 180(1) of the CC of BiH, for which he was sentenced to a long-term imprisonment for a term of 25 years. It is evident that the case at hand concerns a criminal offense that is classified as one of the most serious kinds of crimes, which resulted in deaths of a large number of people and which carried the death penalty under the CC of SFRY. It is, therefore, obvious that this is a situation completely opposite to the one the ECtHR encountered in the case of *Maktouf and Damjanović*, and the Constitutional Court in the case of *Zoran Damjanović*.

163. When reviewing the grounds for the Appeal by the Accused, by analogy with the conclusions in the referenced Decisions, the Constitutional Court established that in order to determine whether there was a violation of Article 7(1) of the ECHR, it was necessary to make a comparison between the respective maximum punishments in the CC of SFRY and the CC of BiH. However, the Constitutional Court failed to take into consideration all factual and legal circumstances of the case at hand, as well as the gravity of the resulting consequences relevant to resolving this legal issue. The Appellate Panel notes that the Constitutional Court compares the sentence of 20 years in prison, as the maximum punishment for the relevant criminal offense under the CC of SFRY, with the sentence of long-term imprisonment of 45 years, as the maximum sentence for the same offense under the CC of BiH, and in doing so, contrary to its previous stance about the same issue

it omits the death penalty as the sanction prescribed under the law in effect at the time of perpetration.

164. In other words, with its current decision in the case of *Novak Đukić*, the Constitutional Court has abandoned its position presented earlier in the case of *Abduladhim Maktouf*[92] and has offered a completely new position compared to the one previously established concerning the assessment of the matter of the more lenient law. The Constitutional Court has stated that the death penalty has been eliminated from the system of criminal sanctions, therefore, pursuant to Article 38(2) of the CC SFRY (*"The Court may impose a punishment of imprisonment for a term of 20 years for criminal offenses which carry the death penalty.")*, in a situation when it is no longer possible to pronounce the death penalty, it is possible to "*...pronounce the maximum sentence of imprisonment of 20 years (which, under that Code, was pronounced as a substitute for the death penalty) or the sentence of imprisonment of 15 years (which that law envisages as the maximum prison sentence)"*.

165. In favor of the conclusion that the death penalty was eliminated from the system of criminal sanctions, it is argued that with the coming into effect of the Constitution of BiH (14 December 1995), Protocol No. 6 to the ECHR also came into effect, and that on 3 May 2002 the Council of Europe adopted Protocol No. 13 to the ECHR on the abolition of the death penalty in all circumstances, which Bosnia and Herzegovina ratified on 1 November 2003. This leads to the conclusion that in 2008 and 2009, at the time the contested Decisions were rendered, it was not possible to impose the death penalty on the Appellant for the criminal offense concerned.

166. The Appellate Panel notes that the Constitution of BiH (Annex IV of the Dayton Peace Agreement) does not contain a provision on death penalty, while Article 2 of Protocol 6 to the ECHR -- the ECHR being an integral part of the Constitution -- leaves room for a possibility of prescribing death penalty for the gravest offenses committed in times of war. However, the Constitutional Court does not provide the argument as to how the application of this provision of the Protocol reflected on the existing criminal legislation at the moment of the enacting of the Constitution. Also, the reference to Protocol 13 to the ECHR, which is the only document on the international level that abolishes the death penalty in all circumstances, has no effect in the case at hand, since it was adopted on 3

[92] Case of *Abdulhadim Maktouf*, Constitutional Court of B-H, Decision on Admissibility and Merits, No. AP 1785/06, 30 March 2007, para 68. *"In practice, legislation in all countries of former Yugoslavia did not provide a possibility of pronouncing either a sentence of life imprisonment or long-term imprisonment, as often done by the International Criminal Tribunal for the former Yugoslavia (the cases of Krstić, Galić, etc.). At the same time, the concept of the SFRY Criminal Code was such that it did not stipulate either long-term imprisonment or life sentence but death penalty in case of a serious crime or a 15 year maximum sentence in case of a less serious crime. Hence, it is clear that a sanction cannot be separated from the totality of goals sought to be achieved by the criminal policy at the time of application of the law."* 69. *"In this context, the Constitutional Court holds that it is simply not possible to 'eliminate' the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned."*

May 2002 and ratified in BiH on 1 November 2003, much later than the abolition of death penalty from the criminal laws in BiH (in 1998 in the Federation of BiH and in 2000 in Republika Srpska). The conclusion that the death penalty could not have been pronounced in 2008 would have been relevant only if the death penalty had been pronounced, which is not the case with the relevant court verdict.

167. In addition, in a situation when the case-law on an important legal issue is being significantly changed, which the Constitutional Court has done with such a position, the Appellate Panel finds it appropriate to refer to the relevant conclusion of the Constitutional Court in its Decision in the case of *Luca Tokalić et al.,* No*.* AP 1123/11, of 22 March 2013 (paragraph 115):

> "The Constitutional Court reiterates that the changes in the case-law and different decision of the court in circumstances that are factually and legally similar or the same, may not result in the violation of legal certainty. However, the lack of reasoning as to why the circumstances of the instant case are different in relation to all previous cases in which the position was applied in regard to an important legal issue and which should be applied in similar future situations, in the absence of a mechanism through which it would be reviewed, may result in legal uncertainty and may undermine public confidence in the judiciary, which is contrary to the principle of the rule of law."

168. The Appellate Panel concludes that the matter of retroactivity and application of a more lenient law must be solved on a case-by-case basis, without resorting to generalizations and automatic approach[93], as noted in paragraph 69 of the ECtHR Judgment in *Maktouf and Damjanović.* This implies the conclusion that the CC of BiH should apply to the gravest kinds of war crimes, as a law that is more lenient to the perpetrator and that ensures an adequate punishing of the perpetrators of the gravest violations of international humanitarian law, which is also an obligation of the state of Bosnia and Herzegovina in line with the Convention on the Prevention and Punishment of the Crime of Genocide.

169. Also, in the case at hand, both the law that was in effect at the time of the perpetration (the CC of SFRY) and the law that is currently in effect (the CC of BiH) prescribe the criminal acts that the Accused was found guilty of as the criminal offense of War Crimes against Civilians. It is, therefore, clear that there exist legal preconditions for conducting criminal proceedings against the perpetrator for the criminal offense of War Crimes against Civilians and for his punishing, given that the acts that the Accused undertook constitute a criminal offense, both under the law that was in effect previously,

[93] "The fundamental starting point is that the matter of choosing a more lenient law shall not be solved *in abstracto*, but *in concreto*, that is, not by a generalized comparison between the old and the new Criminal Code, but by comparing them with respect to a given, specific case." V. Group of authors: *Commentary on the Criminal Procedure Codes in Bosnia and Herzegovina*, Vol. I, Joint Project of the Council of Europe and the European Commission, p. 66.

that is, the law of the time of the perpetration, and the law that is currently in effect, that is, the law of the time of the trial.

170. It is not contestable that the criminal offense of War Crimes against Civilians, of which the Accused was found guilty, was set forth as a criminal offense both by the CC of SFRY (Article 142 of the adopted CC of SFRY) and the CC of BiH (Article 173 of the CC of B-H).

171. Article 142 of the adopted CC of SFRY reads:

> "(1) Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders *an attack against civilian population*, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health; *an indiscriminate attack without selecting a target, by which civilian population gets hurt*; that civilian population be subject to killings […], or who commits one of the foregoing acts,
>
> shall be punished with a sentence of imprisonment for not less than five years or by the death penalty." (Emphasis added)

172. Article 173 of the CC of B-H in the relevant part reads:

> "(1) Whoever in violation of rules of international law in time of war, armed conflict or occupation, orders or perpetrates any of the following acts:
>
> a) *Attack on civilian population*, settlement, individual civilians or persons unable to fight, which results in the death, grave bodily injuries or serious damaging of people's health;
>
> b) *Attack without selecting a target, by which civilian population is harmed*;
>
> […]
>
> shall be punished by imprisonment for a term not less than ten years or long-term imprisonment." (Emphasis added)

173. Also, attack on civilian population and attack without selecting a target, by which civilian population is harmed, as *actus reus* of the criminal offense of War Crimes against Civilians of which the Accused Đukić was found guilty, constitute *actus reus* of the criminal offense of War Crimes against Civilians under both Criminal Codes. It follows from the foregoing that the adopted CC of SFRY and the CC of BiH defined the criminal offense of War Crimes against Civilians in the same way and that, when evaluating which law was more lenient to the perpetrator, it was necessary to analyze the prescribed punishment pursuant to the Constitutional Court's decision in the foregoing manner.

174. As for the mode of liability of the Accused, the Trial Panel convicted him on the basis of his individual criminal responsibility, which was not prescribed as such by the law in effect at the time of perpetration of the crime. However, based on the established state of facts, this Panel concludes that the Accused Đukić acted as a direct perpetrator in the commission of the incriminating acts, that is, he undertook the act of commission of the

crime by having ordered it, which is foreseen in the definition of the criminal offense of War Crimes against Civilians under Article 142 of the adopted SFRY CC. Therefore, it was necessary to omit from the legal qualification of the offense the part wherein it was stated: "*... in conjunction with Article 180(1) of the Criminal Code of Bosnia and Herzegovina."*

175. Article 314(1) of the CPC of B-H provides that the panel of the Appellate Division shall render a verdict revising the first-instance verdict if the Panel deems that the decisive facts have been correctly ascertained in the first-instance verdict and that in view of the state of the facts established, a different verdict must be rendered when the law is properly applied, according to the state of the facts. The Appellate Panel has partly upheld the Appeal filed by the Defense and revised the first-instance Verdict in terms of the legal qualification of the offense and responsibility of the Accused, in the manner favorable to the Accused.

## VI. DECISION ON CRIMINAL SANCTION

176. The Prosecutor's Office argued on appeal that the level of culpability of the Accused in the perpetration of the referenced offense is extremely high[94] and that the circumstances under which the offense was perpetrated make it exceptionally serious. The Prosecutor also argues that the Court correctly established facts related to the criminal offense and responsibility of the Accused, but rendered a wrong conclusion that the imposed sanction can achieve the purpose of punishment envisaged under Article 39 of the BiH CC.[95] At the session of this Panel held on 11 April 2014, the Prosecutor moved the Court to impose a criminal sanction on the Accused in accordance with the law.

177. The Defense did not raise any specific objections in relation to this ground of appeal. However, given the fact that it clearly follows from the Appeal that the Defense contested the Verdict on the ground of incorrectly and incompletely established state of facts, this Panel applied the provision of Article 308 of the CPC of BiH – Extended Effect of the Appeal – having established that the arguments raised by the Defense relate also to the decision on criminal sanction. Accordingly, this Panel reviewed the soundness of the first-instance Verdict in this respect too.

178. Since the Panel has applied the CC of SFRY in this case, the same law had to be applied when deciding about the objections raised to dispute the decision on the sanction. Also, the Panel needed to stay within the range of sanctions foreseen in Article 142 of the CC of SFRY for the criminal offense of which the Accused is now found guilty, in accordance with the provisions which govern the sentencing and in line with the instructions and positions taken in the Decision of the Constitutional Court.

179. Pursuant to Article 41(1) of the CC of SFRY, the Appellate Panel has first determined the range of sanctions foreseen for the relevant criminal offense, in particular

[94] Prosecutor's Appeal at p. 3.
[95] Prosecutor's Appeal at p. 4.

the special maximum, given that the sanction imposed on the Accused under the CC of BiH in the revoked Verdict went in that direction (sentence of long-term imprisonment for the term of 25 years). In paragraph 52 of the relevant Decision, AP 5161/10, the Constitutional Court noted that it clearly follows from the provisions of Article 38(2) of the CC of SFRY that "*... the maximum penalty for the criminal offense in question, in a situation where it is no longer possible to impose the death penalty, is the 20-year prison sentence."* In the same paragraph, the Constitutional Court concludes: *"Therefore, given the fact that it was possible to impose the maximum penalty of 20 years in prison on the appellant according to the CC SFRY, whereas the long-term sentence of 25 years in prison was imposed on him in accordance with the CC BiH, the Constitutional Court holds that the CC BiH was retroactively applied to the detriment of the appellant insofar as the penalty imposed was concerned, which was contrary to Article 7 of the European Convention."*

180. Therefore, according to the Constitutional Court, in the situation when the death penalty is abolished, the sanction foreseen for the criminal offense of War Crimes against Civilians codified under Article 142 of the CC of SFRY is 20 years of imprisonment, as a special maximum and as the sanction which the court may impose for the criminal offenses carrying the death penalty. Thus, as it follows from the cited provision of Article 38 of the CC of SFRY, there is no possibility to mete out a criminal sanction within the range of between 15 and 20 years of imprisonment.

181. When deciding on the sanction, the Appellate Panel has upheld as correct all the decisive facts established by the First Instance Panel, which were important for meting out the sentence. This is why the Appellate Panel has largely relied on the correct findings of the first instance Verdict, primarily with regard to the general considerations and the criteria stipulated by law that have to be taken into account when meting out a sentence. The Appellate Panel has also relied on the individually established facts and circumstances which are important when deciding on the sentence in this case.

182. The purpose of punishment and general principles in fixing punishment are laid down in Articles 33 and 41 of the adopted CC of SFRY.

183. A general principle is that the type and range of criminal sanction must be "necessary" and "commensurate" with the "nature" and "extent" of the danger to the protected values: personal freedoms and human rights, and other fundamental values. When it comes to War Crimes against Civilians, the type of sanction the court may now impose in these cases is restricted to a prison term of 5 to 15 years or to 20 years of imprisonment. In addition to the general principle, when meting out and imposing the sentence, the court has to take into account the circumstances which can be divided in two groups: those relating to the relevant criminal offense and their impact on the community, including the victims; and those relating specifically to the sentenced person.

184. It is necessary to bear in mind that the values to be protected are universal human values, those which constitute a condition and a basis for a common and human existence

and whose violation is a severe violation of international legal standards. The seriousness and gravity of these offenses is indicated by the fact that the crimes are not barred by the statute of limitations.

185. Primarily, we have considered the consequences of the offense itself, which the trial Panel considered when imposing punishment: that the shelling was carried on “Youth Day”, a beautiful evening that followed several days of rain; hundreds of young people were gathered in downtown Tuzla; 71 people were killed and more than 130 sustained injuries. The youngest killed person was 2.5 years old. The wounded went through a difficult period of suffering and pain during their rehabilitation, which has continued until the present. Many of them still suffer the physical consequences from their injuries, in addition to psychological suffering which may never disappear. Further, the families of victims continue to suffer.

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

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

188. Further, the Trial Panel gave due consideration to the fact that the Accused cooperated with the prosecution and his family circumstances, recognizing that he is the father of two adult children with one child receiving medical treatment in Belgrade.

189. This Panel supports all the above conclusions concerning aggravating and mitigating circumstances. In light of the gravity of the crime and the resulting consequences, this Panel holds that in the instant case only the maximum sentence can meet the purpose of punishment set forth in Article 33 of the CC of SFRY.

190. In doing so, the Panel is limited by the binding order from the Constitutional Court’s Decision. In light of this and taking into account the sentencing range prescribed for the criminal offense in question, the purpose of punishment and all the circumstances bearing on the magnitude of punishment, in particular the degree of criminal responsibility of the Accused, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed and personal situation of the Accused, this Panel concludes that the sentence of imprisonment for the term of twenty (20) years for the committed crime is adequate in view of all these circumstances and personality of the Accused as the offender, and that this sentence will fully meet the purpose of punishment in terms of both specific and general deterrence.

191. Based on all the foregoing, this Panel revised the contested Verdict in the part that concerns decision on criminal sanction, as explained above. The time the Accused spent in custody, as well as the time spent serving the sentence imposed on him earlier in this case, shall be credited towards his sentence of imprisonment.

## VII. COSTS OF THE CRIMINAL PROCEEDINGS

192. The Prosecutor's Office also argued on appeal that the Trial Panel should have obliged the Accused to reimburse the costs of the proceedings and the scheduled amount with respect to the convicting part of the Verdict, considering that doing so would not jeopardize the subsistence of the Accused.[96]

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

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

195. No appeal challenged the conclusion of the Trial Panel pursuant to Article 198(2) of the BiH CPC instructing the injured parties to pursue potential claims in a civil action. We are of the opinion that this was a fair resolution of the issue. Establishing facts regarding the amount of the property claims would require lengthy proceedings, which would extend the duration of the instant proceedings. Where the injured parties so agreed through their attorneys, that part of the Verdict has become final. We are of the same mind regarding the convicting part of the Verdict referring injured parties to pursue their claims in a civil action pursuant to Article 198(3) of the CPC of BiH.

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

197. In accordance with the foregoing, pursuant to Article 310(1) in conjunction with Article 314(1) of the CPC of BiH, it was decided as stated in the operative part of the Verdict hereof.

| **RECORD-TAKER** | **PRESIDING JUDGE**<br>**JUDGE** |
|---|---|
| Medina Džerahović | Dragomir Vukoje |

**NOTE ON LEGAL REMEDY**: No appeal lies from this Verdict.

[96] Prosecutor's Appeal at p. 4.